DIGEST

OF

DECISIONS OF THE UNITED STATES CIRCUIT AND DISTRICT COURTS, FROM 1789 TO 1880, AS CONTAINED IN THE THIRTY VOLUMES

OF

THE FEDERAL CASES

ALSO CONTAINING A TABLE OF CITATIONS
AND AN ALPHABETICAL TABLE OF CASES

EDITED BY MEMBERS OF THE EDITORIAL STAFF OF
THE NATIONAL REPORTER SYSTEM

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DIGEST OF DECISIONS

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U. S. CIRCUIT AND DISTRICT COURTS

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AS CONTAINED IN THE THIRTY VOLUMES OF THE FEDERAL CASES.

A

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§ 1. Objections to jurisdiction.

Objection to the jurisdiction may be taken by motion.—Nazro v. Cragin, Case No. 10,062.

An exception to the jurisdiction of the federal circuit court by a denial of the fact of citizenship, which is properly averred, can only be taken by plea in abatement.—Wood v. Mann, Case No. 17,952.

An averment that defendant corporation is duly chartered under the laws of the state can only be denied by plea in abatement to the jurisdiction.—Blackburn v. Selma, M. & M. R. Co., Case No. 1,467.

A neglect to make proper indorsement on the writ is no ground of a plea in bar. A plea in abatement is the only one that could be filed.—Miller v. Gages, Case No. 9,571.

§ 2. Another action pending.

When a suit in equity and a suit at law are pending between the same parties for the same matter, one cannot be pleaded in abatement or in bar of the other.—Graham v. Meyer, Case No. 5,673; Hunt v. Danforth, Id. 6,888; Paul v. Hulbert, Id. 10,841.

The pending attachment may be pleaded in abatement to an action brought against the maker in another state.—Hacker v. Stevens, Case No. 5,887.

It is not a good plea in abatement to a suit in the federal circuit court for the recovery of land that another action is pending in the state court between the same parties for the recovery of the same land. It must appear that the two actions are founded on the same cause of action.—Wadleigh v. Veazie, Case No. 17,031.

An objection of lis pendens can be sustained only where the two suits are of the same character, and where the parties in both suits are the same.—In re Certain Logs of Mahogany, Case No. 2,559; Wheeler v. McCormick, Id. 17,498; Thurston v. The Magnolia, Id. 14,017;

Brooks v. Mills County, Id. 1,955; Same v. Vermont Cent. R. Co., Id. 1,964.

Lis pendens is created in equity by filing a bill and actual service of subpœna. At law, suing out the writ without service of the same is sufficient.—Fowler v. Byrd, Case No. 4,999a.

As to whether the pendency of a suit in the state court, between the same parties, and upon the same subject-matter, may be pleaded in abatement in a federal court, see Brooks v. Mills County, Case No. 1,955; Earl v. Raymond, Id. 4,243; White v. Whitman, Id. 17,561; Loring v. Marsh, Id. 8,514; McKay v. Garcia, Id. 8,844; Nelson v. Foster, Id. 10,105.

Pendency of suit between same parties respecting the same subject-matter in a federal court in another state may be pleaded in abatement.—Ex parte Balch, Case No. 790.

The pendency of a suit in a court of general jurisdiction in another state, in which property sufficient to satisfy the demand had been attached, is a bar to a second suit in the federal court.—Lawrence v. Remington, Case No. 8,141.

Lis pendens in a foreign country is not a good plea in abatement.—Lyman v. Brown, Case No. 8,627.

Where a suit in the state court has been prosecuted to final judgment by collusion of the nominal parties to the record, the federal court will not allow proceedings pending in its court to be dismissed, against the wishes of the real party in interest.—Nusbaum v. Emery, Case No. 10,381.

A suit will not be abated because of the pendency of another suit for the same cause where the other suit was dismissed after the plea in abatement was filed.—Chamberlain v. Eckert, Case No. 2,576.

§ 3. Defects and objections as to parties and proceedings.

Quaere, whether the misnomer of a corporation must be pleaded in abatement.—Central Bank v. Tayloe, Case No. 2,548.

A misjoinder of parties is waived, unless taken advantage of by plaintiff in abatement.—Chandler v. Byrd, Case No. 2,591b; Clementson v. Beatty, Id. 2,884.

A plea in abatement, in an action on a note, that one of the joint indorsers, not served, is a citizen of another state, is bad.—Cooper v. Gordon, Case No. 3,195.

The omission of mortgagees on a bill in equity in relation to the premises is no cause of abatement of the suit.—Hoxie v. Carr, Case No. 6,802.

Trespass on the case will lie for use and occupation of land in Virginia, but all joint tenants or tenants in common must be joined as plaintiffs. Omission thereof may be taken advantage of without pleading it in abatement.—Newton v. Reardon, Case No. 10,192.

The expiration of the charter of a corporation abates all suits then pending in its name.—Bank of United States v. McLaughlin, Case No. 928.

A suit against a corporation is abated by a surrender of its charter and acceptance by the legislature pending the suit, where the right of action is not saved by the statute.—Greeley v. Smith, Case No. 5,748.

§ 4. Transfer or devolution of title, right, interest, or liability.

An action does not abate by the termination or transfer of plaintiff's interest therein pendente lite.—Elliot v. Teal, Case No. 4,389; Barnard v. Hartford, P. & F. R. Co., Id. 1,003.

But no further proceedings can be had until his assignee is made a party.—Barnard v. Hartford, P. & F. R. Co., Case No. 1,003.

Where, during the pendency of a suit, one of the defendants is released under the bankrupt law, the suit as to him abates.—Fellows v. Hall, Case No. 4,723.

An action is not abated by substituting the assignee in bankruptcy of plaintiff as party.—Wise v. Decker, Case No. 17,906; Gear v. Fitch, Id. 5,290.

§ 5. Death of party and revival of action—Abatement or survival of action.

Survival or abatement of actions, where death of parties intervenes, depends upon the state or local law.—Ferguson v. Lambert, Case No. 4,739.

At common law, all actions founded on contracts, express or implied, survive, but not actions of tort.—Jones v. Van Zandt, Case No. 7,503; Id. 7,504.

Where a child, a passenger on a steamship, died, as was alleged, on account of negligence of the officers, the cause of action arose on contract, and survived to the administrator.—The City of Brussels, Case No. 2,745.

The rule that actions arising ex delicto die with the person is not affected by the act giving special bail in suits by the United States for penalties.—United States v. Korn, Case No. 15,543.

An action for the injury to a minor child by the wrongful act of defendant, in the absence of a statute, does not survive the death of the person injured, and cannot be brought by his representatives or next of kin.—Sullivan v. Union Pac. R. Co., Case No. 13,599.

An action for malicious arrest and imprisonment under a state warrant, under regular proceedings, abates by the death of defendant (Code Civ. Proc. Ohio, § 399).—Ferguson v. Lambert, Case No. 4,739.

Action for infringement of patent survives.—Atterbury v. Gill, Case No. 638.

A suit against a co-partnership for infringement of a patent does not abate on the death of a co-partner, and it will not be revived against his executors where it does not appear that the survivors are insolvent, and the co-partnership assets are insufficient to pay the claim.—Troy Iron & Nail Factory v. Winslow, Case No. 14,199.

An action of trespass on the case for harboring runaway slaves survives, under Act Ohio Feb. 14, 1824, as an action for injury to property.—Jones v. Van Zandt, Case No. 7,503.

Actions in the admiralty, for mere personal torts, do not survive the death of the person injured.—Crapo v. Allen, Case No. 3,360.

A state statute will not enable an administrator to maintain an action in the district court for a personal tort committed on the high seas.—Crapo v. Allen, Case No. 3,360.

An action of ejectment is one in which the cause of action survives in Vermont.—Hatfield v. Bushnell, Case No. 6,211.

Death of plaintiff's lessor does not abate an action in ejectment.—Baylor v. Neff, Case No. 1,143.

In an action of detinue, the cause of action on the death of plaintiff survives.—Trigg v. Conway, Case No. 14,173.

In the absence of an act of congress providing for a survival or adopting a state act, an action for a penalty does not survive.—Jones v. Van Zandt, Case No. 7,504.

A suit in equity does not abate by the death of a co-plaintiff or co-defendant. If one plaintiff and one defendant survive, the suit is open for amendment.—Fisher v. Rutherford, Case No. 4,823.

Death of a party where the cause of action survives results in no disadvantage to either party. A suggestion of the fact apud acta removes the technical difficulty.—Nevitt v. Clarke, Case No. 10,138.

§ 6. —— Continuance or revival of action.

Case is not revived on death of party without order to that effect.—Atterbury v. Gill, Case No. 638.

The state statute limiting the time for the allowance of a continuance by an administrator (Civ. Code Or. § 34) applies to actions in the federal courts.—Barker v. Ladd, Case No. 990.

The filing of letters of administration by the administrator of a deceased party *held* a "proceeding" in the case, under Act Md. 1785, c. 80, § 1.—Wilson v. Harbaugh, Case No. 17,807.

Discontinuance for want of appearance or proceeding for two terms after the suggestion of death (Act Md. 1785, c. 80) *held* cured by subsequent appearance, trial, and verdict.—Brent v. Coyle, Case No. 1,837.

Where plaintiff dies before judgment. his personal representative may become a party to the suit, and prosecute it to final judgment (Act 1789, § 31), where the cause of action survives by the local law.—Hatfield v. Bushnell, Case No. 6,211; Baldwin v. Lamar, Id. 800; Trigg v. Conway, Id. 14,173.

The assignee of the complainant cannot file a bill of revivor. His proper course on the death of the original complainant is to file a supplemental bill.—Metal Stamping Co. v. Crandall, Case No. 9,493c.

A devisee cannot maintain a bill of revivor. —Slack v. Walcott, Case No. 12,932.

Where defendant in a suit in equity has neither been served with process, nor appeared, the suit cannot be revived against his administrator after his death.—United States v. Fields, Case No. 15,089.

Where defendant in a suit to enjoin infringement of a patent, and for an accounting, dies before decree, a bill of revivor will lie against his personal representatives to prevent abatement of the suit.—Smith v. Baker, Case No. 13,010.

The administratrix and infant son and sole heir of defendant in the original bill are proper parties to a bill of revivor.—Bettes v. Dana, Case. No. 1,368.

The only questions upon bill of revivor are as to its form and the competency of the parties. Objections cannot be taken to the original bill.—Bettes v. Dana, Case No. 1,368.

Defendant, who appeared, *held* not entitled to three months to answer a bill of revivor under Sup. Ct. Rules 6 and 10.—Oliver v. Decatur, Case No. 10,496.

It seems that the objection that a devisee cannot maintain a bill of revivor may be taken by answer as well as by plea or demurrer.—Slack v. Walcott, Case No. 12,932.

In a suit in equity against the members of a firm, a demurrer will not lie to a bill of revivor to bring in the representative of a deceased partner.—Wilson v. Seligman, Case No. 17,832a.

§ 7. Waiver of grounds of abatement.

Plea in bar waives plea in abatement.—Adams v. White, Case No. 68; Dowell v. Cardwell, Id. 4,039; Evans v. Davenport, Id. 4,558.

A plea of misnomer, in abatement, is too late after the expiration of the rule to plead.—Brooklyn White Lead Co. v. Pierce, Case No. 1,940.

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See "Seduction."

Actions for wrongful abduction of infant, see "Parent and Child," § 3.
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ABETTORS.

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Effect upon limitation of prosecution, see "Criminal Law," § 28.
Suspension of running of statute of limitation, see "Limitation of Actions," § 13.

ABSTRACTS OF TITLE.

§ 1. Liabilities of examiners of titles.

An attorney employed by the lender to examine the title of property offered as security for a loan, though compensated by the borrower, is responsible to the lender for the correctness of his opinion.—Page v. Trutch, Case No. 10,668.

The certificate of such attorney that the security is a good one is a warranty not only that the title shall be found good on litigation, but that it is free from any palpable grave doubt or serious question of its validity.—Page v. Trutch, Case No. 10,668.

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ACCORD AND SATISFACTION.

§ 1, Part payment. § 2, Conveyance of property. § 3, Execution of accord as satisfaction. § 4, Pleading.

See, also, "Compositions with Creditors"; "Compromise and Settlement"; "Novation"; "Payment"; "Release."

§ 1. Part payment.

An agreement to deliver, in satisfaction of a debt, notes or money for a less sum, does not discharge the larger debt, unless fully and fairly performed in all its parts.—Memphis v. Brown, Case No. 9,415.

§ 2. Conveyance of property.

A transfer of specific property to trustees for the use of creditors, under a mutual agreement that the property shall be received in full satisfaction and discharge of their several demands, constitutes a valid accord and satisfaction.—Bartlett v. Rogers, Case No. 1,079.

§ 3. Execution of accord as satisfaction.

The making of an allowance for services of a person as an officer of a society, if accepted by him, is conclusive as an adjustment for his services.—Oliver v. Vernon, Case No. 10,501.

§ 4. Pleading.

An unperformed agreement cannot be pleaded in bar as an accord and satisfaction.—United States v. Clarke, Case No. 14,812.

Accord and satisfaction occurring after issue formed in a suit, to be available, must be pleaded puis darrein continuance.—Good v. Davis, Case No. 5,530a.

ACCOUNT.

§ 1, Action of account or account rendered. § 2, Equitable actions.

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—— by receiver, see "Receivers," § 7.
—— by trustee, see "Trusts," §§ 36–40.
—— by United States officers, see "United States," § 12.
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§ 1. Action of account or account rendered.

The declaration must show the privity by which plaintiff is entitled to an account, and also proceedings under or pursuant to it, raising a balance in his favor to be recovered.—Travers v. Dyer, Case No. 14,150.

On a general demurrer to a count it need only be sufficient in substance, without regard to form.—Travers v. Dyer, Case No. 14,150.

In an action of account, a plea of plene computavit is not sustained by evidence showing that goods were sent to defendant to be sold on commission, and that he delivered an account in which he debited himself with the entire amount, and credited the sales, leaving a large balance of goods unsold and unreturned.—Read v. Bertrand, Case No. 11,602.

On motion for a decree on the bill (for an account of license fees) and the answer, *held*, that an affidavit and counter affidavits could not be considered.—Evory v. Candee, Case No. 4,583.

From the fact that defendant objected to certain items of debit, and was silent as to others, the jury ought to infer that he acquiesced in the latter, unless defendant show that he did not so intend.—United States v. Kuhn, Case No. 15,545.

Where, after a jury is sworn, it appears necessary to examine and determine accounts between the parties, the jury will be discharged, and the case sent to an auditor.—United States v. Rose, Case No. 16,193.

In an action of account, on a reference to auditors under judgment quod computet, all transactions between the parties are to be considered down to the time when the auditors make an account.—Couscher v. Tulam, Case No. 3,287.

In an action of account, nothing can be pleaded before the auditors contrary to what has been previously pleaded and found in a verdict.—Spear v. Newell, Case No. 13,224.

An account rendered is proper evidence before an auditor to whom a cause is referred to state the account.—Bank of United States v. Johnson, Case No. 919.

The report "that the plaintiff has no legal demand against the defendant at present" is objectionable.—Couscher v. Tulam, Case No. 3,287.

§ 2. Equitable actions.

Courts of equity possess concurrent jurisdiction with courts of law in matters of account, and will interpose where a court of law could not give adequate redress.—Mitchell v. Great Works Milling & Manufacturing Co., Case No. 9,662.

Where defendants dispute an account stated by them which has been accepted by complainant, the latter may maintain a bill in equity for an account and discovery.—Walker v. Kremer, Case No. 17,077.

Bill to account does not lie on an executory contract where compensation for the breach can be had in damages.—Baker v. Biddle, Case No. 764.

Where a bill for a balance of account is taken pro confesso, the account must be referred to the master.—Pendleton v. Evans, Case No. 10,921.

Where the court has the means to stay an account, the matter will not be referred to a

master unless both sides agree thereto.—Jewett v. Cunard, Case No. 7,310.

On a reference to a master to take and state an account, the court will not revise each act of the master as the case progresses.—Union Sugar Refinery v. Mathiesson, Case No. 14,398.

Where accounts are referred to a master, the court will not settle principles previous to taking the account, but they must be brought before it on exceptions.—Vanderwick v. Summerl, Case No. 16,845.

An account will not be referred back before argument of exceptions because of the discovery of new evidence.—Camac v. Francis, Case No. 2,329.

On a reference to a master to take and state an account, the master should make up his draft report after completing his investigation, file it in the clerk's office, and give time for the parties to make their objections thereto.—Union Sugar Refinery v. Mathiesson, Case No. 14,398.

ACCOUNT, ACTION ON.

§ 1, Open accounts. § 2, Verified accounts.

§ 1. Open accounts.

In cases of mutual running accounts, every item, whether for pay, services, or otherwise, ending in a debt, is to be deemed a credit in favor of the party pro tanto.—Gass v. Stinson, Case No. 5,262.

Reliance by defendant upon the credit side of an account *held* a prima facie admission of the debit side.—Bell v. Davidson, Case No. 1,248; Morris v. Hurst, Id. 9,832.

In an action upon an open account, plaintiff may give evidence of any item of which defendant has had reasonable notice.—Barry v. Barry, Case No. 1,060.

If an account be received and not objected to for several years, the jury may infer that it is correct.—White v. Macon, Case No. 17,553.

In a count in assumpsit "for sundry matters properly chargeable in account," according to an account alleged to be annexed, if no account be in fact annexed, the words referring to such annexation may be rejected as surplusage, and money lent may be proved under the count.—Lovejoy v. Wilson, Case No. 8,551.

Upon a count "for sundry matters properly chargeable, as by account annexed," it is not necessary that the account should be such as would be evidence per se under Act Md. 1729, c. 20.—McLaughlin v. Turner, Case No. 8,875.

§ 2. Verified accounts.

Sufficiency of plaintiff's own oath to support an account under Acts Md. 1729, c. 20, § 9, and 1785, c. 46.—Rogers v. Fenwick, Case No. 12,011.

ACCOUNT STATED.

§ 1, Mode of stating and settling. § 2, Interest on balance. § 3, Opening and correcting. § 4, Surcharging and falsifying.

§ 1. Mode of stating and settling.

An account may be a stated or settled account, though not signed by the parties.—York v. Wistar, Case No. 18,141.

The presumption of a promise to pay arises when the account is rendered and received without objection made in a reasonable time.—York v. Wistar, Case No. 18,141.

An account retained an unreasonable time without objection becomes an account stated, and bars a bill to account.—Baker v. Biddle, Case No. 764.

§ 2. Interest on balance.

An account current, received and not objected to within a reasonable time, will bear interest.—Bainbridge v. Wilcocks, Case No. 755.

§ 3. Opening and correcting.

A receipt in full on a settled account is merely prima facie evidence, and is not binding, unless it be the result of a compromise.—Lawrence v. Schuylkill Nav. Co., Case No. 8,143.

Equity may open the settlement of accounts between merchants having extensive and complicated dealings, for the purpose of correcting errors therein.—Dunbar v. Miller, Case No. 4,130.

An account stated cannot be opened because an item of interest not illegal, which went into it, could not have been recovered by suit.—Bainbridge v. Wilcocks, Case No. 755.

§ 4. Surcharging and falsifying.

An account current, received and kept without objection, except as to particular items, may still be surcharged and falsified as to other items.—Barry v. Barry, Case No. 1,060.

ACCRUAL.

Of claims against bankrupt, see "Bankruptcy," § 369.
Of lien, see "Maritime Liens," § 49; "Mechanics' Liens," § 2.
Of right of action, in general, see "Limitation of Actions," § 9.
—— by or against assignee in bankruptcy, see "Bankruptcy," § 349.

ACKNOWLEDGMENT.

§ 1, Necessity. § 2, Authority to take. § 3, Mode of taking. § 4, Certificate. § 5, Further certificate of authenticity and conformity. § 6, Curing defects. § 7, Operation and effect. § 8, Evidence.

Admissions as evidence, see "Criminal Law," § 60; "Evidence," §§ 27–38.
—— as ground of estoppel, see "Estoppel," § 8.
After maturity of contract made in infancy, see "Infants," § 2.
By partner, see "Partnership," § 28.
Of certificate of formation of limited partnership, see "Partnership," § 54.
Of indebtedness barred by limitation, see "Limitation of Actions," §§ 17–25.

§ 1. Necessity.

A defective acknowledgment of a deed in Rhode Island renders it void as to all persons except the parties and their heirs.—Richards v. Randolph, Case No. 11,772.

In Rhode Island, a deed of the wife's estate by the husband and wife does not convey her title unless duly acknowledged by her as prescribed by law.—Manchester v. Hough, Case No. 9,005.

A feme covert need not acknowledge her deed, to render it valid under Act Ill. 1869 (Pub. Laws, 359).—Hawes v. Mann, Case No. 6,239.

§ 2. Authority to take.

A notary public is competent to acknowledge and certify a deed of trust, although he is interested as one of the beneficiaries in the trust.—National Bank of Fredericksburg v. Conway, Case No. 10,037.

An alderman of the city of Philadelphia *held* a "magistrate," within Act Me. Feb. 20, 1821, providing for the taking of acknowledgments.—Gordon v. Hobart, Case No. 5,609.

A deed acknowledged before the mayor of Cincinnati, Ohio, who has the same power as a justice of the peace "in civil and criminal

cases," is good under the state decisions, which will be followed by the federal courts.—Shults v. Moore, Case No. 12,824.

A chattel mortgage by a resident of the city of Chicago may be acknowledged before any justice of the peace for that city.—In re Burnett, Case No. 2,172.

The superintendent of the city of Washington, D. C., *held* authorized to take the acknowledgment of deeds of land within the city.—Peltz v. Clarke, Case No. 10,914.

In 1823 the commissioner of public buildings in Washington had power to take acknowledgments of deeds of land.—Middleton v. Sinclair, Case No. 9,534.

§ 3. Mode of taking.

The separate examination of a feme covert, as required by the statute, is indispensable, but the exact statutory words need not be used.—Raverty v. Fridge, Case No. 11,587.

It is the acknowledgment of a married woman which gives effect in Illinois to a deed of her own real property, and it must be in substantial conformity with the law, or the deed is invalid.—Lane v. Dolick, Case No. 8,049.

§ 4. Certificate.

Where the certificate fails to state that the subscribing witness was personally known to the officer taking the acknowledgment, as required by Rev. St. Ill. 1845, p. 107, § 20, it is fatally defective.—Morgan v. Curtenius, Case No. 9,799.

Nothing will be presumed in favor of a notary's certificate of acknowledgment. He must state all the facts necessary to show a valid official act, and that he has affixed his notarial or official seal.—Wetmore v. Laird, Case No. 17,467.

And a certificate which fails to show that the seal affixed is his notarial or official seal is insufficient.—Wetmore v. Laird, Case No. 17,467.

The magistrate's certificate of the acknowledgment of a deed is sufficient, in Pennsylvania, to admit it in evidence, though it be not under seal.—Fellows v. Pedrick, Case No. 4,724.

On a deed of land in Nebraska executed in another state, and not acknowledged before a commissioner for Nebraska, the certifying officer must certify that the execution and acknowledgment are according to the laws of the state in which it is executed.—Morton v. Smith, Case No. 9,867.

It is sufficient if it appear by the certificate of the execution and acknowledgment of a deed by a feme covert that the statutory directions were substantially complied with.—Talbot v. Simpson, Case No. 13,730.

Sufficiency of certificate of acknowledgment to a deed by a married woman reciting that she was made acquainted with its contents through a sworn interpreter.—Norton v. Meader, Case No. 10,351.

A deed by a wife and her husband, purporting to convey her separate estate in Illinois *held* invalid where the acknowledgment was a mere relinquishment of dower.—Lane v. Dolick, Case No. 8,049.

Where a notary public, in signing a jurat, appended to his name the words "notary public," and affixed a seal bearing his name and the words "notary public," *held* a sufficient compliance with Act Sept. 16, 1850.—Goodyear v. Hullihen, Case No. 5,573.

§ 5. Further certificate of authenticity and conformity.

An acknowledgment of a deed before a clerk of a court in another state is not good without evidence that the person taking the acknowledgment was clerk.—Wallace v. Dewey, Case No. 17,099.

Where the justices of the peace, in Maryland, taking the acknowledgment were of a different county than that in which the land lay, there must be a county clerk's certificate of their official character to entitle the deed to record.—Milligan v. Mayne, Case No. 9,606.

§ 6. Curing defects.

A defective acknowledgment of a feme covert cannot afterwards be amended by the court before whom it was taken, by parol proof of the facts.—Elliott v. Peirsoll, Case No. 4,395.

Defective acknowledgments of deeds may be made good by statute.—Moore v. Nelson, Case No. 9,771.

§ 7. Operation and effect.

The certificate of acknowledgment of a deed or mortgage is not conclusive, in Minnesota, as to the facts stated therein.—Drury v. Foster, Case No. 4,096.

§ 8. Evidence.

The acknowledgment of a deed before a person who styles himself a justice of the court of common pleas is prima facie evidence that he was such; and it is not necessary to produce the commission of the justice until evidence is given to render the fact questionable.—Willink v. Miles, Case No. 17,768.

The presumption is that the person examined was of full age, until the contrary is shown.—Battin v. Bigelow, Case No. 1,108.

The body of the deed may be considered to determine whether it was duly acknowledged before the proper officer.—Geekie v. Kirby Carpenter Co., Case No. 5,295.

Parol proof that a justice acted as such in taking an acknowledgment is admissible when the fact is not stated in the certificate.—Shults v. Moore, Case No. 12,824.

ACTION.

§ 1, Grounds and conditions precedent. § 2, Nature and form. § 3, Joinder of causes. § 4, Splitting causes. § 5, Consolidation. § 6, Termination.

Abatement, see "Abatement and Revival."
Accrual, see "Bankruptcy," § 349; "Limitation of Actions," § 9.
Adoption by federal courts of state forms of action, see "Courts," § 69.
Bar by former adjudication, see "Judgment," §§ 46–48, 65, 66.
Commencement within period of limitation, see "Limitation of Actions," § 16.
Concealment of cause of action, see "Limitation of Actions," § 14.
Counterclaim, see "Set-Off and Counterclaim."
Effect of repeal of law on pending suits, see "Statutes," § 15.
—— of war on pending suits, see "War," § 2.
—— on federal court of abolition of remedy by state law, see "Courts," § 70.
Election of remedy, see "Election of Remedies."
Enforcement of lien, see "Mechanics' Liens," § 7.
Jurisdiction of courts, see "Courts," §§ 14–67.
Laches, see "Equity," §§ 18–21.
Limitation by statutes, see "Limitation of Actions."
Malicious actions, see "Malicious Prosecutions."
Penal and qui tam actions, see "Penalties," § 3.
Pendency of action, see "Abatement and Revival," § 2; "Lis Pendens."
Petitory and possessory actions, see "Admiralty," § 12.
Remedies of assignee in bankruptcy, see "Bankruptcy," §§ 208–213.
Restraining actions at law, see "Injunction," § 5.

Revival, see "Abatement and Revival," § 6.
Right of alien to sue in our courts, see "Aliens," § 4.
Set-off, see "Set-Off and Counterclaim."
Submission of controversy to court without action, see "Submission of Controversy."
Survival, see "Abatement and Revival," § 5.

Actions between parties in particular relations.

See "Bailment," § 8; "Guaranty," §§ 10–13; "Guardian and Ward," § 8; "Indemnity," § 2; "Master and Servant," § 8; "Partnership," § 18; "Principal and Agent," § 15.
Co-sureties, see "Principal and Surety," § 14.
Co-tenants, see "Partition," §§ 2, 3.
Part owners of vessels, see "Shipping," § 26.

Actions by or against particular classes of parties.

See "Ambassadors and Consuls," §§ 3, 6; "Associations," § 4; "Banks and Banking," §§ 14, 21; "Carriers," §§ 2–52; "Corporations," §§ 26, 48–61, 85; "Counties," § 7; "Executors and Administrators," §§ 41–55, 73, 74; "Husband and Wife," §§ 9, 10; "Indians," § 8; "Infants," § 3; "Master and Servant," § 9; "Municipal Corporations," §§ 39–44; "Partnership," §§ 34–39, 44, 49; "Pilots," § 9; "Principal and Agent," § 34; "Railroads," § 42; "Seamen," §§ 170–174; "Sheriffs and Constables," §§ 6–8; "States," § 9; "Towns," § 6; "United States," §§ 28–35.
Alien enemies, see "War," § 3.
Assignees, see "Assignments," § 4; "Assignments for Benefit of Creditors," § 10; "Bankruptcy," §§ 337–367; "Insolvency," § 10.
Bankrupts, see "Bankruptcy," §§ 505–514.
Officers in general, see "Officers," §§ 5–9.
—— of corporations, see "Corporations," § 37.
—— of customs, see "Customs Duties," § 27.
—— of internal revenue, see "Internal Revenue," § 6.
—— of United States, see "United States," § 11; "United States Marshals," §§ 20–22.
Receivers, see "Banks and Banking," § 22; "Receivers," §§ 5, 6.
States, territories, or counties, see "Courts," § 17; "States," § 9.
Stockholders, see "Corporations," §§ 27–33.
Taxpayers, see "Municipal Corporations," § 38.
Trustees, see "Trusts," §§ 29–31, 45–48.

Actions relating to particular species of property or estates.

See "Ground Rents," § 2; "Literary Property," § 5; "Lost Instruments," §§ 2, 3; "Party Walls," § 3.
Grants, see "Public Lands," §§ 87–91.
Letters patent, see "Patents," § 125.

Particular causes or grounds of action.

See "Account Stated"; "Bills and Notes," §§ 85–105; "Bonds," §§ 17–24; "Collision," §§ 118–160; "Conspiracy," §§ 1–5; "Death," § 2; "Equity," §§ 1–10; "False Imprisonment," §§ 3–6; "Fraud," §§ 6–9; "Insurance," §§ 167–191, 195; "Judgment," §§ 79, 80; "Kidnapping"; "Libel and Slander," §§ 14–23; "Malicious Prosecutions," §§ 1, 5–10; "Money Received"; "Negligence," §§ 4, 5; "Penalties," § 3; "Torts"; "Trespass"; "Trover and Conversion," §§ 2–4; "Use and Occupation"; "Waste"; "Work and Labor."
Abuse of process, see "Process," § 9.
Award, see "Arbitration and Award," § 5.
Bonds, administration, see "Executors and Administrators," §§ 75–78.
—— appeal, see "Appeal and Error," § 46.
—— bottomry, see "Shipping," § 127.
—— embargo, see "War," § 15.
—— official, see "Post Office," § 8; "United States Marshals," § 26.
—— replevin, see "Replevin," §§ 14–17.
—— town, see "Towns," § 5.
Breach of charter party, see "Shipping," §§ 66, 69.
—— of contract, see "Contracts," §§ 36–41; "Sales," §§ 46, 48–50; "Vendor and Purchaser," § 43.
—— of covenant, see "Covenants," §§ 9–11.
—— of promise of marriage, see "Breach of Marriage Promise."
—— of warranty, see "Sales," § 51.
Duties, see "Customs Duties," § 60.
—— and charges illegally exacted, see "Customs Duties," §§ 62–75.
Freight, see "Shipping," § 188.
General average contribution, see "Shipping," § 241.
Infringements of copyrights, see "Copyrights," §§ 36–49.
—— of patents, see "Patents," §§ 188–265.
—— of trade-mark of trade-name, see "Trade-Marks and Trade-Names," §§ 26–34.
Injuries to land, see "Public Lands," § 7.
Interference with employment, see "Master and Servant," § 10.
Lays or shares in earnings of vessels, see "Seamen," § 153.
Legacies, see "Wills," § 49.
Loss of services of child, see "Parent and Child," § 3.
—— or injury of goods shipped, see "Shipping," § 172.
Penalties, see "Customs Duties," §§ 118–120a; "Internal Revenue," § 95.
Personal injuries, see "Carriers," §§ 40–48; "Highways," § 5; "Master and Servant," § 8; "Railroads," §§ 68–71.
Price of goods, see "Sales," §§ 42–45.
—— of land, see "Vendor and Purchaser," § 40.
Recovery of goods delivered by seller, see "Sales," § 41.
—— of land sold by vendor, see "Vendor and Purchaser," § 39.
—— of payment, see "Payment," §§ 24–28.
Recovery of price paid for goods, see "Sales," § 47.
—— for land, see "Vendor and Purchaser," § 41.
Recovery of taxes paid, see "Taxation," § 11.
Refusal of patent, see "Patents," § 87.
Rent, see "Landlord and Tenant," § 9.
Services, see "Work and Labor."
Share of proceeds of property forfeited, see "Forfeitures," § 27.
Subscriptions to corporate stock, see "Corporations," § 21.
Taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 12.
Taxes, see "Internal Revenue," § 16.
—— illegally collected, see "Internal Revenue," § 20.
Wharfage, see "Wharves," § 5.
Witness fees, see "Witnesses," § 17.
Wrongful attachment, see "Attachments," § 18.
—— execution, see "Execution," § 27.

Particular forms of action.

See "Account, Action on"; "Action on the Case"; "Assumpsit, Action of"; "Covenant, Action of"; "Debt, Action of"; "Detinue"; "Ejectment"; "Entry, Writ of"; "Forcible Entry and Detainer"; "Real Actions"; "Replevin"; "Trespass," §§ 3–11; "Trespass to Try Title"; "Trover and Conversion."
To recover penalties, see "Customs Duties," § 118.

Particular forms of special relief.

See "Account"; "Creditors' Suits"; "Divorce"; "Injunction"; "Interpleader"; "Marshaling Assets and Securities"; "Partition," §§ 2, 3; "Quieting Title"; "Specific Performance."
Accounting, see "Partnership," § 53; "Trusts," § 37.
Admeasurement or assignment of dower, see "Dower," § 4.
Cancellation of written instruments, see "Cancellation of Instruments."

Confirmation of tax titles, see "Taxation," § 17.
Construction of wills, see "Wills," § 43a.
Determination of adverse claims to real property, see "Quieting Title."
Dissolution, see "Partnership," § 53.
Enforcement or foreclosure of liens, see "Maritime Liens," §§ 54–65; "Railroads," §§ 43–54.
Establishment and enforcement of trust, see "Trusts," §§ 41–48.
—— of will, see "Wills," § 14.
Foreclosure of mortgage, see "Chattel Mortgages," § 23; "Mortgages," §§ 28–47; "Railroads," §§ 43–54.
Redemption of mortgage, see "Mortgages," § 47.
Reformation of written instruments, see "Reformation of Instruments."
Removal of cloud on title, see "Quieting Title."
Setting aside fraudulent conveyance, see "Fraudulent Conveyances," §§ 28–35.
Trial of tax title, see "Taxation," § 17.

Particular proceedings in actions.

See "Appearance"; "Bail," § 22; "Continuance"; "Costs"; "Damages"; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Motions"; "Parties"; "Pleading"; "Process"; "Reference"; "Removal of Causes"; "Stipulations"; "Trial"; "Venue."
Bill of particulars, see "Pleading," §§ 63, 64.
Default, see "Judgment," §§ 11–14.
Nonsuit, see "Trial," § 14.
Notice of action, see "Process," § 5.
Revival of judgment, see "Judgment," §§ 71, 72.
Verdict, see "Trial," §§ 22, 23.

Particular remedies in or incident to actions.

See "Arrest," §§ 1–10; "Attachments"; "Bail," §§ 1–13; "Deposits in Court"; "Discovery"; "Garnishment"; "Injunction"; "Ne Exeat"; "Receivers"; "Scire Facias"; "Tender."
Notice of pendency of action, see "Lis Pendens."
Stay of proceedings, see "Appeal and Error," § 17.

Proceedings in exercise of special jurisdictions.

Courts of limited jurisdiction in general, see "Courts," § 11.
Criminal prosecutions, see "Criminal Law."
Suits in admiralty, see "Admiralty"; "Collision," §§ 118–160; "Maritime Liens," §§ 54–65; "Salvage," §§ 58–68; "Seamen," §§ 132–145; "Shipping," §§ 244–255.
—— in equity, see "Equity."
—— in justices' courts, see "Justices of the Peace," §§ 8–11.

Review of proceedings.

See "Appeal and Error"; "Audita Querela"; "Certiorari"; "Equity," §§ 127–135; "Exceptions, Bill of"; "Judgment," §§ 35–42; "Justices of the Peace," §§ 12–17; "New Trial."

§ 1. Grounds and conditions precedent.

Actual perceptible damage is not indispensable as the foundation of an action, but it is sufficient to show a violation of a right. The law will presume some damage in such a case. A fortiori, where the act done is such that, by its repetition or continuance, it may become the foundation or evidence of an adverse right. —Webb v. Portland Mfg. Co., Case No. 17,322.

The court will enforce civil rights acquired under a foreign law.—Delilah v. Jacobs, Case No. 3,773.

The ancient doctrine of the common law, that a private wrong is merged in a felony, is not applicable in this country.—Plummer v. Webb, Case No. 11,234.

The civil rights of a person injured by a felonious act are only suspended until the rights of the government to punish it criminally have been satisfied.—Ocean Ins. Co. v. Fields, Case No. 10,406.

Where the felony is not cognizable under the criminal law of the country where civil redress is sought, the civil rights of the party seeking redress are not thereby suspended.—Ocean Ins. Co. v. Fields, Case No. 10,406.

A person who is a slave by the law of his domicil may maintain an action in his own name, in a country where slavery is not allowed, for a personal tort committed within that jurisdiction.—Polydore v. Prince, Case No. 11,257.

A person cannot sue on bills of exchange in the circuit court in Massachusetts, as beneficiary heir and administrator of the estate of the deceased indo-see under the law of France, without taking out letters of administration in the state.—Picquet v. Swan, Case No. 11,132.

There is no privity of contract whereby a creditor may maintain an action against the debtor of his debtor.—King of Spain v. Oliver, Case No. 7,813.

Damages are recoverable for failure to pay a sum of money as agreed, out of funds expected to come into the promisor's hands, if, by his own fault, the money did not come into his hands.—Blight v. Ashley, Case No. 1,541.

The right of the United States to retain moneys due their debtors by an award under a treaty with a foreign power will not affect their right to proceed in a court of equity.—United States v. Myers, Case No. 15,844.

A court of admiralty will not refuse a passenger damages for injuries in a collision, on the ground that he was traveling, at the time, in violation of a law of the state within whose waters the collision occurred. It is for the state to punish violations of its laws.—The D. S. Gregory, Case No. 4,100.

§ 2. Nature and form.

Debt or covenant is the appropriate remedy on a writing obligatory.—French v. Tunstall, Case No. 5,104a.

Where the connection in a joint adventure terminates with the sale of the property, and one party appropriates the proceeds, an action on the case will lie by the other for his portion; but, where the connection is not thus terminated, account render is the proper form of action.—Hourquebie v. Girard, Case No. 6,732.

A submission upon an agreed state of facts waives objections to the form of the action.—Snow v. Miles, Case No. 13,146.

Where a person having an election to bring his suit either on a contract or for a tort proceeds to judgment without a declaration, he cannot subsequently file a declaration for a tort, where the whole course of his proceedings shows that he proceeded upon a contract.—Thibault v. De Basavilbaso, Case No. 13,881.

Neither congress nor the courts can do away with the distinction between law and equity, nor the forms used, nor the causes and reasons which distinguish one from the other.—Butler v. Young, Case No. 2,245.

No state regards the forms or modes of remedies in other states to enforce contracts, but acts upon its own process only.—Titus v. Hobart, Case No. 14,063.

It is not necessary to pursue a statutory remedy in order to enforce a statutory right.—The Highland Light, Case No. 6,477.

When a new right is introduced, and a remedy for its violation is prescribed by statute, the party complaining of such violation is confined to the statutory remedy.—James v. Atlantic Delaine Co., Case No. 7,179.

§ 3. Joinder of causes.

Where it appears that plaintiff is entitled to the whole of a given sum in certain given rights, it is no objection to a recovery by him that it is not shown how much he is entitled to in each right.—Stokes v. Mowatt, Case No. 13,481.

Whenever the same plea may be pleaded and the same judgment given on two counts, they may be joined in the same declaration.—Stockwell v. United States, Case No. 13,466.

A wrongful act causing loss, being single, but one action can be maintained therefor.—Ætna Ins. Co. v. Hannibal & St. J. R. Co., Case No. 96.

A bill of review may be conjoined with a bill for relief against a fraudulent decree.—Campbell v. Railroad Co., Case No. 2,366.

A count in assumpsit for a breach of promise of marriage, and a count in tort to recover damages for deceit, cannot be joined, and the defect can be reached by demurrer.—Wilkinson v. Pomeroy, Case No. 17,675.

A count upon the promise of an intestate may be joined to that of the administrator to pay the debt of the intestate.—Wilkings v. Murphey, Case No. 17,663.

The joinder of counts on a bill of exchange as indorsee with counts as beneficiary heir and administrator *held* bad.—Picquet v. Swan, Case No. 11,132.

A count for injuring the plaintiff's mare by negligence, and a count upon the promise to return the mare safe, may be joined, and advantage can only be taken of the misjoinder (if it be one) by special demurrer.—Dobbin v. Foyles, Case No. 3,942.

Counts charging the defendants as executors upon the promise of their testator, and upon their own promise as executors, in consideration of assets, may be joined in the same declaration.—Dixon v. Ramsay, Case No. 3,932.

A good count in assumpsit, and a count in the same form, but not supported by the cause of action set out, do not constitute a misjoinder of actions without which, if there be one good count, a demurrer to the whole declaration will not be sustained.—French v. Tunstall, Case No. 5,104a.

§ 4. Splitting causes.

A severance of a suit, so as to make two several suits out of one joint suit, is not allowed at the common law as to parties defendant.—Smith v. Rines, Case No. 13,100.

Two several actions cannot be brought to recover on different portions of one entire contract.—Chinn v. Hamilton, Case No. 2,685.

Upon a joint shipment and orders by three persons, the master of the vessel is not liable to an action by two for a breach, in the absence of an express promise.—Young v. Black, Case No. 18,153.

The plaintiff in a suit to quiet title cannot, at his option, split his case up into many suits; and if he omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot afterwards bring another suit upon the fragment or portion of the case omitted.—Starr v. Stark, Case No. 13,316.

§ 5. Consolidation.

The court may order causes consolidated or one tried as a test case, where they involve same issues.—Andrews v. Spear, Case No. 379.

Actions pending in a federal court of like nature or relative to the same question, may be consolidated to avoid unnecessary costs, or to prevent delay.—The Burke, Case No. 2,159.

Where plaintiff has several causes of action which may be joined, and brings a separate suit on each, the court will compel a consolidation at his costs.—Wolverton v. Lacey, Case No. 17,932.

Consolidation of actions on notes, though parties are the same in all, not ordered.—Bank of Alexandria v. Young, Case No. 857.

Numerous suits involving the same issues will not be consolidated on motion of plaintiff.—Ferrett v. Atwill, Case No. 4,747.

Instead of consolidating actions for trespass to the person and for trespass to property, arising out of the same transaction, the court directed that they be tried at the same time and to the same jury.—Holmes v. Sheridan, Case No. 6,644.

The intermission of a term between the issue of the writ on which one defendant was taken and an alias or pluries against the other will not prevent consolidation of the causes.—Smith v. Woodward, Case No. 13,129.

§ 6. Termination.

A suit is not terminated by the rendition of judgment, nor until satisfaction thereof.—Campbell v. Hadley, Case No. 2,358.

An omission to provide for the decision of pending causes, in an act of the legislature, changing the time of holding courts, does not amount to a discontinuance of such causes.—Boswell v. Newton, Case No. 1,683a.

ACTION ON THE CASE.

See, also, "Action," § 2.
For seduction, see "Seduction."
For trespass, see "Trespass," §§ 3–11.

§ 1. Nature and grounds.

Action on the case lies when there has been no contract, and a tort is unaccompanied by force, and is followed by a consequential injury; or where a contract, express or implied, exists out of which a common-law duty arises, and the party on whom that duty devolves is guilty of malfeasance, misfeasance, or nonfeasance in regard to it.—Emigh v. Pittsburgh, Ft. W. & C. R. Co., Case No. 4,449.

An action on the case will lie for false warranty.—Allen v. Schuchardt, Case No. 236.

An action upon the case for deceit will not lie for a breach of promise.—Fenwick v. Grimes, Case No. 4,733.

An action on the case in the nature of an action for a conspiracy may be maintained, as in the case of a common tort against all or any one or more of the tort feasors.—Smith v. Rines, Case No. 13,100.

Action on the case will lie where a railroad company, after engaging to carry a passenger and taking him on the train, wrongfully ejects him.—Emigh v. Pittsburgh, Ft. W. & C. R. Co., Case No. 4,449.

The reversioner cannot maintain an action upon the case against a stranger, who, by persuasion or threats, induces the tenant to attorn to a third person, it not being maliciously done.—Brown v. Corcoran, Case No. 1,999.

An action on the case will lie for the loss of plaintiff's slave, although defendant wrongfully and unlawfully acquired and kept possession of the slave.—Washington v. Wilson, Case No. 17,240.

ACT OF GOD.

See "Carriers," § 22.

ADEQUATE REMEDY AT LAW.

See "Creditors' Suit," § 5; "Specific Performance."
Effect on jurisdiction of equity, see "Equity," §§ 11–13.

ADJOINING LANDOWNERS.

See "Boundaries"; "Party Walls."

ADJUDICATION.

Of bankruptcy, see "Bankruptcy," §§ 43, 55, 134–137.
Of courts in general, see "Courts," § 8.
Operation and effect of former adjudication, see "Judgment," §§ 46–51, 65, 66.

ADJUSTMENT.

Of loss within insurance policy, see "Insurance," § 158.

ADMEASUREMENT.

Of dower, see "Dower," § 4.

ADMINISTRATION.

Of estate in bankruptcy, see "Bankruptcy," §§ 287–336.
—— of decedent, see "Executors and Administrators."
Of trust property, see "Trusts," §§ 16–31.

ADMIRALTY.

I. JURISDICTION.

§ 1, Nature, grounds, and scope in general. § 2, Saving of common-law remedy. § 3, Conflict of jurisdiction as to the res. § 4, Waters and places. § 5, Persons—In general. § 6, —— Foreign seamen and vessels. § 7, Vessels and other property. § 8, Rights and controversies in general—Accounting. § 9, —— Disputes between vessel owners. § 10, —— Mortgages. § 11, —— Miscellaneous cases. § 12, Ownership and possession of vessels. § 13, Contracts—Maritime contracts in general. § 14, —— Affreightment and charter parties. § 15, —— Executory contracts relating to maritime matters. § 16, —— Repairs and supplies to vessel. § 17, —— Bottomry. § 18, —— Marine insurance. § 19, —— Wharfage. § 20, —— Shipbuilding contracts. § 21, —— Towage contracts. § 22, —— Passenger contracts. § 23, —— Services in general. § 24, —— Services to vessel in port. § 25, —— Stevedores' Services. § 26, —— Services connected with navigation. § 27, —— Pilotage. § 28, —— Salvage. § 29, Liens. § 30, Torts—Maritime torts in general. § 31, —— Injuries to vessels or other property. § 32, —— Personal injuries. § 33, —— Causing death. § 34, Penalties, forfeitures, and seizures. § 35, Captures and prize. § 36, Method of raising question and waiver of jurisdiction.

II. REMEDIES IN PERSONAM AND IN REM, AND MATTERS OF PRACTICE IN GENERAL.

§ 37, Mode and forms of procedure in general. § 38, Rules of practice. § 39, Grounds of proceeding in personam or in rem. § 40, Joinder of causes and proceedings. § 41, Grounds of defense in general. § 42, Place of bringing suit. § 43, Premature commencement of suit. § 44, Laches and stale demands. § 45, Pendency of other proceeding. § 46, Set-off, counterclaim, and cross suit. § 47, Consolidation. § 48, Stay of proceedings. § 49, Abandonment, discontinuance, or dismissal.

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IV. PLEADING, PETITIONS, AND MOTIONS.

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(B) Security for Payment.

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(C) Amount, Items, and Taxation of Costs.

§ 141, In general. § 142, Clerk's fees. § 143, Marshal's fees and disbursements. § 144, Proctor's and advocate's fees. § 145, Miscellaneous items. § 146, Amount dependent upon amount of recovery. § 147, Retaxation. § 148, Appeal from taxation.

(D) Costs on Appeal.

§ 149, When allowed and amount.

(E) Payment and Remedies for Collection.

§ 150, Priority. § 151, Stay of prosecution. § 152, Enforcement against stipulators.

See, also, "Collision"; "Maritime Liens"; "Pilots"; "Salvage"; "Seamen"; "Shipping"; "Towage"; "Wharves."

Conflict of jurisdiction as to the res between state and federal court, see "Courts." § 118.

Jurisdiction and procedure in prize cases, see "War," §§ 51–78.

—— of crimes committed on high seas or vessels, see "Criminal Law," §§ 10, 11.

—— of federal courts, see "Courts," §§ 20, 93, 94.

—— of suits for wharfage, see "Wharves," § 5.

Proceedings to limit liability of vessel owners, see "Shipping," §§ 244–255.

Property and proceeds in salvage cases, see "Salvage," §§ 75–89.

Rights, duties, and liabilities of proctors in admiralty, see "Attorney and Client."

Subrogation, see "Maritime Liens," § 65; "Subrogation," § 1.

I. JURISDICTION.

On attachment, see post, § 58.

§ 1. Nature, grounds, and scope in general.

Admiralty jurisdiction over a maritime cause is in its nature complete. It extends to the person as well as to the res, and cannot be confined to one of the remedies on a contract when the contract itself is within the cognizance of the court.—Stevens v. The Sandwich, Case No. 13,409.

The jurisdiction of the district court embraces all cases of a maritime nature, whether they be particularly of admiralty cognizance or not.—The Seneca, Case No. 12,670.

Such jurisdiction and the law regulating its exercise are to be sought for in the general maritime laws of nations, and are not confined to that of England or any other particular maritime nation.—The Seneca, Case No. 12,670; Davis v. The Seneca, Id. 3,650.

The district courts of the United States, as courts of admiralty, exercise as large a jurisdiction and are governed by the same principles of maritime law as the courts of the maritime nations of continental Europe.—The S. C. Ives, Case No. 7,958.

Admiralty jurisdiction is referred to in the constitution as it was restricted in England at the time of the Revolution, and as exercised by the state courts before the adoption of the constitution.—Bains v. The James and Catherine, Case No. 756.

The constitutional provision that the judicial power of the courts of the United States "shall extend to all cases of admiralty and maritime jurisdiction" embraces those subjects, whether of contract or tort, which, at the time the constitution was adopted, under the general maritime law, were the appropriate subjects of the jurisdiction of admiralty courts.—Scott v. The Young America, Case No. 12,549. See, also, Cunningham v. Hall, Case No. 3,481.

The decisions of the English common-law courts upon the jurisdiction of the admiralty are not binding on the courts of this country.—Steele v. Thacher, Case No. 13,348.

The statutes of 13 & 15 Rich. II. have received in England a construction which must at all times prohibit their extension to this country.—Stevens v. The Sandwich, Case No. 13,409.

The grant of admiralty jurisdiction by the constitution of the United States is more extensive than that allowed to the English high court of admiralty.—Steele v. Thacher, Case No. 13,348.

The admiralty law cognizable in the federal courts is not the civil law of the Roman government, but the admiralty law of Great Britain.—Woodruff v. The Levi Dearborne, Case No. 17,988.

The district court in admiralty is governed by the maritime code possessed before the Revolution, where not altered by law or by a change of circumstance.—Thompson v. The Catharina, Case No. 13,949.

The federal jurisdiction in admiralty in South Carolina extends to all cases whereof the state admiralty courts, by statute or otherwise, had jurisdiction before the federal constitution was adopted.—The Huntsville, Case No. 6,916.

Courts of admiralty in this country are not limited in their jurisdiction by the rules of the common law.—The Stephen Allen, Case No. 13,361.

It seems that no enactment by a state legislature can be the foundation of any right or remedy in admiralty.—The Coernine, Case No. 2,944.

Admiralty jurisdiction is generally determined by the subject-matter.—Davis v. New Brig, Case No. 3,643.

The test of jurisdiction is whether the transaction is maritime in character.—American Ins. Co. v. Johnson, Case No. 303.

The jurisdiction depends not on the character of the parties, but on the subject-matter, whether maritime or not.—De Lovio v. Boit, Case No. 3,776; The Jerusalem, Id. 7,293.

It is not the subject-matter that determines admiralty jurisdiction, but the cause in its secondary sense,—the suit, the legal process.—McAfee v. The Creole, Case No. 8,655.

In cases of torts, injuries, and offenses locality brings them within the admiralty jurisdiction, but in cases of contract it is also necessary that the subject-matter be of a maritime nature.—Thackarey v. The Farmer of Salem, Case No. 13,852.

The admiralty jurisdiction of the federal courts is exclusive of the jurisdiction of the state courts.—The Norfolk, Case No. 10,297.

The admiralty jurisdiction extends to actions ex contractu, quasi ex contractu, ex delicto, and quasi ex delicto.—Beane v. The Mayurka, Case No. 1,175.

As the laws of the state of Pennsylvania provide for shipwrights and material men at the port of outfit, and also regulate domestic pilotage, admiralty will not take cognizance of these matters.—Gardner v. The New Jersey, Case No. 5,233.

The admiralty rules prescribed by the supreme court relate merely to the remedy, and were not intended to affect jurisdiction.—In re Kirkland, Case No. 7,842.

Admiralty has no jurisdiction of the offense of obstructing a navigable stream by a bridge.—United States v. New Bedford Bridge, Case No. 15,867.

The federal admiralty courts may proceed, under their general powers, in every case in which they are not restricted by statute.—United States v. The Little Charles, Case No. 15,613.

A suit in admiralty will be conducted, tried, and decided according to the usage and practice of that court, though jurisdiction is dependent upon a local law.—Boon v. The Hornet, Case No. 1,640.

Laws of Oleron, with historical notes.—30 Fed. Cas. p. 1171.

Laws of Wisbuy, with historical note.—30 Fed. Cas. p. 1189.

Marine Ordinances of Louis XIV., with historical note.—30 Fed. Cas. p. 1203.

Laws of the Hanse Towns, with historical note.—30 Fed. Cas. p. 1197.

§ 2. Saving of common-law remedy.

Const. art. 7 of the amendments, providing that the right of trial by jury shall be preserved, and that no fact tried by a jury shall be otherwise examined in any court of the United States than according to the rules of the common law, excludes the jurisdiction of admiralty over contracts regulated by the common law. Suits upon such contracts are appropriately suits at common law, within the terms of the amendment, and are cognizable only in courts of common law.—Bains v. The James & Catherine, Case No. 756.

The common-law rule that a statutory remedy which does not negative the remedy at common law is cumulative is applicable to remedies under the maritime law.—The Waverly, Case No. 17,301.

The remedy at law on an average bond given on a jettison of goods does not deprive admiralty of jurisdiction.—Dike v. The St. Joseph, Case No. 3,908.

Courts of common law have a jurisdiction concurrent with the admiralty over maritime contracts.—De Lovio v. Boit, Case No. 3,776.

The jurisdiction of the admiralty courts of cases of pilotage services is not exclusive of the state courts, in the absence of any legislative provision on the subject.—The Wave v. Hyer, Case No. 17,300.

The extension of admiralty jurisdiction to the lakes (Act Feb. 26, 1845) did not take away the concurrent remedy which existed at common law.—The Globe, Case No. 5,483.

A judgment against the master of a vessel, recovered in an action for wages in a common-law court, cannot be enforced in admiralty.—Assign v. The G. B. Lamar, Case No. 593a.

§ 3. Conflict of jurisdiction as to the res.

When the district courts and state courts have a concurrent jurisdiction in rem, the right to maintain the jurisdiction attaches to that tribunal which first exercises it and obtains possession of the thing.—The Robert Fulton, Case No. 11,890.

The admiralty and maritime jurisdiction of the United States in rem is exclusively in the United States courts. There is no concurrent jurisdiction in rem in admiralty cases between the courts of the United States and the state courts, and the courts of common law are precluded from proceeding in rem to enforce maritime claims.—Ashbrook v. The Golden Gate, Case No. 574; The Isabella, Id. 7,100.

State statutes authorizing actions in rem against vessels for causes cognizable in admiralty are statutes conferring admiralty jurisdiction, and are therefore unconstitutional.—Jackson v. The Kinnie, Case No. 7,137; The Edith, Id. 4,282; Id. 4,283.

The remedy by proceedings in rem against vessels given by Laws Mich. 1864, p. 107, is an exercise of admiralty jurisdiction, and the act and the liens given thereunder are void.—Moir v. The Dubuque, Case No. 9,696.

A vessel in possession of a sheriff under the process of a state court is nevertheless subject to process in rem, in admiralty, to enforce a lien given under the general maritime law.—Wall v. The Royal Saxon, Case No. 17,093; In re Certain Logs of Mahogany, Id. 2,559; The Julia Ann, Id. 7,577; The John Richards, Id. 11,827; The Gazelle, Id. 5,289. CONTRA, see The Robert Fulton, Case No. 11,890; The Oliver Jordan, Id. 10,503.

Whether previous possession by a state sheriff, under a fi. fa. issued by a state court, excludes the marshal from arresting a vessel forfeited for a breach of the laws of the United States, quære.—The Florenzo, Case No. 4,886.

Persons, with knowledge that a vessel was under attachment by a marshal, during the temporary absence of the ship keeper, forcibly carried her into another state, and caused her to be attached by process out of the state court. *Held*, that the marshal might follow and retake her.—The Joseph Gorham, Case No. 7,537.

Where a conflict arises between a sheriff acting under process of a state court and a marshal who has made a subsequent levy on the same property, the sheriff must either apply to the state court to be protected, or by petition to the federal court, to order its officer to withdraw.—The Circassian, Case No. 2,721.

It is no good defense to a petition that freight may be brought into the admiralty court to answer the exigency of suits for mariners' wages and materials, which are a charge on the freight, that the consignee, before the libels were filed, was summoned as trustee or garnishee of the shipowner in a court of common law.—The Caroline, Case No. 2,419.

State statute provisions authorizing seizure of a vessel under process of a justice of the peace to enforce a claim for damages must be strictly followed to give jurisdiction. The appearance of the owner's agent to defend the suit will not give jurisdiction.—The G. H. Montague, Case No. 5,377.

§ 4. Waters and places.

Jurisdiction in admiralty is founded in original cause and place of transaction.—Brevoor v. The Fair American, Case No. 1,847.

The admiralty jurisdiction is not limited to tide waters, but embraces the lakes and navigable streams through which interstate or foreign commerce is carried on.—The Avon, Case No. 680; The Cheeseman v. Two Ferryboats, Id. 2,633; Eads v. The H. D. Bacon, Id. 4,232; Franconet v. The F. W. Backus, Id. 5,048; The Lewellen, Id. 8,307; McGinnis v. The Pontiac, Id. 8,801; Raymond v. The Ellen Stewart, Id. 11,594; Western Transp. Co. v. The Great Western, Id. 17,443; Williams v. The Jenny Lind, Id. 17,723.

Admiralty jurisdiction extends over tidal water (Savannah river), although within the body of a county.—Bulloch v. The Lamar, Case No. 2,129.

The waters of the Welland canal, being used for international commerce, are within American admiralty jurisdiction.—The Avon, Case No. 680; Scott v. The Young America, Id. 12,549.

A seizure in the St. Lawrence river within the territorial limits of the district gives jurisdiction of a libel in rem for collision without reference to the character of the vessel or her voyage.—The East, Case No. 4,251.

Saginaw river, though wholly within the state of Michigan, is a public navigable stream, and within the admiralty jurisdiction.—The General Cass, Case No. 5,307.

Whether admiralty has jurisdiction of collisions upon the Erie canal, or contracts for the carriage of goods from place to place exclusively upon the Erie canal, quære.—The E. M. McChesney, Case No. 4,463.

Admiralty has jurisdiction of a suit for damages caused by collision between vessels at a pier of the city of New York.—Camden & A. R. Co. v. The Thomas Wallace, Case No. 2,337; Camden & A. R. Transp. Co. v. The Lotty, Id. 2,337a.

The admiralty jurisdiction does not extend to matters of contract or tort arising in commerce on tide water wholly between ports in the same state.—Poag v. The McDonald, Case No. 11,238; The Troy, Id. 14,192.

Admiralty has no jurisdiction of a suit to recover damages resulting from negligent towage upon the Hudson river on a voyage from Albany to New York, whether founded upon contract or in tort.—Poag v. The McDonald, Case No. 11,238; Id. 11,239.

Act Feb. 26, 1845 (5 Stat. p. 726), extending the jurisdiction in admiralty to certain cases upon the Great Lakes and navigable waters connecting the same, having been passed on the erroneous assumption that admiralty jurisdiction was limited to tide waters, is wholly inoperative, and neither enlarged nor restricted the jurisdiction in admiralty as it existed under the constitution and the judiciary act of 1789.—The Flora, Case No. 4,878; Franconet v. The F. W. Backus, Id. 5,048; Gillet v. Pierce, Id. 5,437; Parmlee v. The Charles Mears, Id. 10,766; The Revenue Cutter No. 1, Id. 11,713; Scott v. The Young America, Id. 12,549; Western Transp. Co. v. The Great Western, Id. 17,443; Wolverton v. Lacey, Id. 17,932.

The part of the sea below low-water mark, and not within the body of any country, is the "high seas" within Act 1789, § 9.—The Abby, Case No. 14.

Waters within the ebb and flow of the tide are to be considered as the sea.—Thackarey v. The Farmer, Case No. 13,852.

All waters, not comprehended within the body of a county, constitute a part of the high sea.—Johnson v. Twenty-One Bales, etc., Case No. 7,417.

It seems that the admiralty and common-law courts have concurrent jurisdiction where an arm of the sea, or creek, haven, basin, or bay, is so narrow that a person standing on one shore can reasonably discern and distinctly see, by the naked eye, what is doing on the opposite shore.—United States v. Grush, Case No. 15,268.

Long Island Sound is not only, in common-law acceptation, an arm of the sea; it is a strait and parcel of the high seas; it is not within the territorial limits of any particular state.—The Martha Anne, Case No. 9,146.

Where the principal contract is maritime, admiralty jurisdiction is not defeated by the fact that some incidental services were performed on land.—The Brookline, Case No. 1,937.

Jurisdiction once attached is not devested by further acts on land in continuation of maritime act.—American Ins. Co. v. Johnson, Case No. 303.

§ 5. Persons—In general.

The admiralty jurisdiction of the federal courts in no way depends upon the residence or citizenship of the parties.—Zollinger v. The Emma, Case No. 18,218; The Planter, Id. 11,207.

Where a court of admiralty in a proceeding in rem has jurisdiction over the thing, it is immaterial to whom it belongs.—Clarke v. New Jersey Steam Nav. Co., Case No. 2,859.

Admiralty jurisdiction in cases of tort depends on locality, in cases of contract upon the subject-matter, but never upon the character or occupation of the parties.—Kellum v. Emerson, Case No. 7,669.

Admiralty has jurisdiction to entertain suits in personam, where the parties are foreigners of different nationalities.—Thomassen v. Whitwell, Case No. 13,928.

Maritime courts are not without jurisdiction over suits whether in rem or in personam between foreigners.—Bucker v. Klorkgeter, Case No. 2,083; Davis v. Leslie, Id. 3,639; The Napoleon, Id. 10,015.

But jurisdiction will be declined unless necessary to prevent failure of justice.—Bucker v. Klorkgeter, Case No. 2,083; Bernhard v. Creene, Id. 1,349; Davis v. Leslie, Id. 3,639; The Napoleon, Id. 10,015.

A court of admiralty may decline to entertain jurisdiction where all the parties are foreigners and reside abroad.—Muir v. The Brisk, Case No. 9,901.

But, where the suit is between subjects of different governments, jurisdiction will not be declined.—Bernhard v. Creene, Case No. 1,349.

Though a court of admiralty is not bound to take jurisdiction of controversies growing out of contracts between foreigners having a domicile in this country, it may lawfully exercise it, and ought to do so where justice requires it.—The Sailor's Bride, Case No. 12,220.

Admiralty may, in its discretion, take jurisdiction over a controversy between foreigners where its subject-matter is of a maritime nature, or remit the parties to their home forum.—The Gazelle, Case No. 5,289; In re One Hundred and Ninety-Four Shawls, Id. 10,521; The Havana, Id. 6,226; The Bee, Id. 1,219.

In the case of a suit between foreigners jurisdiction will not be declined where the request is delayed, and the position of the parties has changed in the meantime.—Thomassen v. Whitwell, Case No. 13,928.

Admiralty will entertain a suit for salvage as to property within its jurisdiction, where the only question is as to the rate of reward, though all the parties are foreigners.—In re One Hundred and Ninety-Four Shawls, Case No. 10,521; The Bee, Id. 1,219.

It seems that when, in a salvage suit between foreigners, the answer charges the libelant with wanton misconduct in obtaining possession of the property, and prays the privilege to contest the claim of the libelant before the courts of their common country, the case should be dismissed to the home forum.—In re One Hundred and Ninety-Four Shawls, Case No. 10,521.

Our admiralty courts will entertain jurisdiction in rem to enforce a bottomry bond executed in a foreign country between subjects of a foreign country when the vessel is within their jurisdiction.—The Jerusalem, Case No. 7,293.

In the case of a libel qui tam against a vessel seized by an English cruiser as having been engaged in the slave trade, process in rem will not be denied libelant because he is a foreigner, but will be granted on condition that he enter into a stipulation with sureties to abide by all

decrees of the court, interlocutory or otherwise. —The Tigris, Case No. 14,038.

An action will lie against a foreign vessel for wages of an American seaman.—The Napoleon, Case No. 10,015.

Admiralty will take jurisdiction of a libel for personal injuries by an American seaman serving on board a British vessel, where the voyage was terminated here, and the master was domiciled here.—Patch v. Marshall, Case No. 10,793.

§ 6. —— Foreign seamen and vessels.

The district court may take cognizance of a suit by foreign seamen against a foreign vessel. —Armstrong v. The Rydesdale, Case No. 547.

Admiralty jurisdiction in suits by foreign seamen for wages is exercised as matter of comity. —Gonzales v. Minor, Case No. 5,530.

Under the treaty between the United States and the free Hanseatic towns, the federal courts have no jurisdiction of a dispute in respect to wages between the master of a vessel belonging to Bremen and a seaman who is a citizen thereof.—Kendept v. The Theodore Korner, Case No. 7,693.

Under the treaty with Prussia of May 1, 1828, the district court has no jurisdiction of a suit in rem for wages by the crew of a Prussian vessel, where the Prussian consul has previously adjudicated on the claim. Case No. 4,427 reversed.—The Elwine Kreplin, Case No. 4,426.

The court will entertain jurisdiction of a libel for seamen's wages against a Nova Scotian vessel, notwithstanding the protest of the British consul, where the seamen did not belong in Nova Scotia, and the itinerancy of the vessel was uncertain.—The Lilian M. Vigus. Case No. 8,346.

The seamen are not precluded from maintaining the action by section 190 of the British merchants' shipping act of 1854.—The Lilian M. Vigus, Case No. 8,346.

Seamen on board a ship of war or vessel belonging to a sovereign, independent state cannot libel the vessel for wages due.—Moitez v. South Carolina, Case No. 9,697.

Seamen on board letters of marque may sue for their wages in the admiralty courts of neutral nations.—Ellison v. The Bellona, Case No. 4,407.

Where a foreign vessel is in the custody of the marshal on a claim made by an American citizen, the court will take jurisdiction of an intervening libel by one of the seamen, though his contract was made and to be performed in a foreign country, and all the parties are subjects thereof.—The Champion, Case No. 2,584.

The court will not take cognizance of disputes between masters and crews of foreign ships except in special cases.—Willendson v. Forsoket, Case No. 17,682.

Courts of a foreign power will take cognizance of the claims of seamen for their wages only in cases of flagrant wrong or suffering on their part, but not upon an alleged breach of contract, much less to decide upon a quantum meruit.—Graham v. Hoskins, Case No. 5,669.

Admiralty will entertain a libel by foreign seamen for wages only when the voyage is broken up, or when the seamen have been wrongfully separated from the ship, or placed in a state of destitution here.—Lynch v. Crowder, Case No. 8,637; The Becherdass Ambaidass, Id. 1,203; The Infanta, Id. 7,030; Hayes v. The J. L. Wickwire, Id. 6,262.

The district court in admiralty will take jurisdiction of a suit for wages between foreigners, if the voyage is ended, and there is no contract binding the parties to another jurisdiction, and no reason why justice cannot be done here.—The Pawashick, Case No. 10,851.

Admiralty will take jurisdiction of a suit by foreign seamen against a foreign vessel to recover wages, where the voyage is completed or broken up or the seamen are wrongfully discharged. — The Hermine, Case No. 6,409; Burckle v. The Tapperheten, Id. 2,141; Gonzales v. Minor, Id. 5,530; Graham v. Hoskins, Id. 5,669; Orr v. The Achsah, Id. 10,586.

Stipulations in foreign shipping articles, to refer all disputes to home courts, will not prevent American courts assuming jurisdiction in such case.—Bucker v. Klorkgeter, Case No. 2,083; The Infanta, Id. 7,030.

But ordinarily they will not interfere in disputes between the master and seamen of a foreign vessel, when they are bound by the articles to submit all disputes to a home tribunal.—Aertsen v. The Aurora, Case No. 95.

The protest of a foreign consul will not prevent the district court from taking jurisdiction of the case.—Orr v. The Achsah, Case No. 10,586.

Admiralty will take jurisdiction of a suit by a British master against a British vessel for wages, where the voyage is ended and justice can be done.—The Pawashick, Case No. 10,851.

A libel by British seamen against a British vessel for wages will be dismissed on the protest of the consul where it appears that the parties are about to pass into the British jurisdiction.—Saunders v. The Victoria, Case No. 12,377.

A foreign seaman who has shipped to this country, and is offered passage home, cannot sue here for wages, where the master has given security for his return.—The Pacific, Case No. 10,644.

Seamen of a British vessel, whose articles provided that they shall not be entitled to wages until the completion of the voyage, cannot sue in the United States courts for wages, unless it appears that they had been prevented from performing their contract, or seeking redress in the British courts, by wrongful act of the master.—Cochran v. McLean, Case No. 2,927a.

It seems that deviation is no ground of entertaining suits by foreign seamen for wages, where, by the articles, they have stipulated to sue in their own country only.—Bucker v. Klorkgeter, Case No. 2,083; The Infanta, Id. 7,030.

The court will take jurisdiction of a suit by a foreign seaman against a foreign vessel for wages, where the foreign consul consents thereto.—Reynolds v. The Simoon, Case No. 11,733.

The approval of a consul is not absolutely necessary to the maintaining of a suit by foreign seamen.—Bucker v. Klorkgeter, Case No. 2,083.

Ordinarily, seamen belonging to a foreign ship are not allowed to sue for wages without the consent of the commercial representative of their country.—Jelly v. Tiddeman, Case No. 7,256a.

Foreign seamen should show good reason for not obtaining approval of their country's commercial representative.—The Infanta, Case No. 7,030.

The court will decline jurisdiction on a libel by a seaman of a British vessel, who, having submitted his claim to the British consul, disregarded the award.—Townshend v. The Mina, Case No. 14,121.

The court declined jurisdiction in a controversy between foreign seamen and their vessel where the parties might have had redress by a tribunal of their own country.—Thomson v. The Nanny, Case No. 13,984.

§ 7. Vessels and other property.

The materials which constitute a ship become one as soon as she leaves the ways and her keel strikes the element for which she was originally designed, and she then first becomes subject to admiralty jurisdiction.—The Eliza Ladd, Case No. 4,364.

If the business or employment of a vessel appertain to travel or trade and commerce on the water, it is subject to the admiralty jurisdiction, whatever may be its size, form, capacity, or means of propulsion.—The General Cass, Case No. 5,307.

Admiralty has no jurisdiction of a libel in rem for services in the nature of salvage to a steamboat dismasted and stripped of her motive power, and fitted and used as a saloon and hotel, where she went ashore while being towed to another place.—The Hendrick Hudson, Case No. 6,355.

A barge without any propelling power or rudder, used as a transport in New York harbor, is a vessel engaged in maritime service upon navigable waters.—Haslett v. The Enterprise, Case No. 6,197.

A canal boat having no power of self-propulsion is not subject to a lien in admiralty for breach of a contract of affreightment.—The Ann Arbor, Case No. 408.

A floating elevator, used in the harbor of New York, though without motive power or capacity for cargo, is a vessel subject to a maritime lien.—The Hezekiah Baldwin, Case No. 6,449.

Steamboats and lighters engaged in trade or commerce on tide water and the seamen employed on board are within the admiralty jurisdiction, but not ferry boats, or those engaged in ordinary traffic along the shores of a river.—Thackarey v. The Farmer of Salem, Case No. 13,852.

Steam ferryboats used between two cities in different states are subject to admiralty jurisdiction, as comprising commerce among the states.—The Cheeseman v. Two Ferry-Boats, Case No. 2,633.

A vessel plying between points on opposite sides of the Mississippi river, six miles apart, though run by a company owning a ferry franchise, is subject to admiralty jurisdiction.—The Gate City, Case No. 5,267.

The maritime law does not apply to a steam ferryboat running between Washington and Alexandria.—Harris v. Nugent, Case No. 6,126.

Flat boats and coal barges used to transport merchandise down stream, and broken up and sold for lumber at the end of their voyage, are not subject to admiralty jurisdiction.—Jones v. Coal Barges, Case No. 7,458.

Admiralty jurisdiction extends to lighters employed in carrying lumber out to vessels lying in deep water.—The General Cass, Case No. 5,307.

The fact that such lighters are not enrolled or licensed does not affect the question of jurisdiction.—The General Cass, Case No. 5,307.

The district court in admiralty has jurisdiction of a libel for collision in the North Sea between vessels of different nations.—The Jupiter, Case No. 7,585.

In the case of a collision in our ports between ships belonging to subjects of different foreign nations, our courts will not decline to take jurisdiction from motives of international comity.—The Russia, Case No. 12,168.

The admiralty court will not proceed against a foreign vessel without the consent of the commercial representative of the foreign government, in the absence of strong circumstances.—Hay v. The Bloomer, Case No. 6,255.

A warship of a neutral nation is not liable to arrest by process from a local court for a wrongful collision, within our territorial jurisdiction, with an American merchant vessel.—The Pizarro v. Matthias, Case No. 11,199.

A public armed vessel in the service of a foreign nation is not exempted from admiralty jurisdiction on libel by one claiming title thereto.—McFaden v. The Exchange, Case No. 8,786.

The harbor police boat owned by New York City cannot be arrested in admiralty to enforce a claim for wharfage.—The Seneca, Case No. 12,668.

A steam tug owned by, and exclusively employed in the service of, a municipal corporation, performing public duties, is not liable to seizure in a suit in rem for a maritime tort, while actually engaged in public service.—The Fidelity, Case No. 4,757; Id. 4,758.

Admiralty has not jurisdiction to try the question of title to certain logs which have been incorporated into a raft and floated down a public navigable river.—Gastrel v. Cypress Raft, Case No. 5,266.

Rafts anchored in a public navigable river are not the subject-matter of admiralty jurisdiction.—Tome v. Four Cribs of Lumber, Case No. 14,083.

Quære, whether admiralty jurisdiction can be sustained against a raft.—The W. H. Clark, Case No. 17,482.

Admiralty has no jurisdiction of a libel in rem to enforce a bottomry bond given on cargo belonging to the United States.—The Othello, Case No. 10,611.

A French admiralty court having declared that the capture of an American vessel by a French privateer was unlawful, an admiralty court of the United States will entertain jurisdiction of a libel in rem against the French vessel to recover damages for an unlawful seizure.—McGrath v. The Candalero, Case No. 8,809.

§ 8. Rights and controversies in general —Accounting.

Admiralty has no jurisdiction over matters of account, merely as accounts, although they may arise exclusively out of maritime transactions. It can take cognizance of accounts only as incidental to other matters over which it has jurisdiction.—Davis v. Child, Case No. 3,628; The Fair Play, Id. 4,615.

Admiralty has no jurisdiction of an accounting between partners.—United States v. The Isaac Hammett, Case No. 15,446; Turner v. Beacham, Id. 14,252.

Or accounting between part owners of a vessel.—The Ocean Belle, Case No. 10,402; The Susan E. Voorhis, Id. 13,633; Kellum v. Emerson, Id. 7,669.

Or accounts for traffic and dealings between master and mate.—Atkyns v. Burrows, Case No. 618.

Or a suit between shipowners to collect a balance to be determined on settlement of joint accounts.—Martin v. Walker, Case No. 9,170.

If it is apparent from the pleadings that the main object of the libel is the settlement of an account, the libel will be dismissed. Case No. 8,086 reversed.—The Larch, Case No. 8,085.

A court of admiralty will order an account only as incident to other matter of which it has admitted cognizance.—Tunno v. The Betsina, Case No. 14,236.

A party can have a remedy in admiralty for matters of account only upon the basis of an adjusted and recognized liability.—Bradshaw v. The Sylph, Case No. 1,791.

Admiralty has no jurisdiction either of a libel in rem or in personam for a seaman's share in the earnings of the vessel where the amount thereof is not ascertained.—Duryee v. Elkins, Case No. 4,197; The Fair Play, Id. 4,615.

Admiralty may entertain a libel in personam for a specific share in the ascertained profits of the voyage.—Duryee v. Elkins, Case No. 4,197; Dexter v. Munroe, Id. 3,863.

On such libel the court may inquire into the charges in account against libelant, relied upon as reducing or satisfying his share.—Duryee v. Elkins, Case No. 4,197.

A libel by the master and co-owner of a whaling vessel, to recover his lay and disbursements and commissions on sales, will be sustained only so far as the lay is concerned.—Hazard v. Howland, Case No. 6,280.

In an action by a master and co-owner of a whaling vessel to recover the amount due for his lay, the fact that the master was indebted "in his capacity as owner" to the other co-owners, and that such claim might properly be allowed in other courts by way of set-off, does not oust the district court of its jurisdiction.—Dexter v. Munroe, Case No. 3,863.

Admiralty has jurisdiction of a suit for the share of libelant as cooper on a whaling voyage.—Macomber v. Thompson, Case No. 8,919.

Admiralty has no jurisdiction of a libel by the master and owners of a vessel against others forming, with libelants, a joint-stock association, for a deficiency in freight, as the suit necessitates an accounting.—Grant v. Poillion, Case No. 5,700.

An account for provisions furnished the owner or commander of a vessel, or for articles for her use when not on a voyage or in a foreign port, is not within the admiralty jurisdiction either as a substantive claim or set-off.—Bains v. The James & Catherine, Case No. 756.

The equitable lien of a part owner and ship's husband on the share of the other owners for advances and disbursements, if any, will not enable a court of admiralty to take an account and enforce it.—The Larch, Case No. 8,085; Id. 8,086.

§ 9. —— Disputes between vessel owners.

In a case of forfeiture, admiralty cannot entertain a claim for alleged balances due by a part owner or a co-partner.—United States v. The Isaac Hammett, Case No. 15,446.

Admiralty has jurisdiction to secure the value of the dissentient minority's interest, in case of disagreement among part owners in the employment of the vessel.—The Tunno v. Betsina, Case No. 14,236.

Admiralty has jurisdiction of a libel for the sale of a vessel, and distribution of the proceeds among the owners, brought by the owners of a moiety against the ship and the owners of the other moiety.—The Annie H. Smith, Case No. 420.

Where two equal part owners of a vessel disagree about the way in which she shall be employed, a court of admiralty may decree a sale of the vessel.—The Seneca, Case No. 12,670, reversing Case No. 3,650; The Ocean Belle, Case No. 10,402.

Admiralty has no jurisdiction of a claim by a part owner, dissenting from a voyage, for the use or destruction during the voyage of his share of the outfit; the remedy is in equity.—The Marengo, Case No. 9,065.

Admiralty has no power to decree a sale at the instance of minority owners, except, perhaps, as the result of the failure of the owners of the majority interest to give security for the safe return of the vessel.—The Ocean Belle, Case No. 10,402.

Admiralty has no jurisdiction of a suit by equity co-owners of a vessel against the other co-owners for supplies furnished.—Hall v. Hudson, Case No. 5,935.

The provisions of the French marine law which authorize a compulsory sale of a vessel in case of partners disagreeing about the use of her are part of the general law of admiralty, binding on the courts of this country. Case No. 3,650 affirmed.—The Seneca, Case No. 12,670.

§ 10. —— Mortgages.

Admiralty has no jurisdiction to enforce the claim of a mortgagee of a vessel.—The Sailor Prince, Case No. 12,219.

Admiralty has no jurisdiction of a petition to redeem from a mortgage of a vessel.—The J. B. Lunt v. Merritt, Case No. 7,247.

Admiralty has no jurisdiction of a suit in rem for the foreclosure of a mortgage on a vessel, nor of one to try the title or right of property in a vessel.—The John Jay, Case No. 7,352.

Admiralty has no jurisdiction to enforce a mortgage upon a vessel where the mortgagee is out of possession, nor to enforce the payment of freight to the mortgagee.—Deely v. The Ernest and Alice, Case No. 3,735.

Quære, whether a libel lies on a mere mortgage of a vessel, as a chattel, to secure a debt, if arising out of a marine contract and business, or not.—Leland v. Medora, Case No. 8,237.

The surrender or avoidance of a mortgage of a vessel on the ground of laches will not be enforced in admiralty. The remedy, if any, is in equity, after the disputed rights are settled at law.—Dean v. Bates, Case No. 3,704.

§ 11. —— Miscellaneous cases.

An admiralty court has jurisdiction to decree the bounty allowed to persons employed in the cod fishery, and a claim therefor may be united with a claim for an account of the fish taken.—The Lucy Anne, Case No. 8,596.

Admiralty has jurisdiction in case of a wrecked ship to decree a sale upon application of the master.—The Tilton, Case No. 14,054.

Such sale is not conclusive upon the owner or upon third persons.—The Tilton, Case No. 14,054.

Goods taken by pirates, and sold upon land, may be recovered from the purchaser by suit in admiralty.—Davison v. Seal-Skins, Case No. 3,661.

Admiralty has jurisdiction of a claim by the owner of goods sold by the master in a foreign port to obtain means of repairing damages to the vessel done on the high seas.—Bulgin v. The Rainbow, Case No. 2,116.

A suit cannot be sustained in admiralty in rem to enforce the payment of duties of the United States.—The Waterloo, Case No. 17,257.

Admiralty has no jurisdiction to decide whether a contract to form a partnership to purchase a vessel is legally or equitably binding.—Turner v. Beacham, Case No. 14,252.

Admiralty has jurisdiction of cases of general average upon losses at sea.—Mutual Safety Ins. Co. v. Cargo of the George, Case No. 9,981.

The owner of cargo shipped under a bill of lading can maintain a libel in rem for its restitution, where it has been separated from the vessel by the wrongful act of the master.—In re Five Hundred and Twenty-Eight Pieces of Mahogany, Case No. 4,845.

No jurisdiction to afford relief for breach of stipulations of personal nature in charter party, —such as agreement by owner to proceed to another than designated port to find market.—Alberti v. The Virginia, Case No. 141.

A proctor may maintain a suit in admiralty for his costs or fees.—McDonald v. The Cabot, Case No. 8,759.

The owners of a steamboat entered into an agreement with a third party, by which the latter was to run the boat, and the proceeds were to go (1) to the expenses of the boat; (2) to the insurance; (3) to a certain sum to the owners; and, lastly, the surplus to be divided among the parties. *Held*, on a libel in personam brought by the owners for breach of the agreement, that the partnership thereby created was not to commence until the first three claims were satisfied; that until then the third party was merely the bailee of the boat, and the jurisdiction of admiralty was not ousted.—Ward v. Thompson, Case No. 17,162.

§ 12. Ownership and possession of vessels.

Admiralty has no jurisdiction of a suit to try the title or right of property in a vessel.—The John Jay, Case No. 7,352.

Admiralty jurisdiction attaches where there is no other question than that of title to a ship, and no pretense of a maritime contract or a marine tort.—Grigg v. The Clarissa Ann, Case No. 5,826.

Admiralty has jurisdiction of petitory as well as possessory actions.—Blanchard v. The Martha Washington, Case No. 1,513; The Friendship, Case No. 5,123; Taylor v. The Royal Saxon, Case No. 13,803; The Watchman, Case No. 17,251.

Admiralty has jurisdiction over petitory as well as possessory suits to reinstate owners of ships who have been wrongfully displaced from their possession.—The Tilton, Case No. 14,054.

Admiralty has no jurisdiction of a possessory libel on a dispute between co-owners of a vessel.—Morgan v. Tapscott, Case No. 9,808.

An admiralty court has no jurisdiction to decree possession of a vessel to persons claiming title by virtue of a mortgage.—The Martha Washington, Case No. 9,148.

Admiralty has jurisdiction of a suit by the mortgagee of a vessel after condition broken to reclaim possession from a purchaser at a sheriff's sale under a judgment against the mortgagor.—The J. B. Lunt, Case No. 7,246.

A court of admiralty has no jurisdiction to try questions of equitable title to vessels, or to enforce the equities between mortgagors and mortgagees of vessels. It can only pass upon the legal title.—The William D. Rice, Case No. 17,691.

Admiralty has no jurisdiction of a libel asserting an equitable title to one-fourth of a vessel, and claiming an account of its earnings and the proceeds of its sale.—Kellum v. Emerson, Case No. 7,669.

The mere equitable title will not sustain a libel for possession.—Kynoch v. The S. C. Ives, Case No. 7,958.

Admiralty can only regard the legal title to a vessel, and, in an action between a mortgagee under an unregistered mortgage and a subsequent purchaser, must decide in favor of the latter.—Bogart v. The John Jay, Case No. 1,597.

Admiralty will not decree possession to a libelant claiming under a contract whereby the claimant agreed to sell an interest in the vessel to libelant or any one whom he might designate, after the vessel should have been approved by a third person, as such contract, being still executory, created only an equitable title, of which admiralty will not take cognizance.—Kynoch v. The S. C. Ives, Case No. 7,958.

Admiralty will not enforce the equitable title of one to whom a yacht was sold in the presence of the builder by one for whom she was built, against the legal title, which never passed from the builder by deed or absolute delivery.—The Amelia, Case No. 275; Hill v. The Amelia, Case No. 6,487.

Restoration must be awarded in a possessory action for a vessel upon the legal ownership without regard to collateral equities.—Cole v. The Brandt, Case No. 2,978.

In a possessory action by a mortgagee to recover possession of a vessel, the accounts between the mortgagor and the mortgagee cannot be adjusted.—The J. B. Lunt, Case No. 7,246; The J. B. Lunt v. Merritt, Id. 7,247.

§ 13. Contracts—Maritime contracts in general.

The provisions of Act Sept. 24, 1789, which give to the district courts original cognizance of all civil causes of admiralty and maritime jurisdiction, comprehended all maritime contracts, and those which relate to the navigation, business, or commerce of the sea, and the building, repairing, or supplying of vessels.—Davis v. A New Brig, Case No. 3,643.

The subject-matter of the contract must be maritime in its nature, to enable an admiralty court to give a remedy.—Cox v. Murray, Case No. 3,304.

Admiralty has jurisdiction over all maritime contracts, wheresoever the same may be made or executed, and whatever may be the form of the stipulations.—De Lovio v. Boit, Case No. 3,776.

It is not essential to the nature of a maritime contract that it be attended by a lien.—The Richard Busteed, Case No. 11,764.

If the subject-matter of a contract concern the navigation of the sea, it is a case of admiralty and maritime jurisdiction, although the contract be made on land.—Zane v. The President, Case No. 18,201.

A contract is not within the admiralty jurisdiction unless it is to be performed upon the sea, or has relation to a maritime service.—The Perseverance, Case No. 11,017.

Every contest between the owners and mariners and the owners and builders or equippers of a ship for the navigation of the sea is cognizable in the admiralty.—Stevens v. The Sandwich, Case No. 13,409.

All maritime contracts made by the master within the scope of his authority as master under the maritime law per se hypothecate the ship, and performance, in whole or in part, does not affect the question of jurisdiction generally, or the character of the proceeding, whether in rem or in personam.—The Williams, Case No. 17,710.

Admiralty has no jurisdiction where a maritime contract sought to be enforced is so inseparably connected with a contract over which the court has no jurisdiction that one cannot be decided without disposing of the other.—Turner v. Beacham, Case No. 14,252.

A contract under which money is advanced to purchase a ship, and her bill of sale deposited with the lender by way of security, with a power of attorney to him to sell the ship for his reimbursement, is not cognizable in admiralty.—The Perseverance, Case No. 11,017.

Such contract gives no interest or lien to the vessel, but only a naked power to sell.—The Perseverance, Case No. 11,017.

Admiralty has jurisdiction to enforce the payment of expenses for curing a sick seaman in the course of a voyage.—Harden v. Gordon, Case No. 6,047.

The obligation of a shipper to afford accommodations for the delivery of cargo according to the usage of the port is a maritime contract, for breach of which an action will lie in admiralty.

—Higgins v. United States Mail Steamship Co., Case No. 6,469.

§ 14. —— Affreightment and charter parties.

A contract for the transportation of goods on the high seas is of maritime jurisdiction.—The Huntress, Case No. 6,914.

Admiralty has jurisdiction of action based on contract of affreightment, though damages may be indirect.—The A. M. Bliss, Case No. 274.

Admiralty has jurisdiction of a libel on a charter party under seal for freight due, where no penalty is demanded.—Drinkwater v. The Spartan, Case No. 4,085.

Admiralty has jurisdiction in cases of charter parties for foreign voyages, and may enforce by proceedings in rem the maritime lien for freight thereunder.—In re Certain Logs of Mahogany, Case No. 2,559; The Volunteer, Id. 16,991.

A bill of lading for goods to be transported by sea, though made on land, is a maritime contract, enforceable in admiralty by action in rem. —The Gold Hunter, Case No. 5,513.

The admiralty courts have jurisdiction of a contract of affreightment for the carriage of merchandise from one port or place to another, within the ebb and flow of tide, on a navigable river. It is immaterial whether the vessel or boat by means of which the service is to be performed is propelled by its own motive power, or is towed by another vessel.—Van Santwood v. The John B. Cole, Case No. 16,875.

The width of a stream or length of a voyage is no criterion by which to determine the character of the service, nor the question of admiralty jurisdiction.—The Gate City, Case No. 5,267.

Admiralty has jurisdiction of a libel for freight on goods transported over navigable tide waters lying between two states.—Gaughran v. One Hundred and Fifty-One Tons of Coal, Case No. 5,273.

To give jurisdiction on a contract of affreightment, the chief part of the service under the contract must be to be performed on tide water. —Wallis v. Chesney, Case No. 17,110.

Admiralty has no jurisdiction of a libel for freight on merchandise carried in a canal boat 250 miles by canal and only 40 miles on tide water.—Wallis v. Chesney, Case No. 17,110.

Admiralty has no jurisdiction of an action on a contract of carriage by canal boat between New York and Rome in New York state.—The Ann Arbor, Case No. 407; Id. 408.

Admiralty has jurisdiction to enforce a contract for the carriage of goods by canal boat from the Buffalo river to New York City, by way of Lake Erie, the Erie Canal, and the Hudson river.—The E. M. McChesney, Case No. 4,463; Id. 4,464.

Admiralty has jurisdiction in rem of a libel for damages under a contract of affreightment to carry goods from Bound Brook, on the Raritan river, to Philadelphia, by the Delaware & Raritan Canal.—Lowry v. The E. Benjamin, Case No. 8,582.

A contract of affreightment between two ports of the same state is within admiralty jurisdiction where the course of the vessel is in part on the high seas.—Carpenter v. The Emma Johnson, Case No. 2,430.

Admiralty has jurisdiction of a contract of affreightment, though it is to be performed wholly between ports of the same state.—The Mary Washington, Case No. 9,229.

Admiralty has jurisdiction of a contract of affreightment to be performed wholly on navigable water, though entirely within the state. —The Elmira Shepherd, Case No. 4,418.

Admiralty has jurisdiction of a libel in rem for injuries to a cargo carried under a contract of affreightment between New York City and Troy, made between residents of the state. —The Leonard, Case No. 8,256.

A suit in admiralty may be maintained for the nonperformance of a contract for the transportation of merchandise from the city of Albany to the city of New York, on the Hudson river, in a canal boat designed for the navigation of the Erie Canal, and without motive power of its own.—Van Santwood v. The John B. Cole, Case No. 16,875.

Admiralty has jurisdiction, in a case of loss in the course of water transit, of goods shipped from Chicago to Erie by the Lakes, and thence by land to an inland point, under a contract for through transportation.—Phoenix Ins. Co. v. Erie & W. Transp. Co., Case No. 11,112.

For transporting goods landwise after voyage by water completed, not expressly contracted for in the shipping contract, there is no lien enforceable in admiralty.—Gaughran v. One Hundred and Fifty-One Tons of Coal. Case No. 5,273; In re One Hundred and Fifty-One Tons of Coal, Id. 10,520.

Admiralty has no jurisdiction where the contract of shipment is made on land, and the damage sued for is done in port.—Jones v. The Massachusetts, Case No. 7,480.

Deviation contrary to express agreement is a breach of maritime contract giving the federal courts jurisdiction in rem.—Knox v. The Ninetta, Case No. 7,912.

A verbal contract for the use of a steamboat for excursion trips, at definite times, for definite sums, is a charter, for breach of which admiralty has jurisdiction in personam.—Marshall v. Pierrez, Case No. 9,130.

A contract for the use of a barge at a stipulated rate is cognizable in admiralty, and a libel may be maintained against the steamboat using it.—The Dick Keys, Case No. 3,898; Scott v. The Dick Keyes, Id. 12,528.

Admiralty has jurisdiction of a contract by a steamboat, made in connection with the contract to transport goods, to collect the price, freight, etc., from the consignee, and return the balance to the consignor.—The Hardy, Case No. 6,056; The St. Joseph, Id. 12,230.

Admiralty will not take cognizance of a libel for a breach of a contract to purchase a cargo for a vessel with her funds, although such contract is contained in a charter party stipulating for the carriage of the cargo.—Peck v. Laughlin. Case No. 10,890.

Where a master was instructed, in his home port, to sell a cargo at the port of destination according to his judgment, and he landed the cargo there, and proceeded to dispose of it on shore, *held*, that this was not a maritime contract, cognizable in an admiralty court.—Waterbury v. Myrick, Case No. 17,253.

Where a master so employed abandoned the sale of the cargo in order to effect a salvage service in a vessel procured by pledging the proceeds of the cargo, *held*, that this was a breach of contract, for which no action lay in a court of admiralty.—Waterbury v. Myrick, Case No. 17,253.

Admiralty has jurisdiction of a libel to recover damages in the nature of demurrage, although there is no stipulation for demurrage in the bill of lading.—Sheppard v. Philadelphia Butchers' Ice Co., Case No. 12,757.

Admiralty has no jurisdiction of a suit for breach of a contract for rent of bar privileges thereon.—The Illinois, Case No. 7,005.

§ 15. —— Executory contracts relating to maritime matters.

Admiralty has no jurisdiction over preliminary contracts leading to maritime contracts, irrespective of the name given to them.—The Tribune, Case No. 14,171.

Admiralty has no jurisdiction to enforce specific performance of an agreement relating to maritime affairs.—Davis v. Child, Case No. 3,628; Deely v. The Ernest & Alice, Id. 3,735.

Admiralty has no jurisdiction to entertain a libel for a specific performance of an executory contract of sale.—The Kynoch v. S. C. Ives, Case No. 7,958.

An action in rem cannot be maintained against a vessel for the breach of a contract in refusing to accept materials or supplies to be furnished. Case No. 7,038 reversed.—The Cabarga, Case No. 2,276.

Admiralty has no jurisdiction of a contract of partnership to engage in maritime commerce.—The Crusader, Case No. 3,456.

A contract to form a partnership to purchase a vessel is not maritime.—Turner v. Beacham, Case No. 14,252.

Admiralty has no jurisdiction of matters leading to a charter party or stipulations and representations not embraced therein.—Balchen v. The Eli Whitney, Case No. 792a.

Admiralty has no jurisdiction over contracts leading to policies of marine insurance.—Andrews v. Essex Fire & Marine Ins. Co., Case No. 374.

An executory contract for transportation by, or for the service of, a vessel is not a maritime contract, and does not create a lien on the vessel, and admiralty has no jurisdiction thereof. To make such contract maritime, the vessel must have entered upon its performance.—The Edwin v. Naumkeag Steam Cotton Co., Case No. 4,301; The General Sheridan, Id. 5,319; The Pauline, Id. 10,848; Rynaud v. The Richard Cobden, Id. 12,191; Torices v. The Winged Racer, Id. 14,102; Vandewater v. The Yankee Blade, Id. 16,847; The William Fletcher, Id. 17,692; Hannah v. The Carrington, Id. 6,029. CONTRA, see The Flash, Case No. 4,857; The Pacific, Id. 10,643; Quirk v. Clinton, Id. 11,518. QUERY, see Rich v. Parrott, Case No. 11,760.

A libel in rem will lie for the refusal to receive on board, and the refusal to deliver, cargo contracted by the master to be carried from New York to Brooklyn, where part of the cargo was received on board.—The Flash, Case No. 4,857.

Admiralty has jurisdiction of a personal action by a charterer against the owner of a vessel for damages in not proceeding to the port of loading.—Oakes v. Richardson, Case No. 10,390.

Where, under a charter of a vessel, the charterer put a cargo on board, and then took it out and refused to fulfill the charter party, alleging that it had been violated by the owner of the vessel, and the charter party gave to the owner a lien on the cargo for a breach by the charterer, the lien attached as soon as the cargo was put on board, and the owner could libel the cargo in rem in the admiralty for the breach.—The Hermitage, Case No. 6,410.

§ 16. —— Repairs and supplies to vessel.

The district courts of the United States have a general admiralty jurisdiction in rem in suits brought by material men against foreign ships, and in cases of domestic ships where the local law gives a lien.—Wick v. The Samuel Strong, Case No. 17,607.

The question of the right to sue ship or freight or master or owner for supplies or repairs does not depend on the twelfth rule, but on the general admiralty and maritime law.—The Eledona, Case No. 4,340.

Admiralty has jurisdiction of suits in favor of material men.—The Jerusalem, Case No. 7,294.

The jurisdiction in admiralty over a contract for repairs or supplies to a vessel depends upon her character, and not upon the manner in which she is actually employed.—Reppert v. Robinson, Case No. 11,703.

The repair of a canal boat used and navigated on tide waters, although used partly on inland navigation, is a maritime contract, and mechanics and material men may enforce their rights thereunder in admiralty.—McLelland v. The Robert Morris, Cas. No. 8,896.

Admiralty has no jurisdiction of a claim for repairs to a canal boat navigating the interior canals of a state, and repaired at a point on a river where the tide ebbs and flows.—Boon v. The Hornet, Case No. 1,640.

As the laws of Pennsylvania provide a remedy in the state court for shipwrights and material men at the port of outfit, admiralty will not take jurisdiction of material men's claims at the port of outfit.—Gardner v. The New Jersey, Case No. 5,233.

Admiralty has jurisdiction to enforce a claim for materials and supplies by libel in personam, without regard to the existence of a lien on the vessel therefor.—Schultz v. Bosman, Case No. 12,488.

A contract for repairs in a home port is within the jurisdiction of admiralty as to the person.—Schuchardt v. The Angelique, Case No. 12,483b.

Admiralty has jurisdiction in the case of a contract for repairs or supplies to a domestic ship, to determine to whom the credit was given and who is liable for the amount.—Turner v. Beacham, Case No. 14,252.

A contract made on land by a shipwright to repair a vessel in his shipyard is not maritime, and admiralty has no jurisdiction of a libel in personam for negligence or delay in performing it.—Ransom v. Mayo, Case No. 11,571; Ransom v. Mayo, Id. 11,571a.

Under rule 12 of 1845, the admiralty courts have no jurisdiction over suits in personam brought by material men to enforce payment of their claims for supplies furnished at the home port.—Merritt v. Sackett, Case No. 9,484.

When a lien is claimed for labor and materials furnished in fitting out a vessel for sea, the admiralty courts of the United States observe the lex loci contractus, and grant or refuse the remedy sought, according as it is allowed or denied by that law.—The Infanta, Case No. 7,030.

§ 17. —— Bottomry.

Admiralty jurisdiction over contracts depends principally upon their subject-matter; and in cases of bottomry it is not the absolute necessity of the loan that gives jurisdiction.—The Mary, Case No. 9,187.

Admiralty has jurisdiction over a bottomry bond given by the owner in a home port, where there is an express pledge as security.—The Draco, Case No. 4,057.

Admiralty has jurisdiction over a bottomry bond, when made by the owner, as well as when made by the master.—The Mary, Case No. 9,187.

Admiralty has no jurisdiction to enforce a bottomry bond given in the home port for money not used, and not intended to be used, for the purposes of the voyage.—Knight v. The Attila, Case No. 7,881.

A bond executed as an hypothecation of a vessel, but not upon the principles which gov-

ern such security, cannot be enforced in admiralty.—Hurry v. The John & Alice, Case No. 6,925.

§ 18. —— Marine insurance.

A policy of marine insurance is a maritime contract, and therefore of admiralty jurisdiction.—De Lovio v. Boit, Case No. 3,776; Gloucester Ins. Co. v. Younger, Id. 5,487; Hale v. Washington Ins. Co., Id. 5,916.

§ 19. —— Wharfage.

A contract for wharfage is a maritime contract, and enforceable in admiralty.—The Kate Tremaine, Case No. 7,622; The Ann Ryan, Id. 428; Atlantic Dock Co. v. Wenberg, Id. 622. CONTRA, see Delaware River Storage Co. v. The Thomas, Case No. 3,769; Squires v. The Charlotte Vanderbilt, Id. 13,271.

A claim for wharfage for a period during which a vessel lay sunk in a pier cannot be enforced in admiralty.—Taylor v. The Joseph Walker, Case No. 13,795.

See, further, "Wharves," § 6.

§ 20. —— Shipbuilding contracts.

A contract for building a ship or for work or materials used in her construction is not a maritime contract, and admiralty has no jurisdiction thereof.—Allair v. The Francis A. Palmer, Case No. 203; Clinton v. The Hannah, Id. 2,898; The Coernine, Id. 2,944; Foster v. Ellis, Id. 4,968; Ludington v. The Nucleus, Id. 8,598; The Norway, Id. 10,359; Young v. The Orpheus, Id. 18,169. CONTRA, see The Hull of a New Ship, Case No. 6,859; The Charles Mears, Id. 10,766; Read v. Hull of a New Brig, Id. 11,609; The Richard Busteed, Id. 11,764.

Contracts for materials furnished at the home port, in building steamboats and other vessels, are not within Act Feb. 26, 1845, extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connected therewith.—Ludington v. The Nucleus, Case No. 8,598.

The district court in admiralty has no jurisdiction of a libel in personam against the builder of a vessel, after its delivery, for breach of the written contract under which it was built. Case No. 3,482, reversed.—Cunningham v. Hall, Case No. 3,481.

Admiralty has jurisdiction of a claim for damages for refusal to accept boats built under contract with the master of the vessel. Case No. 2,276, reversed. — Ingersoll v. The Carbarga, Case No. 7,038.

A contract to furnish a ship with the means of propulsion, or to change the mode of her propulsion, after she is launched and afloat, is not a contract to build a ship, and is maritime.—The Eliza Ladd, Case No. 4,364.

Admiralty has jurisdiction of a contract to furnish materials for the equipment of a vessel after she is launched and afloat on navigable waters.—The Revenue Cutter, No. 2, Case No. 11,714.

Work done in fitting a vessel for navigation after the hull is launched, where it was loaded with flour for ballast, and towed to the place where the work was done, *held* done in building the vessel.—The Iosco, Case No. 7,060.

§ 21. —— Towage contracts.

It is no objection to admiralty jurisdiction of a claim for negligent towage that the contract of towing was to be performed within the body of the state, or within a harbor.—Leonard v. The Volunteer, Case No. 8,260.

A contract to tow a canal boat in New York harbor is a maritime contract, and gives rise to a lien enforceable in admiralty.—The W. J. Walsh, Case No. 17,922.

Admiralty has jurisdiction of a libel for an injury to a tow from negligent navigation of the tug, in the performance of a contract of towage between Albany and New York.—The Brooklyn, Case No. 1,938.

Admiralty has no jurisdiction in case of breach of towage contract on the Hudson river between Kingston and Albany between residents of New York.—Abbey v. The Robert L. Stevens, Case No. 8.

Towage services on the Great Lakes are maritime.—The Acadia, Case No. 24.

Admiralty has jurisdiction of a suit for services of a tug in hauling off a vessel aground.—The Clarion, Case No. 2,795.

§ 22. —— Passenger contracts.

A contract to transport a passenger on the high seas or on tide water is a maritime contract, and within the admiralty jurisdiction both in rem and in personam.—Marshall v. Bazin, Case No. 9,125; Stone v. The Relampago, Id. 13,486.

A contract for an excursion trip by steamer between Philadelphia and Cape May is a maritime contract, and within the admiralty jurisdiction.—Woolston v. The John A. Warner, Case No. 18,033.

A passenger between ports in the same state on a steamer on the Mississippi river making a trip between different states cannot sue in admiralty for injuries sustained as such passenger.—Whitaker v. The Fred Lorents, Case No. 17,527.

A contract for the carriage of a passenger, with stipulations as to the manner in which the vessel should be fitted up, and the number to be carried, is of admiralty jurisdiction in its entirety.—The Pacific, Case No. 10,643.

Admiralty has jurisdiction of an action by a passenger against a steamship for breach of a contract of passage as to the accommodations afforded.—The Hammonia, Case No. 6,006.

A libel by passengers, charging that the master and owners, in disregard of their duty, deprived libelants of reasonable food and drink, and subjected them to cruelties and indignities, states a case of admiralty jurisdiction.—M'Afee v. The Creole, Case No. 8,655.

Admiralty has jurisdiction of an action brought to recover the value of the baggage of a passenger, stolen from her room on board a passenger steamer. — Walsh v. The H. M. Wright, Case No. 17,115.

§ 23. —— Services in general.

If services or a contract properly concern a vessel and her owners, they are maritime services, and can be sued against the owners of a domestic vessel in a court of admiralty, or in rem against a foreign vessel.—The George T. Kemp, Case No. 5,341.

The nature of a contract or service, and not the question whether the contract is made, or the service is rendered, on the land or on the water, is the proper test in determining admiralty jurisdiction. — Wortman v. Griffith, Case No. 18,057.

A contract of a special nature is not cognizable in the admiralty merely because the consideration of the contract is maritime service. The whole contract must, in its essence, be maritime, or for compensation for maritime services.—Plummer v. Webb, Case No. 11,233.

Where no materials are furnished or labor bestowed in the refitment or reparation of vessels, services which are entitled to take the rank and character of maritime are such as are performed in aid of the ship's company or the navigation of the vessel, and are rendered while she is afloat upon tide waters.—The Harriet, Case No. 6,097.

To impart a maritime character to personal services rendered in or upon a vessel, they must be connected with the reparation or betterment of the vessel, or be rendered in aid of her navigation directly by labor on the vessel, or in sustenance and relief of those who conduct her operations at sea.—Gurney v. Crockett, Case No. 5,874.

§ 24. —— Services to vessel in port.

Where contracts are made between owners of a vessel and carpenters and others to perform service on land, or within the body of a county, the admiralty has no jurisdiction.—North v. The Eagle, Case No. 10,309.

Admiralty has no jurisdiction of a suit by shipping masters to recover for services in procuring a crew to navigate a vessel from one port to another in the same state.—Scott v. The Morning Glory, Case No. 12,542.

Admiralty has jurisdiction of a claim for services in hauling a vessel on ways and for a per diem while she is on the ways, and being repaired by another person.—Wortman v. Griffith, Case No. 18,057.

Work done upon a vessel in the dry dock, in scraping her bottom preparatory to coppering her, is not of a maritime character, and compensation for such labor cannot be recovered in admiralty.—Bradley v. Bolles, Case No. 1,773.

Services rendered in compressing cotton in a cotton press for the purpose of arranging the bulk for more convenient carriage and stowage are not maritime in their character.—The Joseph Cunard, Case No. 7,535; United Hydraulic Cotton-Press Co. v. The Alexander McNeil, Id. 14,404.

Admiralty has no jurisdiction of a claim for wages of a seaman for the time he was engaged in repairing the vessel, which had been sunk in port and raised again.—The M. M. Caleb, Case No. 9,682.

Admiralty has jurisdiction of a contract, made between the master of a ship and a cooper, to put the cargo of the ship in landing order, the services being rendered partly on the ship and partly on the wharf, but before the delivery of the cargo.—The Onore, Case No. 10,538.

Services rendered by a fireman on board a British ship while at the dock at Liverpool do not give to the demand for wages a maritime character of which admiralty can take cognizance.—Graham v. Hoskins, Case No. 5,669.

Admiralty has no jurisdiction of a claim for services in watching a vessel in port while moored to a wharf.—The Harriet, Case No. 6,097; Levering v. Bank of Columbia, Id. 8,287; Russell v. Barkman, Id. 12,151.

A seaman whose wages have been paid up to the end of the voyage, but who remains on board afterwards, while the vessel is moored at the wharf, has no claim for services enforceable in admiralty.—Phillips v. The Thomas Scattergood, Case No. 11,106.

A contract to work at a certain rate per day in port in putting in machinery in a vessel is not a maritime contract, and will not support an action in rem in the admiralty.—Walter v. The Kamchatker, Case No. 17,119.

A person employed to visit a vessel at anchor, from time to time, to see to her safety, ventilate her, try her pumps, and the like, cannot maintain a suit in admiralty to recover his compensation for such services. — Gurney v. Crockett, Case No. 5,874.

Services rendered by one employed to visit a vessel at anchor, from time to time, in getting the vessel under way, and navigating her to another anchorage, are maritime in their character.—Gurney v. Crockett, Case No. 5,874.

§ 25. —— Stevedores' services.

The contracts of stevedores for loading or unloading a vessel are maritime in their nature, and admiralty has jurisdiction of claims for services thereunder.—The George T. Kemp, Case No. 5,341. CONTRA, see The Circassian, Case No. 2,722; Paul v. The Ilex, Id. 10,842; The Amstel, Id. 339; Cox v. Murray, Id. 3,304; Coyne v. The Alexander McNeil, Id. 3,312a; Kegan v. The Amaranth, Id. 7,646; Regan v. Same, Id. 11,664; The A. R. Dunlap, Id. 513; The Joseph Cunard, Id. 7,535; McDermott v. The S. G. Owens, Id. 8,748.

§ 26. —— Services connected with navigation.

A contract to sail a vessel in co-partnership for a share of the earnings affords no remedy in rem for wages.—Milne v. Huber, Case No. 9,617; Same v. The John Cook, Id. 9,617a.

A contract relative to services on board a vessel on the sea or within tide waters cannot be enforced in admiralty, unless the service is essentially maritime. — Thackarey v. The Farmer of Salem, Case No. 13,852.

To entitle a person employed on board a vessel to sue in admiralty for wages, the services rendered must contribute to the preservation of the vessel or those employed in her navigation.—Trainer v. The Superior, Case No. 14,136.

Admiralty has no jurisdiction of a suit in rem for wages of persons employed on a vessel as musicians.—Trainer v. The Superior, Case No. 14,136.

Services by seamen upon a vessel sailing between Philadelphia and ports on the Chesapeake Bay, employed as laborers to obtain a cargo of oysters for purposes of transplanting, *held* maritime.—Hart v. The Enterprise, Case No. 6,151.

The pilot, deck hands, engineer, and firemen on board of a steamboat are entitled to sue in the admiralty for their wages.—Wilson v. The Ohio, Case No. 17,825.

A libel in rem cannot be maintained for services in navigating a raft of logs.—Raft of Cypress Logs, Case No. 11,527.

Persons employed to load, navigate, and unload a vessel plying between two adjoining ports principally for the transportation of stone, she being licensed for the coasting trade, and being propelled by sails and the usual apparatus of a coaster, are performing services maritime in their character.—The Canton, Case No. 2,388.

Seamen on a small licensed coasting vessel employed in taking paving stones from Marshfield and Scituate Beaches to Boston have a lien for their wages, enforceable in admiralty.—Lee v. Guardian Life Ins. Co., Case No. 8,190.

Services rendered by the mate and engineer of an enrolled steamer employed in towing vessels in and about a harbor are maritime in their character.—The May Queen, Case No. 9,360.

A contract for services on board a vessel employed in transporting fuel across the Delaware river cannot be enforced in admiralty.—Thackarey v. The Farmer of Salem, Case No. 13,852.

A contract for wages on a voyage between ports of adjoining states on tide water is within the jurisdiction of admiralty, and may be enforced by a suit in rem.—Smith v. The Pekin, Case No. 13,090; Wilson v. The Ohio, Id. 17,825.

Admiralty has jurisdiction of a libel by mariners for wages against a vessel plying on navigable waters entirely within one state.—The Sarah Jane, Case No. 12,349.

The district court has no jurisdiction in rem for seamen's wages for services exclusively within the state.—Brooks v. The Peytona, Case No. 1,959.

A mariner rendering services on board of a vessel carrying coal between Philadelphia and New York upon tide waters, though she be stripped of sails and masts, and be towed by steamboats, may proceed in rem against such vessel for his wages.—The D. C. Salisbury, Case No. 3,694.

Admiralty has jurisdiction of a claim for seaman's wages on a voyage between Cincinnati and Pittsburgh on a vessel of more than 10 tons' burden.—Sheckler v. The Geneva Boxer, Case No. 12,735.

Admiralty has no jurisdiction of a suit for wages earned in a voyage on a canal connecting navigable lakes in different states, though a small part of the voyage was on public navigable waters.—McCormick v. Ives, Case No. 8,720.

A lien for wages arises from maritime services to a boat plying upon the tide waters of the Hudson river, enforceable in rem in admiralty. —Pierce v. The Victory, Case No. 11,149a.

A hand on board a sloop of over 50 tons plying on the Hudson river, between New York and Catskill, is a seaman, and entitled to sue in personam in admiralty for wages.—Martin v. Acker, Case No. 9,155.

Unless it be shown that the remedy in the local court is doubtful, admiralty may refuse to take jurisdiction of a libel for wages filed by a seaman hired to serve on a small vessel navigating the Hudson river, it appearing that he knew the residence and responsibility of the owner.—The Bolivar, Case No. 1,609.

Admiralty has no jurisdiction of a contract for the navigation of a boat on the Erie canal from Albany to Rochester, and back to Albany and New York.—Davis v. The Enterprise, Case No. 3,632.

Admiralty has jurisdiction of a suit by a father for wages earned by his minor son by maritime services.—Plummer v. Webb, Case No. 11,233.

A master may maintain a suit in personam in the admiralty for wages, or for compensation in the nature of wages.—Hammond v. Essex Fire & Marine Ins. Co., Case No. 6,001.

The master of a vessel exclusively engaged in navigating the interior waters of one state may maintain a libel in rem for his wages and advances, when a lien therefor is created by the state law.—Whitney v. The Mary Gratwick, Case No. 17,591.

No suit for services performed by the master as a factor, or in any other character except that of master, is cognizable in the admiralty. —Willard v. Dorr, Case No. 17,680.

A contract by the master employing another as nominal master for a particular purpose may be sued on in admiralty as to the wages stipulated, but not as to a further stipulation for an additional sum in case the voyage should be altered or discontinued.—L'Arina v. Manwaring, Case No. 8,089.

§ 27. —— Pilotage.

Admiralty has jurisdiction in personam as well as in rem for pilotage to, from, and on the sea.—The Anne, Case No. 412.

A contract for pilotage, to be performed wholly within a state, cannot be enforced in admiralty.—Harrison v. The Anna Kimball, Case No. 6,132. CONTRA, see The Wave, Case No. 17,297; Same v. Hyer, Id. 17,300.

Admiralty has jurisdiction notwithstanding pilotage services were rendered under a state law.—The Alaska, Case No. 129.

Congress having adopted the New York laws relating to pilots previous to the passage of the judiciary act, the admiralty courts have no jurisdiction of cases for pilotage services thereunder. Case No. 17,297 reversed.—The Wave v. Hyer, Case No. 17,300.

The claim under a state law for half pilotage on a tender and refusal of services is not a mere penalty, but depends upon a quasi contract, which is maritime in its nature, and admiralty has jurisdiction thereof.—The America, Case No. 289; The George S. Wright, Id. 5,340; The California, Id. 2,312; Banta v. McNeil, Id. 966; The Kalmar, Id. 7,601. CONTRA, see Leitch v. The George Law, Case No. 8,223; Harrison v. The Anna Kimball, Id. 6,132; The Robert J. Mercer, Id. 11,891; Arcularius v. Staples, Id. 509b.

The remedy given by the state law against the consignee is cumulative merely.—The George S. Wright, Case No. 5,340.

§ 28. —— Salvage.

Admiralty has exclusive jurisdiction of claims for salvage on the high seas and all public navigable rivers.—Brevoor v. The Fair American, Case No. 1,847; The John Gilpin, Id. 7,345; Williams v. The Jenny Lind, Id. 17,723; Cheeseman v. Two Ferry Boats, Id. 2,633.

Admiralty has jurisdiction in rem to recover for salvage services, though rendered under a contract for a fixed compensation not dependent upon the result.—The A. D. Patchin, Case No. 87; Gager v. The A. D. Patchin, Id. 5,170; The Circassian, Id. 2,723; The Louisa Jane, Id. 8,532; The Williams, Id. 17,710.

Courts of admiralty in the United States have jurisdiction over claims for salvage upon waters within the ebb and flow of the tide, though within the body of a state.—The Wave, Case No. 17,297.

Admiralty has jurisdiction of salvage services on a river navigable from the ocean for vessels of 10 or more tons burden.—Williams v. The Jenny Lind, Case No. 17,723.

Services rendered in raising a floating dry dock are not maritime, and admiralty has no jurisdiction of a suit therefor.—Salvor Wrecking Co. v. Sectional Dock Co., Case No. 12,273.

A claim for salvage service in saving a raft of timber may be maintained in a court of admiralty, if there is no local custom making the service gratuitous. — Fifty Thousand Feet of Timber, Case No. 4,783.

The admiralty jurisdiction extends to a salvage suit for services rendered from the land in completion of services rendered by other salvors at sea.—The Huntsville, Case No. 6,916.

The admiralty jurisdiction extends to a salvage suit by a city fire department for services rendered from the land to a burning vessel brought to the city's wharves.—The Huntsville, Case No. 6,916.

Admiralty has jurisdiction in the case of salvage for a retaking on land of property captured by pirates.—Davison v. Seal-Skins, Case No. 3,661.

The jurisdiction of the federal district court in cases of salvage is not confined to American property or to cases occurring in American waters.—Western Transp. Co. v. The Great Western, Case No. 17,443.

Where a tug is hired at a certain sum per day to assist a vessel reported aground, and proceeds to the spot, and returns without having rendered any assistance, the vessel having been floated in the meantime, an action in rem will lie for the stipulated compensation. — The Williams, Case No. 17,710.

See, also, "Salvage," § 58.

§ 29. Liens.

Admiralty has general jurisdiction to enforce all maritime liens.—Davis v. Child, Case No. 3,628; Drinkwater v. The Spartan, Id. 4,085.

Admiralty has jurisdiction over such liens only as arise from work and labor connected with maritime affairs, navigation, or shipping.—Read v. Hull of a New Brig, Case No. 11,609.

Admiralty will take cognizance, under a local law giving a lien on vessels, of all contracts or charges of an admiralty or maritime nature, though no lien was given by the general maritime law; but otherwise as to contracts or charges not of an admiralty or a maritime nature.—Boon v. The Hornet, Case No. 1,640; Griffenberg v. The John Laughlin, Id. 5,811.

Where a shipwright, who has repaired a domestic vessel, retains possession, he has a lien under the common law which admiralty will enforce by proceedings in rem.—The Marion, Case No. 9,087.

A wharfinger's lien cannot be enforced in admiralty against a domestic vessel, as he is not a material man within rule 12, in relation to the liens given by the local law.—Russel v. The Asa R. Swift, Case No. 12,144; The Gem, Id. 5,303.

Where the local law provides for proceedings in rem against domestic vessels, but gives no lien before seizure, admiralty has no jurisdiction, under rule 12, which provides that proceedings in rem may be had in the admiralty courts against domestic ships "when by the local law a lien is given."—The Samuel Strong, Case No. 17,607.

A material man, whose only lien is given by a state law, and has by that law been devested, is not entitled to sue in the United States courts.—The Golden Gate, Case No. 574.

A libel in rem will lie for tolls imposed by a state statute in favor of corporations organized for the improvement of rivers and harbors.—The St. Joseph, Case No. 12,230.

The lien on the ship for wages, given to masters of British vessels by the law of the flag, though not existing under the maritime law, may be enforced in the admiralty courts of the United States.—The Havana, Case No. 6,226.

Admiralty has no jurisdiction of a claim for state and county taxes assessed against a steamboat.—The Bradich Johnson, Case No. 1,770.

The acceptance of notes as a liquidation of a claim for breach of a charter party, but not in satisfaction thereof, will not bar the admiralty jurisdiction where the notes are surrendered in court for cancellation.—Sheafe v. Kimball, Case No. 12,729a.

An agreement that a wrecked vessel shall be responsible for blocks used in getting her afloat, and for their hire, does not create any hypothecation which admiralty can enforce.—Squire v. One Hundred Tons of Iron, Case No. 13,270.

The equitable lien of a part owner and ship's husband on the share of the other owners for advances and disbursements, if any, will not enable a court of admiralty to take an account and enforce it. Case No. 8,086 reversed.—The Larch, Case No. 8,085.

§ 30. Torts—Maritime torts in general.

For a wrong committed on the high seas or tide waters, for which trespass on the case would lie at common law, admiralty has also jurisdiction.—Smith v. Wilson, Case No. 13,128.

Congress has no authority to legislate in respect to damages done on land within the body of a state by a vessel upon public navigable waters.—King v. American Transp. Co., Case No. 7,787.

Admiralty has jurisdiction over all maritime torts.—West v. The Uncle Sam, Case No. 17,427; Martins v. Ballard, Id. 9,175; The Amiable Nancy, Id. 331; The Martha Anne, Id. 9,146.

Maritime torts, over which admiralty has jurisdiction, are unlawful acts, injurious to others, independent of contract, happening or being committed upon the sea or tide waters.—Philadelphia & Havre De Grace Steam Tow-Boat Co. v. Philadelphia, W. & B. R. Co., Case No. 11,085.

The admiralty jurisdiction as to torts depends upon locality, and is limited to torts committed on the high seas, or within the ebb and flow of the tide.—Thomas v. Lane, Case No. 13,902; De Lovio v. Boit, Id. 3,776.

Admiralty courts will take cognizance of cases of collision within harbors and upon rivers where the tide ebbs and flows, although within the body of a county.—The Washington Irving, Case No. 17,242a.

Admiralty has jurisdiction in a cause of collision between vessels when the injury is received in a slip between piers or wharves, where the tide ebbs and flows.—The Lotty, Case No. 8,524.

Admiralty has jurisdiction over cases of collision upon inland canals.—The Monitor, Case No. 9,708.

Admiralty has jurisdiction in the case of a tort committed by collision on an artificial ship canal connecting navigable waters which are within that jurisdiction.—The Oler, Case No. 10,485.

Tort committed upon the Welland Canal connecting Lakes Erie and Ontario, though within the body of Canada, is within admiralty jurisdiction.—Scott v. The Young America, Case No. 12,549.

Admiralty has jurisdiction in cases of collision upon tide waters in Chesapeake Bay or its tributary rivers.—Taylor v. Harwood, Case No. 13,794.

Seizure of a vessel by force in Long Island Sound is a maritime tort, of which the federal courts have jurisdiction in rem and in personam.—The Martha Anne, Case No. 9,146.

Seizure of a vessel in Long Island Sound, under warrant of a justice of the peace of the town of Oyster Bay, for the arrest of persons violating the rights of fishery in that bay, is a maritime tort.—The Martha Anne, Case No. 9,146.

The jurisdiction over marine torts depends upon the locality of the wrong, and not upon its extent or character, or the relation of the person injured.—The Highland Light, Case No. 6,477.

The locality of an injury is the locality of the thing injured, not of the thing causing the injury.—The Maud Webster, Case No. 9,302.

Admiralty has jurisdiction in the case of a tort which originated in port, but did not become a completed act until carried out upon navigable tide waters.—The Yankee v. Gallagher, Case No. 18,124.

If a tort committed partly on land and partly on the high seas be one continued act, admiralty has jurisdiction over the whole matter.—Steele v. Thacher, Case No. 13,348. CONTRA, see The Yankee v. Gallagher, Case No. 18,124.

The district courts in admiralty have jurisdiction of torts committed on the high seas, without reference to the nationality of the parties or vessel.—Bernhard v. Creene, Case No. 1,349.

The master of a scow took, without authority, a lighter lying in a fish pond staked off from the Detroit river, and used it in carrying wood from the shores of Lake St. Clair to the scow, and neglected to return it. *Held*, that admiralty had

jurisdiction in rem for the tort.—The Florence, Case No. 4,880.

The general maritime law gives a lien for a maritime tort upon the offending vessel which travels with the vessel, into whosesoever hands she may go, and irrespective of the place of transfer.—The Avon, Case No. 680.

The proceeding in rem to enforce a lien for damages caused by a collision is not process, or a part of the lex fori.—The Avon, Case No. 680.

A forcible deportation of a citizen to a foreign country in an American ship, commanded by an American master, in pursuance or execution of a sentence of banishment of an illegal and self-constituted body of men, is a marine tort.—Gallagher v. The Yankee, Case No. 5,196; The Yankee v. Gallagher, Id. 18,124.

No damages can be recovered in admiralty for injury to character, etc., by such sentence, or from protracted exile caused by fear to return.—Gallagher v. The Yankee, Case No. 5,196.

The master of the vessel who willingly and knowingly carries such sentence into execution is liable for exemplary damages.—Gallagher v. The Yankee, Case No. 5,196.

A parent may maintain a libel in the admiralty for the wrongful abduction of his child, and carrying him beyond the sea.—Steele v. Thacher, Case No. 13,348; Stephens v. Felt, Id. 13,368; Plummer v. Webb, Id. 11,233.

A libel may be maintained by the father in the admiralty for the consequential damages resulting from an assault and battery of his minor child on the high seas.—Plummer v. Webb, Case No. 11,234.

The fact that the abduction of libelant's son, for service in a voyage on the high seas, began in port, did not prevent the abduction from constituting a maritime tort. The tort was continuing through the entire voyage.—Plummer v. Webb, Case No. 11,233.

Admiralty has jurisdiction to try the question of unlawful seizure of maritime property for taxes or duties.—The North Cape, Case No. 10,316.

Admiralty has jurisdiction of a libel by owners against the master for satisfaction of the damages sustained in consequence of a wrongful capture made by him.—Dean v. Angus, Case No. 3,702.

§ 31. —— Injuries to vessels or other property.

As respects torts, the admiralty jurisdiction depends entirely on the locality, not on the character of the object injured or inflicting the injury.—Simpson v. The Ceres, Case No. 12,881.

Admiralty has jurisdiction of a collision between a canal boat and a tug engaged exclusively in harbor service, and occurring upon navigable water, wholly within the body of a county.—The Volunteer, Case No. 16,990.

Admiralty has jurisdiction of a collision between a steam tug and a floating dry dock moored to a wharf.—Simpson v. The Ceres, Case No. 12,881.

Admiralty has jurisdiction of a libel against a vessel for damages caused by a collision with a floating bath house.—The M. R. Brazos, Case No. 9,898.

Admiralty has no jurisdiction of a libel for injury to a bridge by a vessel.—Lake Shore & M. S. R. Co. v. The Neil Cochran, Case No. 7,996; The Savannah, Id. 12,384.

Admiralty has jurisdiction of an action for injuries to a vessel by collision with a pier erected, without legal authority, within the navigable channel of a river.—Northwestern Union Packet Co. v. Atlee, Case No. 10,341.

A libel for damage to a pier, which avers that the pier is within navigable waters and the ebb and flow of the tide, and does not show that it is part of the land, states a case of admiralty jurisdiction.—New York v. Hichland, Case No. 10,196.

Admiralty has no jurisdiction of a libel against a vessel to recover for injuries to a wharf from a collision.—The Ottawa, Case No. 10,616.

The court has no jurisdiction over a claim by a contractor building a lighthouse on a mud shoal for damage caused thereto by being run into by a vessel.—The Maud Webster, Case No. 9,302.

Admiralty has jurisdiction of a libel by the owners of a vessel for collusive spoliation of it, when wrecked under an agreement between the master and a salvor.—Church v. Seventeen Hundred and Twelve Dollars, Case No. 2,713.

The fact that one vessel is engaged in towing another, under a contract for such service, does not change her liability for any negligent navigation, resulting in injury to the tow, from tort to contract, nor deprive the admiralty of that jurisdiction which applies to torts committed on navigable waters.—The Brooklyn, Case No. 1,938.

§ 32. —— Personal injuries.

Admiralty has jurisdiction over a personal tort committed on board a vessel in a harbor where the tide ebbs and flows.—Borden v. Hiern, Case No. 1,655.

Admiralty has jurisdiction of a personal tort committed upon tide waters within a local harbor, where connected with other matters within admiralty cognizance.—Thomas v. Gray, Case No. 13,898.

Admiralty has jurisdiction over a tort committed by an officer of the vessel against a seaman on board, in relation to the maintenance of discipline, while the ship is lying in a port of the United States, within the body of a county.—Roberts v. Skolfield, Case No. 11,917.

Admiralty will not entertain suits for merely nominal damages in cases of personal torts, not involving any other subject-matter.—Barnett v. Luther, Case No. 1,025.

Admiralty has jurisdiction in rem for damages for a personal injury caused by a collision between two vessels.—Dunstan v. The R. R. Kirkland, Case No. 4,181; Mendell v. The Martin White, Id. 9,419.

The admiralty has jurisdiction of personal torts to a passenger on the high seas, committed by the master of the ship, and it is immaterial whether such torts be by direct force or consequential injuries.—Chamberlain v. Chandler, Case No. 2,575.

In actions for personal torts, courts of admiralty afford to seamen no remedies and no privileges to which they would not be entitled in courts of common law.—Peterson v. Watson, Case No. 11,037.

§ 33. —— Causing death.

The rule that personal actions die with the person does not obtain in admiralty.—The Sea Gull, Case No. 12,578.

Admiralty has jurisdiction of a suit by the father for consequential damages resulting from an assault and battery of his minor child on the high seas, though death resulted therefrom.—Plummer v. Webb, Case No. 11,234.

A right of action for a death caused by wrongful act, given by a state statute, may be enforced in admiralty.—The Highland Light, Case No. 6,477. CONTRA, see Armstrong v. Beadle, Case No. 541.

Damages are recoverable by a libel in rem in admiralty, for the wrongful death of a per-

son, independent of statutory remedy.—Holliday v. The David Reeves, Case No. 6,625.

A husband can recover by a proceeding in rem, in admiralty, against the vessel which caused the death of his wife, for the injury suffered by him thereby.—The Sea Gull, Case No. 12,578.

Admiralty has jurisdiction in action by the wife of a passenger to recover damages for the death of her husband, caused by negligence of the officers of the vessel.—The Charles Morgan, Case No. 2,618.

The district court in admiralty has jurisdiction of a libel for damages for the death of libelant's husband in a collision caused by the negligence of the vessel libeled.—The Towanda, Case No. 14,109.

§ 34. Penalties, forfeitures, and seizures.

The admiralty courts will enforce municipal regulations which affect the equipment, position, or management of vessels within particular jurisdictions.—Vandewater v. Westervelt, Case No. 16,846a.

A libel or forfeiture against a vessel which has been seized upon water navigable from the sea is a civil cause, of admiralty and maritime jurisdiction, and must be tried to the court sitting as a court of admiralty, without a jury.—The Meteor, Case No. 9,498.

The place of seizure, in maritime offenses, and not the place of committing the offense, gives the court jurisdiction in cases of forfeiture in rem.—The Octavia, Case No. 10,422.

Admiralty has jurisdiction of cases of seizure and forfeiture on tide waters without as well as within the United States, regardless of foreign territorial authority over the place where the seizure was made.—United States v. Arms and Ammunitions, Case No. 14,466a.

An action in rem against the vessel engaged in making an unlawful seizure, and in personam against her master, will lie in admiralty for the tort.—The Martha Anne, Case No. 9,146.

Seizures on water navigable from the sea by vessels of 10 or more tons burden are exclusively cognizable in admiralty.—Cross v. United States, Case No. 3,434.

The restriction in the judiciary act of 1789, confining jurisdiction to waters navigable from the sea by vessels of 10 tons burden or more, applies exclusively to seizures under the laws of impost, navigation, or trade in matters of revenue only.—Western Transp. Co. v. The Great Western, Case No. 17,443.

Goods seized on land are not subject to condemnation and forfeiture in admiralty.—The Ariel, Case No. 527.

Admiralty has jurisdiction of a libel for forfeiture of goods for a fraud on the customs laws, though part of the goods were seized on land.—Two Hundred and Fifty Barrels of Molasses v. United States, Case No. 14,293.

Where, in case of a seizure for violation of the nonimport law, the vessel and part of her cargo were seized in the Delaware river, and part of the cargo after it had been landed, the district court in admiralty has jurisdiction.—Clark v. United States, Case No. 2,837.

The admiralty jurisdiction of the district court in revenue cases extends only to seizures for forfeitures under duty laws, as conferred by Act 1789, § 9.—United States v. Five Hundred Boxes of Pipes, Case No. 15,116.

The penalty of $3 per day given by the act of May 17, 1848, to passengers put upon short allowance of food, must be sued for at law, and admiralty has no jurisdiction.—McAfee v. The Creole, Case No. 8,655.

A suit against a vessel and her master to recover the penalty imposed for failure to enter imported goods on the ship's manifest is a civil case of admiralty and maritime jurisdiction.—The Missouri, Case No. 9,652; United States v. The Queen, Id. 16,107.

A vessel may be proceeded against in rem, in the admiralty, to enforce the lien for importing goods not included in her manifest. Act July 18, 1866, § 8.—United States v. The Missouri, Case No. 15,785.

An information in rem on the admiralty side of the district court for forfeiture under the impost laws is proper.—Clark v. United States, Case No. 2,837.

Seizure of the res. before filing of the libel, is essential to jurisdiction under a libel for a penalty or forfeiture. Case No. 9,329 affirmed.—The May, Case No. 9,330.

The want of a seizure prior to the commencement of proceedings in a cause of seizure under the laws of impost, navigation, and trade, under Act 1789, § 9, is fatal to the jurisdiction, though the objection be first taken upon appeal.—The Fideliter, Case No. 4,755.

The district courts, as courts of admiralty, have jurisdiction of the question who are entitled to the proceeds of a seizure as informers or otherwise.—Robinson v. Hook, Case No. 11,956.

§ 35. Captures and prize.

The common admiralty jurisdiction extends to all things done super altum mare. The prize jurisdiction embraces the whole question of prize, unrestrained by the locality of capture.—Johnson v. Twenty-One Bales, etc., Case No. 7,417.

A court of common law cannot, even incidentally, decide a question of prize.—Maisonnaire v. Keating, Case No. 8,978.

Admiralty possesses exclusive jurisdiction to ascertain who are the captors in a prize case.—The Dash, Case No. 3,584.

Admiralty has exclusive jurisdiction to entertain suits on ransom bills.—Maisonnaire v. Keating, Case No. 8,978.

Where the subject of litigation depends upon the question of prize or no prize, it is completely within the cognizance of the district courts.—United States v. Bright, Case No. 14,647.

The courts of the United States have jurisdiction over all prizes made in ports, as well as on the high seas, by virtue of the delegation of admiralty and maritime jurisdiction.—The Emulous, Case No. 4,479.

District courts are permanent prize tribunals, and take cognizance of questions of prize by virtue of the general jurisdiction.—The Amy Warwick, Case No. 341.

The delegation of admiralty jurisdiction to the federal courts carries with it jurisdiction in prize cases, without any specific mention.—Jennings v. Carson, Case No. 7,281.

The admiralty courts of a neutral nation have no jurisdiction over prize questions arising between belligerents in the case of captures on the high seas.—Findlay v. The William, Case No. 4,790; Hernandez v. Aury, Case No. 6,413.

The prize courts of a belligerent may take jurisdiction of property captured by its cruisers while such property is lying in a foreign neutral port.—The Arabella and The Maderia, Case No. 501.

The jurisdiction of the district court does not extend to the case of a capture on the high seas, by a privateer lawfully commissioned, of the property of an enemy to the sovereign issuing the commission. The case is not altered though the capture should have been originally made by a proscribed privateer.—Castello v. Bouteille, Case No. 2,504.

No suit can be sustained in a neutral tribunal against a lawfully commissioned cruiser brought within its jurisdiction, to recover damages for a supposed illegal capture.—The Invincible, Case No. 7,054.

A French admiralty court having declared that the capture of an American vessel by a French privateer was unlawful, an admiralty court of the United States will entertain jurisdiction of a libel in rem against the French vessel to recover damages for an unlawful seizure.—McGrath v. The Candalero, Case No. 8,809.

Conjunct captures on land of enemy's property by both arms of the service are brought within the prize jurisdiction only by statute.—United States v. Bales of Cotton, Case No. 16,583.

Sale on land in the ports of the United States cannot be prevented by their courts of admiralty, in cases of lawful capture on the high seas, by French privateers duly commissioned.—Moodie v. The Amity, Case No. 9,741.

The act of congress of 1794 (1 Stat. 381) limits the jurisdiction of the district court to a marine league from the coasts or shores, and therefore the district court has no jurisdiction of a libel filed for the restoration of a French vessel captured by an English vessel at a place more than a marine league from the shore, but less than a marine league from certain shoals covered with water, such shoals not being part of the coast or shore.—Soult v. L'Africaine, Case No. 13,179.

Admiralty has jurisdiction of claims by seamen to shares in prizes.—Mahoon v. The Glocester, Case No. 8,970.

Though the capture of an English vessel by a French vessel within the coast-line jurisdiction of the United States during the existence of hostilities between France and England is an offense against the United States as a neutral power, yet, as it is not necessary to bring the captured vessel within the territory of the captors in order to vest the right of property in the captors, admiralty will not entertain jurisdiction of a libel filed by the British owners of the captured vessel for the restoration thereof, as redress of the offense against the United States should be left in the first instance to the executive department of the government.—Moxon v. The Fanny, Case No. 9,895.

§ 36. Method of raising question and waiver of jurisdiction.

The question of jurisdiction in the case of a public armed vessel in the service of a foreign nation libeled by one claiming title thereto may be determined upon a suggestion filed by the district attorney acting under orders of the executive.—McFaden v. The Exchange, Case No. 8,786.

An admiralty court will entertain a libel showing on its face an apparent jurisdiction where there is no opposition.—Skidmore v. The Polly, Case No. 12,923.

At any stage of a proceeding in admiralty until final hearing, the question of jurisdiction is open.—Ward v. Thompson, Case No. 17,162.

Want of jurisdiction appearing on the face of the libel should be taken advantage of by demurrer, not by plea.—Knight v. The Attila, Case No. 7,881.

A plea to the jurisdiction can only be interposed by defendant himself in propria persona, and on oath.—Teasdale v. The Rambler, Case No. 13,815.

A plea to the merits in a case of seizure waives any exception to the jurisdiction.—The Abby, Case No. 14.

A stipulation filed to obtain the release of a vessel is not a waiver of the question as to its original liability to seizure in admiralty. Case No. 4,757 affirmed.—The Fidelity, Case No. 4,758.

II. REMEDIES IN PERSONAM AND IN REM, AND MATTERS OF PRACTICE IN GENERAL.

Limitation and laches in suits for seamen's wages, see "Seamen," § 136.

§ 37. Mode and forms of procedure in general.

Admiralty courts have no general jurisdiction to administer relief as courts of equity.—Kynoch v. The S. C. Ives, Case No. 7,958.

Quære: whether a libel of review in the nature of a bill of review in equity will lie in admiralty.—The New England, Case No. 10,151; The Enterprise, Id. 4,497.

A cause of possession, civil and maritime, must be conducted as a proceeding in personam.—Blanchard v. The Cavalier, Case No. 1,508.

The taking of personal security is a waiver of the remedy in admiralty, but, if the security is returned, the liability in personam may be enforced by citation or arrest.—Marshall v. Bazin, Case No. 9,125.

The defect of beginning a former proceeding in admiralty by warrant of arrest against the vessel, instead of summons, is waived by the concurrence of the other party in new proceedings on the same cause of action.—Reed v. The Fanny, Case No. 11,645a.

§ 38. Rules of practice.

The practice of the federal courts in admiralty is governed by the rules of admiralty law found in the English Reports. — United States v. Seven Hundred and Three Casks of Rice, Case No. 16,253b.

A rule of practice established by virtue of an act of congress has the force of a statute.—Scott v. The Young America, Case No. 12,550.

Courts of admiralty, in their practice and modes of proceedings, are even more free from technical rules than courts of equity.—Richmond v. New Bedford Copper Co., Case No. 11,800.

The supreme court has power to regulate the practice of the courts of admiralty, and to frame rules in relation to execution, and other process to be used therein.—Ward v. Chamberlin, Case No. 17,152.

The rules in admiralty are not to be regarded as restrictive, but as enumerative of the more common remedies.—Gates v. Johnson, Case No. 5,268.

The admiralty creates its own forms of proceeding.—The Epsilon, Case No. 4,506.

The district courts in admiralty, in the absence of action by the supreme court, will devise modes of proceeding to enable them to carry into effectual execution any law which they are called upon to administer.—The Epsilon, Case No. 4,506.

§ 39. Grounds of proceeding in personam or in rem.

In salvage cases the court of admiralty may proceed in personam as well as in rem.—The Centurion, Case No. 2,554.

Proceedings in admiralty may be prosecuted for marine torts in rem and in personam.—Arthur v. The Cassius, Case No. 564; McGrath v. Candalero, Id. 8,810; British Consul v. Thompson, Id. 1,899.

The process to enforce the remedy in admiralty for a wrong done or injury incurred by the death of a person may be either in rem or in personam.—The Sea Gull, Case No. 12,578.

The holder of a bill of lading has a remedy in admiralty against the master on his undertaking, or personally against the owners of the vessel, or against the vessel in rem, where the goods shipped on board are not delivered.—The Leonidas, Case No. 8,262.

Where the contract for the carriage of a passenger is broken by the interruption of the voyage, he has an action in rem, as well as in personam, to recover back passage money paid or damages.—Stone v. The Relampago, Case No. 13,486.

The right to proceed in rem does not exclude the remedy in personam.—Brevoor v. The Fair American, Case No. 1,847.

A libel in personam may be maintained in admiralty to recover money awarded to respondent for salvage services by a court without jurisdiction to make such award.—American Ins. Co. v. Johnson, Case No. 303.

Where the depositary of saved property has rendered himself liable for the lien of the salvors, he may be proceeded against in admiralty.—Gates v. Johnson, Case No. 5,268.

A suit in admiralty in personam will lie against the owner of a ship in favor of a shipper who paid salvage to wreckers with whom the master had fraudulently concerted to strand his vessel.—Church v. Shelton, Case No. 2,714.

There can be no suit in rem unless there is a lien on the thing sought to be charged.—Boon v. The Hornet, Case No. 1,640; Willard v. Dorr, Id. 17,679; Beane v. The Mayurka, Id. 1,175.

Where two vessels collide without fault upon the part of either, and one makes a voluntary sacrifice in order to diminish the damage which might otherwise result, no maritime lien for contribution arises in favor of the owners of such vessel, and therefore they cannot maintain a libel in rem against the other vessel, a maritime lien being the foundation of all proceedings in rem.—Beane v. The Mayurka, Case No. 1,175.

There is no maritime lien created by a general average loss, and admiralty has not jurisdiction in rem.—Beane v. The Mayurka, Case No. 1,175.

Though all parties are foreigners, the court within whose jurisdiction the thing is situated has jurisdiction in rem, unless it is brought within the jurisdiction by violation of the sovereign right of another nation.—The Bee, Case No. 1,219.

The remedy of the master for advances for supplies and repairs is in personam.—Bartlette v. The Viola, Case No. 1,083.

The wages of the master of a vessel do not constitute a lien upon the vessel, and he can proceed only in personam for them.—The Grand Turk, Case No. 5,683; The Leonidas, Id. 8,262; Willard v. Dorr, Id. 17,679.

A mate cannot sue in rem for services rendered as captain.—The Leonidas, Case No. 8,262.

The remedy of the master of a vessel to enforce payment for services in performance of pilot's duties is in personam, and not in rem.—Bartlette v. The Viola, Case No. 1,083.

Admiralty cannot enforce a claim for money which has been advanced on the personal credit of the vessel owner or master in a suit in rem.—Maitland v. The Atlantic, Case No. 8,980.

A mortgage or hypothecation of a vessel to secure a bill of exchange given for advances, in which it is stipulated that the lender is not to take the usual marine risks in cases of bottomry and hypothecation, does not give a lien enforceable in admiralty.—Maitland v. The Atlantic, Case No. 8,980.

An hypothecation of vessel by way of a mortgage, for supplies furnished in a foreign port, may be enforced in rem.—The Hilarity, Case No. 6,480.

A libel in rem may be maintained against a sum of money paid into court as compensation for salvage services, where it was alleged that after the money had been so awarded libelant discovered that said services were rendered pursuant to an agreement between the master of the vessel and the salvor that the vessel should be voluntarily wrecked, and the master and salvor divide the salvage award.—Church v. Seventeen Hundred and Twelve Dollars, Case No. 2,713.

A libel in rem cannot be maintained for breach of an agreement between the owners of separate vessels to embark them in a common enterprise in transporting passengers and dividing profits in a mode agreed upon, as such agreement is rather one of consortship, and no mutual liens arise from contracts of consortship, and no suit in rem can be maintained for their enforcement.—Vandewater v. The Yankee Blade, Case No. 16,847.

No libel in rem may be maintained for breach of an executory contract, whereby the libelant was to charter the vessel for the transportation of property.—The Pauline, Case No. 10,848.

A suit in rem will not lie against a vessel chartered to take a cargo for a certain voyage, because her master and owners refuse to take the cargo on board, or to run the voyage. The remedy for such a breach of the contract is against the parties personally.—The General Sheridan, Case No. 5,319.

In the case of a charter party, a suit in rem against the vessel is not maintainable for the misrepresentation or concealment of facts by her master or owner in respect to her tonnage or capacity.—The Eli Whitney, Case No. 4,345.

The widow and son of a hand killed on a steamboat by the negligence of the engineer have a remedy against the owners of the vessel, but not in rem against the vessel. Acts 1838, 1852.—The Highland Light, Case No. 6,477.

Where the possession of movable property has been changed, against the right of the true owner, by a maritime tort, or by the breach of a maritime contract, to which the property was subject, the owner may vindicate his title in admiralty by a proceeding in rem.—Five Hundred and Twenty-Eight Pieces of Mahogany, Case No. 4,845.

A court of admiralty can only proceed in rem against the thing itself, or quasi in rem against the proceeds thereof.—Carson v. Jennings, Case No. 2,464.

Where property in the hands of a third person is arrested, on a claim to a specific lien upon it, that constitutes the suit a suit in rem, whether the third person holds the property as owner of it in his own right or as trustee of the debtor.—Reed v. Hussey, Case No. 11,646.

Proceedings in rem in admiralty cannot be instituted against the individual interest of a part owner in a vessel.—Manhattan Fire Ins. Co. v. The C. L. Breed, Case No. 9,021.

The suit is one in rem, where property in the hands of a third person is arrested on a claim to a specific lien upon it.—Reed v. Hussey, Case No. 11,646.

An action in rem will lie without arrest of the property proceeded against, or its presence within the territorial jurisdiction.—Jones v. The Richmond, Case No. 7,492.

After a vessel has been seized and libeled for forfeiture, the court does not lose jurisdiction to condemn by losing possession of her.—United States v. The Little Charles, Case No. 15,612.

It is not essential to the jurisdiction of the court on a libel for collision that the marshal should continuously retain the vessel in his custody.—The E. W. Gorgas, Case No. 4,585.

Jurisdiction once acquired by possession of the res is not lost by its subsequent removal beyond the territorial jurisdiction of the court without consent of libelant.—Otis v. The Rio Grande, Case No. 10,613.

The right of the admiralty to proceed in rem is cumulative, in many cases, and does not exclude the remedy in personam. A party, however, can have only one satisfaction.—Brevoor v. The Fair American, Case No. 1,847.

An action by seamen for wages is not devested of its character as a proceeding in rem merely because the attachment was levied on the remnants of the vessel after the same had been adjudicated at public auction to a third person with notice.—Reed v. Hussey, Case No. 11,646.

Under the amended twelfth rule of admiralty of May 6, 1872, one who furnishes supplies, etc., to a vessel, domestic or foreign, may proceed in rem against the vessel, or in personam against her master or owner.—The Circassian, Case No. 2,720a.

Parties may have in a court of admiralty the same remedies against the proceeds of property subject to its jurisdiction that they are entitled to against the property itself, in whose hands soever the proceeds may be found.—Mutual Safety Ins. Co. v. Cargo of the George, Case No. 9,981.

A libel in rem cannot be changed into a libel in personam against the owner.—The Young America, Case No. 18,178.

On a libel against a cargo for freight and demurrage, where it is in the hands of a purchaser without notice, freed from the lien, and the consignee appears and admits the claim, the court will turn the proceedings into an action in personam.—One Hundred and Eighteen Sticks of Timber, Case No. 10,519.

Where property had been acquired by agents with full notice of libelant's claim, and on its arrest they intervened by stipulation and answer, *held*, that the suit might be treated as one in personam against them.—Reed v. Hussey, Case No. 11,646.

§ 40. Joinder of causes and proceedings.

Separate and distinct trespasses cannot be joined in the same libel against defendants who are not jointly liable.—Thomas v. Lane, Case No. 13,902.

An allegation founded on an hypothecation of a vessel implied by law for money advanced for repairs, may be united with an allegation on a bottomry bond given for the same consideration.—The Hunter, Case No. 6,904.

A general prize allegation cannot be properly joined with an information on a seizure for the violation of a statute.—The Dimon, Case No. 3,917.

Several demands against the same defendant for breach of the contracts contained in passenger tickets may be united in an action brought by the transferee of such claims in his own name.—Cobb v. Howard, Case No. 2,925; Id. 2,924.

Claims for wages and for moneys advanced to the use of the ship may be united in an action in rem.—The Merchant, Case No. 9,434.

A claim by a seaman against the master for personal damages cannot be joined in the same libel with a claim for the fine imposed by the act of 1840. (5 Stat. 396.)—Knowlton v. Boss, Case No. 7,901.

It was early decided that a libel in rem and one in personam could not be joined in the same suit.—Citizens' Bank v. Nantucket Steamboat Co., Case No. 2,730; Dean v. Bates, Id. 3,704.

Remedies in rem and in personam may ordinarily be sought in one suit, where the vessel and master or owner are conjointly liable.—The Merchant, Case No. 9,434.

A joint action will lie against a vessel in rem and the master in personam on a cause of action for which both are liable.—The Zenobia, Case No. 18,208.

Where a libel is filed for a cause of action upon which both vessel and master may be together liable, the court will not make an order that the libelant elect between the remedy in rem and that in personam, nor that he submit to have either the arrest of the respondent or the attachment against the vessel vacated.—The Zenobia, Case No. 18,208.

A proceeding in rem and a proceeding in personam may be joined in one action, where such joinder is calculated to advance the ends of substantial justice.—The Zenobia, Case No. 18,208.

Parties may join, in one libel, causes of action arising ex contractu and those arising ex delicto, where the causes of action are so united that the same evidence will apply to all.—Borden v. Hiern, Case No. 1,655.

A libel in rem may be joined with a libel in personam for breach of a charter party.—The Aldebaran, Case No. 150; Draper v. The O. C. Clary, Id. 4,071. CONTRA, see Citizens' Bank v. Nantucket Steamboat Co., Case No. 2,730.

An action in rem against goods shipped may be joined with an action in personam against the consignees for freight.—Vaughan v. Six Hundred and Thirty Casks of Sherry Wine, Case No. 16,900; In re Six Hundred and Thirty Casks of Sherry, Case No. 12,918.

A joint action for collision cannot be maintained in rem against one vessel and in personam against the owner of another.—The Young America, Case No. 18,178.

Libelants cannot join in one libel a demand in rem against the vessel for a collision and one in personam against the owners for the same cause.—Ward v. The Ogdensburgh, Case No. 17,158.

An admiralty suit for a collision cannot properly be brought against a vessel in rem, and her owner in personam, unless her owner is also master.—The Richard Doane, Case No. 11,765.

An action of damages, as for asault and battery, against the master of a vessel, cannot be joined in the same libel with an action for wages, if it be excepted to.—Pratt v. Thomas, Case No. 11,377. CONTRA, see Borden v. Hiern, Case No. 1,655.

Under rule 19, a proceeding in rem cannot be joined with a proceeding in personam for salvage of the same goods.—Nott v. Sabine, Case No. 10,366.

The twenty-second admiralty rule requires that in petitory and possessory suits the proceedings shall be jointly in rem and in personam.—Kynoch v. The S. C. Ives, Case No. 7,958.

The joinder of an action for a joint tort against two or more in admiralty with an action for a tort against one separately is bad on objection taken.—Roberts v. Skolfield, Case No. 11,917.

§ 41. Grounds of defense in general.

It is no defense to a libel for failure to deliver goods that no credit is given for freight earned. Such claims should be set up by cross libel.—Maxwell v. The Powell, Case No. 9,324.

§ 42. Place of bringing suit.

The locus rei sitæ gives jurisdiction in suits in rem.—The Ada, Case No. 38.

Cases of maritime torts committed upon navigable waters are cognizable in admiralty within any district where the vessel may be apprehended.—Town v. The Western Metropolis, Case No. 14,114.

A libel in personam is not a "civil suit," within the meaning of section 11, Judiciary Act 1789 (1 Stat. 78), requiring the defendant to be a resident of the district within which suit is brought.—Manchester v. Hotchkiss, Case No. 9,004. CONTRA, see Wilson v. Pierce, Case No. 17,826.

A vessel in the basin at Jersey City moored to piles 40 feet from the dock is within the jurisdiction of the district court for the Southern district of New York.—The Argo, Case No. 515.

A proceeding to limit the liability of a shipowner is properly brought in the district where the stranding, out of which the liability arose, occurred, where the property which such owner seeks to abandon is within such district, and no suit has been instituted in any other district.—The John Bramall, Case No. 7,334.

Jurisdiction in rem in admiralty is exclusive in the district courts, but the suit may be instituted in the district where the res is found, irrespective of where the injury complained of occurred.—Killam v. The Eri, Case No. 7,765.

§ 43. Premature commencement of suit.

A libel brought before the right of action is perfected must be dismissed, if duly excepted to on that ground, though such right becomes perfected during the progress of the suit.—The Martha, Case No. 9,144.

An objection that a libel is prematurely brought should be raised on the return day of the warrant of arrest by way of exception.—Furniss v. The Magoun, Case No. 5,163.

An exception that the suit was commenced before the cause of action was matured, not taken until after its maturity, will be considered waived.—Furniss v. The Magoun, Case No. 5,163.

The objection that the suit was prematurely commenced must be raised by plea in abatement or demurrer, to be available where the right of action is perfected before final hearing.—The Isaac Newton, Case No. 7,089.

The giving of assistance in arresting the goods, and subsequently obtaining the same on stipulation, is a waiver of the objection that the libel was filed too soon.—The Salem's Cargo, Case No. 12,248.

A plea to the merits waives any irregularity existing on account of filing the libel at a time when the vessel is not within the district.—St. Paul Fire & Marine Ins. Co. v. The Lake Superior, Case No. 12,244.

Where, in a suit in rem for wages, an answer is filed to the merits, and issue is joined, and the case is brought to a hearing, and proofs are taken on both sides, this is a waiver by the claimant of any right of exception to the regularity of the proceedings of the libelant as to the time of instituting his suit.—The Edward, Case No. 4,289.

§ 44. Laches and stale demands.

Suits for salvage, see "Salvage."
Suits for seaman's wages and lays, see "Seamen."
Suits on maritime liens, see "Maritime Liens."

The statute of limitations of a state is no bar to a suit in admiralty.—Willard v. Dorr, Case No. 17,679; Brown v. Jones, Id. 2,017; Hall v. Hudson, Id. 5,935; Cadmus v. Polhamus, Id. 2,282a.

While the admiralty court is not bound by the local statute of limitations, it is inclined to follow its analogies.—Hall v. Hudson, Case No. 5,935; Cadmus v. Polhamus, Id. 2,282a.

Courts of admiralty govern themselves by the analogies of the common-law limitations of actions.—The Sarah Ann, Case No. 12,342; Jay v. Allen, Id. 7,235; Scammon v. Cole, Id. 12,432.

Independently of any limitations, courts of admiralty will not entertain suits for stale demands.—The Sarah Ann, Case No. 12,342; Willard v. Dorr, Id. 17,680.

There is no fixed rule of limitation in admiralty, but the matter is left to the discretion of the court, to be governed by the facts and circumstances of the case, considered with due reference to the wants and convenience of commerce and the analogies of the local laws of limitation.—The Blenheim, Case No. 1,539; The Harriet Ann, Id. 6,101; Duane v. Goodall, Id. 4,105.

A suit is not barred within the time prescribed by the statute of limitations where there has been no change of ownership.—The Frank Moffat, Case No. 5,060.

In order to maintain the defense of stale claim, it is necessary to allege and prove that the respondents are purchasers in good faith, for a valuable consideration, and without notice of the existence of the claim.—The Melissa, Case No. 9,400. See, also, The Harriet Ann, Id. 6,101.

The statute of limitations is not available to a respondent in admiralty unless it is pleaded.—Brown v. Jones, Case No. 2,017.

Delay pending another case on the same state of facts, arising out of the same transaction, will not render the claim stale.—Jones v. The Richmond, Case No. 7,492.

A demand against a vessel for loss of freight is not barred by lapse of time, where it appears that the demand was prosecuted on the first arrival of the vessel within the district where the cause of action arose.—The Blenheim, Case No. 1,539.

A libel for loss of goods filed two years and ten months after the loss, and after a bona fide assignee of the shipper's bill of lading had seized the boat, cannot be maintained, though the boat has been released on bond.—The Favorite, Case No. 4,696.

Twelve years' delay, unexplained, will affect a demand with the imputation of staleness.—Willard v. Dorr, Case No. 17,680.

Two years' delay to enforce a claim against a vessel, which in the meantime was repeatedly within the jurisdiction of libelant's residence, *held* to bar the claim as against a mortgagee without notice under a mortgage made nine months after the cause of action had accrued.—Griswold v. The Nevada, Case No. 5,839.

A claim against a resident master for supplies to foreign vessel *held* not lost by seven years' delay to enforce it, where his absence prevented service of process.—Cadmus v. Polhamus, Case No. 2,282a.

A claim for damages for collision *held* barred by a delay of over six years where the vessel was for more than a year after the collision within the district in which the owner has continuously resided.—Smith v. Sturgis, Case No. 13,111.

Where a vessel owned in New Jersey became subject to a lien for damage by collision to a vessel owned in Boston, and afterwards came within the district of Boston on three voyages, one of which arrivals was known to the libelants, and was then, nearly four years after the collision, sold to bona fide purchasers without notice, *held*, that a libel in rem, filed four years and one month after the collision, was too late.—The D. M. French, Case No. 3,938.

A libel verified in 1870, but not filed until 1873, for a collision occurring in 1868, will be

dismissed on account of its staleness, no excuse being shown for the delay in bringing suit.—The Columbia, Case No. 3,036.

An objection that the demand in suit is stale or barred by the statute of limitation cannot be made without being properly stated in the pleadings.—The Swallow, Case No. 13,665; The Platina, Id. 11,210; Jones v. The Richmond, Id. 7,492.

§ 45. Pendency of other proceeding.

A suit in personam in a state court, by the consignee against the vessel owner for nondelivery, cannot be pleaded in abatement to a suit in rem in admiralty for the same cause.—The Prince Albert, Case No. 11,426.

The pendency of a replevin suit in a state court to settle the right of property in a vessel will be *held* to bar a libel in admiralty to settle the same right between the same persons.—Taylor v. The Royal Saxon, Case No. 13,803.

A court of admiralty will not order a salvage suit to be set aside or to be stayed because there is pending in a court of law an action of replevin for the salved property, brought by the owner against the salvor, and in which the validity of the salvor's lien upon the property may be determined.—A Raft of Spars, Case No. 11,528.

The claimant in an answer to a libel for engineer's wages alleged that, prior to the commencement of the suit, it had commenced an action against libelant in another court to recover damages for injuries to the steamboat on which libelant was employed, caused by the misconduct of libelant, and caused a garnishee process to be served on the master and sometime owner of the boat, during the period that libelant was employed as engineer. *Held*, that the answer was impertinent, as it did not appear that the court in the alleged pending suit had acquired jurisdiction of the libelant.—The Pioneer, Case No. 11,176.

The fact that libelant brought a suit in the state court for the same cause of action, which he voluntarily discontinued, will not prevent a suit in admiralty.—Bingham v. Wilkins, Case No. 1,416.

The objection that a prior suit for the same cause of action is pending in a state court can only be taken in a suit in rem in admiralty by a dilatory or declinatory exception, under rule 76, and not by plea in abatement.—The Prince Albert, Case No. 11,426; Certain Logs of Mahogany, Id. 2,559.

After a decision for libelants in rem for freight and demurrage, it cannot be objected that freight has been found due libelants in a pending suit in personam.—Brookman v. Sixty Barrels of Molasses, Case No. 1,941a.

§ 46. Set-off, counterclaim, and cross suit.

There is no general doctrine of set-off recognized in admiralty; and, if the damages set up by respondent exceed libelant's demand, there can be no decree for the balance, nor any subsequent suit therefor.—Snow v. Carruth, Case No. 13,144.

Courts of admiralty do not take notice of set-offs, except so far as they grow out of a maritime contract, submitted to its cognizance, and then principally by way of diminishing compensation, and not as an independent right.—Willard v. Dorr, Case No. 17,680.

Admiralty does not take cognizance of set-off, but allowances may be made to the master or owner by rebatement of wages in compensation of losses or injuries incurred by them in consequence of negligence or fault of the mariner in the performance of his duties.—The Hudson, Case No. 6,831.

As the seventh amendment to the constitution of the United States preserving the right of trial by jury excludes admiralty jurisdiction over contracts regulated by the common law, no set-off (not otherwise within admiralty jurisdiction) is allowable on a libel for seamen's wages, unless it is a payment on account thereof.—Bains v. The James & Catherine, Case No. 756.

Quære, whether the civil-law action of reconvention, or the remedy of compensatio or stoppage, may be had in admiralty.—The Hudson, Case No. 6,831.

On a libel for freight, the consignee may set up, by way of recoupment, a claim for damages to the goods; but, if the damage exceeds the claim for freight, he can have no decree for the excess, nor can he subsequently maintain a suit therefor.—Snow v. Carruth, Case No. 13,144; Kennedy v. Dodge, Case No. 7,701.

Respondent may, at his election, file a cross libel for such damage, instead of setting it up by way of recoupment, and in such case may have a decree for the excess.—Snow v. Carruth, Case No. 13,144; Kennedy v. Dodge, Case No. 7,701.

A charterer who sets up a neglect of duty by the shipowner merely to repel a claim for demurrage is not thereby prevented from maintaining a cross libel for damages sustained by such neglect.—Nichols v. Tremlett, Case No. 10,247.

A cross action cannot be maintained which seeks a retrial of matters already adjudicated between the parties.—The Navarro, Case No. 10,059.

Nor is this rule varied when the subject-matter is the same, although one action be in rem and the other in personam; the thing sued being regarded in admiralty as substituted for its owner, and, when subject to his responsibilities, entitled at the same time to his immunities.—The Navarro, Case No. 10,059.

Adm. Rule 54, providing that whenever a cross libel is filed the respondents in the cross libel shall give security in the usual amount, and that all proceedings upon the original libel shall be stayed until such security shall be given, was not intended to give jurisdiction on a cross libel in rem without seizure of the vessel.—The Bristol, Case No. 1,889.

On a libel for freight on coal, compensation for carting it to consignee's coal yard, for which there is no lien in admiralty, may be charged against advances made by consignee.—Gaughran v. One Hundred and Fifty-One Tons of Coal, Case No. 5,273.

Debts or liabilities of seamen to the master or owner of a vessel for other cause than for misfeasance or nonperformance in the duties of their position cannot be set up against their demand of wages.—The Hudson, Case No. 6,831.

In an action by a seaman to recover wages, the court cannot compel the seaman to apply towards his wages a sum in his hands as acting captain which remained after the sale of part of the cargo belonging to claimants, as, in an action against a vessel, the court cannot take cognizance of collateral equities to enforce them against the parties personally.—The Leonidas, Case No. 8,262.

Former owners of tug libeled for negligence may file a cross libel under the fifty-third rule, and have proceedings stayed until security given.—The George H. Parker, Case No. 5,334.

Adm. Rule 53, requiring respondents in a cross libel to give security to respond in damages as claimed therein, applies as well to actions in rem as to those in personam.—The Toledo, Case No. 14,077.

The cross libelant must act promptly. A motion for security, made upon the eve of trial, and after the witnesses had been summoned, and case was ready to proceed, comes too late.—The George H. Parker, Case No. 5,334.

§ 47. Consolidation.

Causes of action of a like nature, involving substantially the same questions arising out of a collision, though against different vessels, may be consolidated in admiralty.—The Burke, Case No. 2,159.

§ 48. Stay of proceedings.

In the case of three litigations against a vessel or its owners, involving title to the same property, brought in different courts, the proceedings in one were stayed unless libelant should elect to stay proceedings in the others.—The Idaho, Case No. 6,996.

It is in the discretion of an admiralty court to stay proceedings under a libel until libelant, being out of the jurisdiction, shall enter appearance to a cross libel.—Nichols v. Tremlett, Case No. 10,247.

The taking of notes and mortgages from the owners as collateral security after the seizure and bonding of the vessel *held* not to operate to stay the suit nor discharge the surety.—The Maggie Jones, Case No. 8,947.

In the case of a libel in personam against the owners of a foreign ship for injuries by collision, where such owners sought the benefit of the rule of the general maritime law permitting them to abandon their vessel and freight, *held*, that an injunction should be granted against the prosecution of the libel in personam, providing that the vessel owners, who were nonresidents and could not be served with process, should first enter their appearance.—Churchill v. The British America, Case No. 2,715.

§ 49. Abandonment, discontinuance, or dismissal.

A libelant has the right, at any stage of the cause, voluntarily to discontinue the same on payment of costs.—The Oriole, Case No. 10,573.

On a libel to recover possession of a vessel wrongfully taken from the owner, brought against the wrongdoer and a purchaser from him in possession, where no decree for damages is asked against the wrongdoer, the libel against him will be dismissed without costs.—Thurber v. The Fannie, Case No. 14,014.

If a court of equity would not dismiss a case because some of the joint plaintiffs refused to proceed, a court of admiralty would not dismiss a libel under similar circumstances.—Richmond v. New Bedford Copper Co., Case No. 11,800.

The libel was dismissed for delay in prosecuting the same, where libelant refused the option of going to trial on the libel and answer and replication filed on the day appointed for the special hearing.—Douglass v. The Washington, Case No. 4,033.

Upon a tender of the accrued costs by a libelant on the voluntary dismissal of his libel, the court will not, upon the application of claimant, inquire into damages caused him by an unfounded arrest of the ship.—The Oriole, Case No. 10,573.

On the voluntary dismissal of a libel, and tender of the accrued costs by the libelant to claimant, the court will not entertain a motion to compel the libelant to file additional stipulations in the cause, and that the court award out of such securities an indemnity to claimant for the wrongful prosecution of the action.—The Oriole, Case No. 10,573.

A possessory suit being discontinued, no appearance having been entered, the marshal was directed to discharge the vessel, and libelant assumed possession. *Held*, that the court had no further jurisdiction in such suit, and could not direct the marshal to restore the vessel to the persons from whom he took it.—The Jack Jewett, Case No. 7,121.

III. PARTIES, PROCESS, CLAIMS, AND STIPULATIONS OR OTHER SECURITY.

Proceedings supplementary to execution against stipulators, see "Execution," § 23.

§ 50. Capacity to sue or be sued in admiralty.

A person who, from incapacity of mind or other cause, cannot be made to understand the English language, cannot be a party to a sworn libel. He should sue under the guardianship of a committee, a prochein ami, or a trustee.—Sunday v. Gordon, Case No. 13,616.

If it appears from the libel that the libelant is not entitled to sue, the respondent may demur; but if the incapacity does not appear, but exists in fact, he must plead in bar.—Knight v. The Attila, Case No. 7,881.

A minor may recover wages as a seaman in his own name when the contract was made personally with him, and it does not appear that he has any parent, guardian, or tutor entitled to receive them.—The David Faust, Case No. 3,595.

A minor may recover his wages as seaman upon a libel promoted by his father as prochein ami, where the father has agreed that the son may receive his own wages.—Davis v. The Seneca, Case No. 3,651.

Admiralty will interpose to protect the rights of a minor suing by his prochein ami against the misconduct of the latter, and will hold the acts of the latter to be of no effect in the case of bad faith or collusion.—The Etna, Case No. 4,542.

In an action by a minor to recover wages as seaman, the respondent is not entitled to require the appointment of a guardian ad litem or next friend for the libelant.—Wicks v. Ellis, Case No. 17,614.

§ 51. Libelants—Who may sue in general.

A carrier can maintain an action in admiralty for damage done to goods in his care.—The St. John, Case No. 12,224.

A purchaser who has been put in possession, though he has no bill of sale, may maintain a possessory suit in admiralty.—Thurber v. The Fannie, Case No. 14,014.

The fact that the owners of a vessel in possession have placed the title temporarily in another, to secure moneys borrowed to pay her purchase price, will not prevent their maintaining a libel for collision.—Messena v. The Neilson, Case No. 9,493a.

A libel by a firm of three members against a vessel in which two of them owned an interest cannot be maintained.—The Benton, Case No. 1,334.

It is not a valid objection that proceedings were brought in the firm name by the surviving partner, if he is the real party in interest.—Byrnes v. The Rockaway, Case No. 2,274.

§ 52. —— Assignee or transferee of cause of action.

In admiralty, suits may be brought by the assignee of a chose in action in his own name.—Cobb v. Howard, Case No. 2,924; Swett v. Black, Id. 13,690; Cohan v. The Rolling Wave, Id. 2,959a.

The right to sue in admiralty to enforce a claim for supplies and repairs to a vessel is personal, and cannot be maintained for the benefit of an assignee of a duebill or promissory note given to secure the claim.—Reppert v. Robinson, Case No. 11,703.

The lien of a material man is assignable, and, where the assignment is absolute, the assignee should proceed in admiralty in his own name.—

The Sarah J. Weed, Case No. 12,350; Cohan v. The Rolling Wave, Id. 2,959a.

The assignee of a seaman's claim for wages cannot enforce the same in rem in admiralty.—Logan v. The Æolian, Case No. 8,465; Rusk v. The Freestone, Id. 12,143; Patchin v. The A. D. Patchin, Id. 10,794.

An action in personam for breach of a contract contained in a passenger ticket may be brought by the transferee of the ticket in his own name.—Cobb v. Howard, Case No. 2,925; Id. 2,924.

A suit in the name of an assignor of the bond may be maintained, where the assignee appeared and filed a supplemental libel, which was duly answered.—Burke v. The M. P. Rich, Case No. 2,161.

Insurers who pay the claims upon their policies are subrogated to the rights and remedies of the insured, and may proceed in admiralty in their own names.—Mutual Safety Ins. Co. v. Cargo of the George, Case No. 9,981.

Where the seaman obtains a common-law judgment, which he sells, no libel can be maintained thereupon, either by himself or for the benefit of the assignee.—The Gate City, Case No. 5,267.

§ 53. —— Joinder.

In suits for seaman's wages, see "Seamen."

Parties whose interests rest upon a cause of action common to all may unite in the same libel in admiralty, though as between themselves their interests are separate and distinct.—American Ins. Co. v. Johnson, Case No. 303.

Where several persons have causes of action of a like nature, involving one or more questions common to all against a vessel, all may join in one libel.—Salmon Falls Mfg. Co. v. The Tangier, Case No. 12,267.

In suits in rem in admiralty, all persons having claims of a like nature against the thing may join in a single libel for the purpose of having that question decided, whether the claims arise from tort or contract.—The Young Mechanic, Case No. 18,182.

All the privileged creditors may unite in one libel, or, if a libel has been filed by any one separately, then others may come in by petition and make themselves parties to the suit.—The Hull of a New Ship, Case No. 6,859.

Where the vessel is liable to two libelants for wages, for which, under the practice of the court in respect to the consolidation of suits, they may be compelled to sue in common, they may join in one action in rem, not only in suing for the common demands, but also in respect to other claims which are peculiar to each.—The Merchant, Case No. 9,434.

A libel in personam, resting upon a common cause of action, may be filed for the libelants and for all others interested, whenever the whole subject-matter can be disposed of in one suit.—American Ins. Co. v. Johnson, Case No. 303.

All the owners of a vessel injured by a collision should be joined as libelants.—The Richard Doane, Case No. 11,765.

Ten out of thirteen owners, having a majority of the shares in a ship, may bring a suit in the name of all the owners; but the suit will be stayed until the other owners are indemnified for costs.—Richmond v. New Bedford Copper Co., Case No. 11,800.

Seamen suing for wages cannot be made colibelants with the holders of a bottomry bond.—Jaurekhe v. The S. G. Troop, Case No. 7,231.

A seaman claiming both wages and moneys advanced to the ship's use may join in a libel in rem with another seaman claiming wages only, but not in a libel in personam.—The Merchant, Case No. 9,434.

Where two whalers are under a contract of mate-ship, there is no such joint property in a whale taken by one of them as requires the owners of both to join in an action for its tortious conversion.—Taber v. Jenny, Case No. 13,720.

A claim for wages, and for moneys advanced to the use of a vessel on the part of one libelant, cannot be joined, in an action in personam, with a separate claim for wages alone, on the part of another.—The Merchant, Case No. 9,434.

§ 54. —— Striking out name.

The name of any party who has lost his interest in the suit can, on a proper application, be stricken from the record.—The Falcon, Case No. 4,618.

A motion by libelants to strike from the record as a party libelant the name of a person who is a mere agent will be granted where it does not appear that respondent will be deprived of any means of defense thereby.—Thompson v. The Jachin, Case No. 13,959.

Where part of the owners of a vessel brought an action in the name of all, *held*, that the nonconsenting owners could not have their names stricken out, but were entitled to have the suit stayed until they were indemnified for costs.—Richmond v. New Bedford Copper Co., Case No. 11,800.

§ 55. Defendants.

An action for a joint tort against two or more cannot, in the admiralty, be united with a tort against one separately, if the objection be taken.—Roberts v. Skolfield, Case No. 11,917.

The master and owners of a whaling ship are not liable to be sued jointly by a seaman for his lay or share.—Matern v. Gibbs, Case No. 9,273.

A person who has no interest, in a legal sense, in the subject-matter of a suit in personam, and who is not a party to it, cannot compel the plaintiff to make him a party defendant.—Coleman v. Martin, Case No. 2,985.

The nonjoinder of proper respondents in an action in personam in admiralty can be taken advantage of only by plea in abatement.—Reed v. Hussey, Case No. 11,646.

A decree may be made against a defendant named in the body of the libel though he is not named in the prayer for relief.—Nevitt v. Clarke, Case No. 10,138.

§ 56. Property subject to process.

When property has been sold or otherwise disposed of, so that it cannot be reached in specie by the process of a court of admiralty, the process may be enforced against the proceeds.—The George Prescott, Case No. 5,339.

A sheriff's levy under an attachment is terminated by an order of the state court appointing a receiver of the debtor; and a seizure by the marshal, then in possession, with the sheriff's consent, under admiralty process, becomes legal.—The Roslyn, Case No. 12,068.

§ 57. Process against the person.

Where a libelant procured the arrest of respondent in a suit brought in a district different from that in which they both resided, upon a stale demand, of small amount, and which was already in litigation between the parties in the courts of the state in which they dwelt, it was *held*, that the respondent ought to be discharged from the arrest.—Martin v. Walker, Case No. 9,170.

The nonimprisonment act of New York (1 Rev. St. p. 807, § 1) does not, by force of acts of congress of Feb. 28, 1839, and Jan. 14, 1841, embrace arrests upon process issued out of maritime courts.—Gardner v. Isaacson, Case No. 5,230; Marshall v. Bazin, Id. 9,125.

Act Aug. 23, 1842 (4 Stat. 518, § 6), conferring upon the supreme court power to regulate

the practice of the circuit and district courts, taken in connection with the rules promulgated by the supreme court under that act, in 1845, operates as a suspension of the acts of congress of 1839 and 1841, abolishing imprisonment for debt on process issuing out of the United States courts in all cases where, by the local law, it would be abolished.—Gaines v. Travis, Case No. 5,180; Hodge v. Bemis, Id. 6,557.

And since the adoption of the rules of 1845 parties are liable to arrest and imprisonment on process issuing out of the United States courts, irrespective of subsequent legislation in the several states abolishing imprisonment on like process.—Gaines v. Travis, Case No. 5,180.

Since the promulgation of the supreme court rules of 1850 abolishing arrests on admiralty process, where, by the state laws imprisonment for debt has been abolished, a warrant of arrest sued out without the special order of the judge is nugatory and void.—Van Stratton v. Borbock, Case No. 16,876a.

Since the adoption by the supreme court, in 1850, of rule 48, there has been no imprisonment for debt upon an execution in admiralty in New York.—The Kentucky, Case No. 7,717.

Act March 2, 1867 (14 Stat. 453), making arrests for debt, whether on mesne process or execution, depend upon the laws for similar arrests in the states respectively, applies to admiralty proceedings.—Louisiana Ins. Co. v. Nickerson, Case No. 8,539. CONTRA, see Hanson v. Fowle, Case No. 6,041.

A respondent arrested must remain in custody until he gives bond or stipulation to satisfy the decree made against him. Rule 3.—Gardner v. Isaacson, Case No. 5,230.

§ 58. Attachment and garnishment—Jurisdiction.

The words "civil suit" as used in § 11 of the judiciary act of 1789, do not embrace admiralty proceedings, and a libel may be filed against a person not residing in the district or not found therein, or against a foreign corporation, and property within the district attached to compel appearance.—Atkins v. Fibre Disintegrating Co., Case No. 600; Bouysson v. Miller, Id. 1,709; Casey v. Leary, Id. 2,497; Clarke v. New Jersey Steam Nav. Co., Id. 2,859; Cushing v. Laird, Id. 3,508; Dyer v. National Steam Nav. Co., Id. 4,225; Manchester v. Hotchkiss, Id. 9,004. CONTRA, see Atkins v. Fibre Disintegrating Co., Case No. 602; New England Ins. Co. v. Detroit & C. Steam Nav. Co., Id. 10,154; Wilson v. Pierce, Id. 17,826.

An attachment of the property of a respondent who is not an inhabitant of the United States, and is not found in this district, is allowable under rule 2, providing that in suits in personam the mesne process may be by warrant of arrest of the person, with a clause that, if defendant cannot be found, his goods and chattels may be attached to the amount sued for, etc.—Cushing v. Laird, Case No. 3,508.

The rule of the district court of Massachusetts, in admiralty, adopted in 1845, that a warrant to attach the goods and chattels, or, in default thereof, the credits, of the defendant, may be granted in cases in which an arrest cannot legally be made, was within the power of the court.—Louisiana Ins. Co. v. Nickerson, Case No. 8,539.

Courts of admiralty have authority to issue a warrant of arrest with a clause that, if defendants cannot be found, their goods and chattels, credits and effects, in the hands of parties named, shall be attached.—Trask v. Pelletier, Case No. 14,146.

Such writ will be set aside as to parties served who are not named therein.—Trask v. Pelletier, Case No. 14,146.

§ 59. —— When lies, and property subject to.

Where, in a suit in personam, a respondent cannot be arrested, a foreign attachment may issue against his property in the hands of a third person to compel his appearance.—Reed v. Hussey, Case No. 11,646.

By a rule in the district of Massachusetts, a warrant to attach the goods and chattels, or, in default, the credits, of defendant, may be granted in cases in which an arrest cannot legally be made.—Louisiana Ins. Co. v. Nickerson, Case No. 8,539.

Foreign attachment in admiralty lies in cases of tort.—Barnes v. Steamship Co., Case No. 1,021.

Admiralty has jurisdiction in rem in cases of marine torts where the person or thing is within the territory, and may issue a foreign attachment to arrest the choses in action of the offending party.—The Invincible, Case No. 7,054.

Where the marshal arrests the respondent, and also attaches his property on a warrant in the alternative, the attachment must be set aside.—Grace v. Evans, Case No. 5,650.

A writ of foreign attachment in aid of a libel in personam to recover less than $500, issued without direct sanction of the court, is irregular, and will be discharged, under rule 28.—Van Stratton v. Borbock, Case No. 16,876a.

Rule 28 of the district court is not rescinded by supreme court rule 7, prohibiting employment of the writ of foreign attachment in aid of demands exceeding $500 without authority of the judge.—Van Stratton v. Bordock, Case No. 16,876a.

In admiralty the debtor's property in the hands of a third person or the credits due to the debtor by another may be attached or garnished to compel his appearance.—Smith v. Miln, Case No. 13,081; Lee v. Thompson, Id. 8,202.

Property purchased bona fide by the holder of it is not subject to a foreign attachment.—Reed v. Hussey, Case No. 11,646.

§ 60. —— Procedure.

For a marshal to attach goods without any endeavor to find and serve personally the defendants when they are to be found within the district, is an abuse of the process of the court, and the attachment cannot be sustained.—International Grain Ceiling Co. v. Dill, Case No. 7,053.

Third persons claiming ownership of a vessel seized on process of foreign attachment may move to amend the marshal's false return of "not found," though they have given bond for release.—International Grain Ceiling Co. v. Dill, Case No. 7,053.

A foreign attachment in admiralty may be directed against goods or rights and credits of the debtor, and be carried into operation by actual arrest of goods, when they can be found, or by notice of the object of the proceedings to those who have either or both in their possession.—Smith v. Miln, Case No. 13,081.

Although the process of foreign attachment in admiralty is not borrowed from the custom of London, yet admiralty courts may recur to the practice of the latter courts for explications of the methods by which the common design may be best effected.—Smith v. Miln, Case No. 13,081.

The warrant for process served upon the garnishee in a suit prosecuted by foreign attachment must contain a notice of the claim, citing him to appear and answer, to authorize the proceeding to be carried on against him personally.—Smith v. Miln, Case No. 13,081.

When the service of a foreign attachment in admiralty is by notice to the garnishee, and not by actual levy upon the goods, it must neces-

sarily be shown to the court, before any order can be taken against the garnishee, that he has been warned of the remedy which the process demands, and for what cause, and the time and place he must appear before the court.—Smith v. Miln, Case No. 13,081.

Rule 37 of the supreme court, providing that if defendant cannot be found the officer may attach his goods, or if such property cannot be found his credits and effects in the hands of garnishees may be attached, does not authorize service of process in garnishment without a notice or citation to the garnishee.—Smith v. Miln, Case No. 13,081.

Adm. Rule 29, requiring a garnishee on the attachment of the goods of a debtor in his hands to file his affidavit, giving a full statement of the property in his hands or to pay it into court, does not authorize the service of process in foreign attachment without a notice or citation to the garnishee as part of the process.—Smith v. Miln, Case No. 13,081.

Personal service on the garnishees of a process, containing a clause of foreign attachment, and a notice of what the process demanded, and for what cause, and of the time and place when the garnishees must appear and answer, is a sufficient attachment of any credits and effects of the respondent in their hands.—Cushing v. Laird, Case No. 3,508.

The duty of a garnishee on appearance is to discharge himself of the effect of the citation by showing that he holds nothing belonging to the debtor, or by specifying exactly what it is, and submitting himself in respect thereto to the court; or he may contest the justness or amount of the libelant's demand.—Smith v. Miln, Case No. 13,081.

It is the right and duty of a garnishee in admiralty to put in an answer, which libelant has no right to contest.—Shorey v. Rennell, Case No. 12,807.

After execution against effects or credits in the hands of a garnishee in admiralty, and a refusal by him to pay, he cannot then discharge himself by putting in an answer.—Shorey v. Rennell, Case No. 12,807.

§ 61. —— Effect of appearance or default.

On the appearance of defendant after attachment of their property on a warrant of arrest, the attachment must be discharged.—Essler v. Worth, Case No. 4,533a.

If defendant fails to appear, the attached property will be held until final decision, when it may be proceeded against by execution.—Essler v. Worth, Case No. 4,533a.

Where a warrant of arrest contains a foreign attachment clause, but gives no direction to bring the garnishee before the court, nor any citation to him to answer the libel, the primary purpose of the attachment is to effect the appearance of the defendant in the action, and not that of the garnishee, and therefore a default entered against the garnishee for nonappearance on the return of the process is irregular.—Smith v. Miln, Case No. 13,081.

When a foreign attachment proceeding is for the purpose of bringing defendant into court, and he makes default on proclamation, a scire facias issues against the garnishee.—Smith v. Miln, Case No. 13,081.

On default of one summoned as garnishee, libelant is not entitled to execution in personam against him.—McDonald v. Rennel, Case No. 8,765.

On the default of a garnishee in admiralty, execution does not go against him personally in the first instance, but only against the credits or effects of the principal in his hands.—Shorey v. Rennell, Case No. 12,807.

On the default of a garnishee in admiralty, the libelant may have compulsory process to obtain an answer. But if he needs no disclosure, and can show by affidavits that the garnishee has effects or credits in his hands, execution may issue against them without requiring an answer.—Shorey v. Rennell, Case No. 12,807.

After default by the garnishee the court has a discretion to allow him to answer upon terms.—Shorey v. Rennell, Case No. 12,807.

After such default, the garnishee is not entitled as of right to put in an answer, except to state facts which have occurred since the default.—McDonald v. Rennel, Case No. 8,765.

Such answer may be allowed in the discretion of the court, and in this case was so allowed, on condition that the libelant might take issue upon it, and that the garnishee should stipulate with sureties to pay whatever the court should allow.—McDonald v. Rennel, Case No. 8,765.

§ 62. Process against vessel or other property.

A proceeding in rem will bind the res, in the absence of any personal notice to the party interested; otherwise as to personal actions.—The Globe, Case No. 5,485.

It is immaterial that the vessel, if attached within the district, was out of the jurisdiction when the libel was filed, as the time of service of process is the commencement of the suit.—Kelsey v. The William Kallahan, Case No. 7,680.

The life of a process in rem in admiralty does not end with its return, and if, at any time before the marshal is discharged, his custody becomes legal, the jurisdiction of the court becomes complete from that time.—The Roslyn, Case No. 12,068.

In a proceeding against a vessel under Rev. St. § 4499, for the penalty for violation of the laws relating to inspection, an executive seizure prior to the seizure under the libel is not necessary.—The Joshua Leviness, Case No. 7,549.

Where a sheriff's keeper allows the marshal to take actual possession, and subsequently holds for both the marshal and the sheriff, and the marshal makes a sale upon the deck of the vessel without objection, the warrant of arrest will be held duly served, and the sale valid.—The Julia Ann, Case No. 7,577.

The judge or court may stay proceedings on a commissioner's order for admiralty process, or act upon the petition de novo.—The Eagle, Case No. 4,233.

The question as to which marshal first seized a vessel in waters over which both districts had jurisdiction should be raised by a petition by the marshal, and not on a plea to the jurisdiction by a party in whose favor the marshal held process.—The Circassian, Case No. 2,721.

A marshal's return stating a seizure of a vessel, but that at such time the vessel was in the custody of a state sheriff, does not imply such seizure as to give the court jurisdiction.—The Circassian, Case No. 2,721.

The court does not acquire jurisdiction where the marshal makes return to a process in rem that he was prevented from making service by the adverse possession of a sheriff; the practice in such case is to wait until the sheriff's custody has ceased.—The Julia Ann, Case No. 7,577.

Sundays are not excluded in the 14 days required before the return of process in rem, in admiralty.—The E. W. Gorgas, Case No. 4,585.

Process in admiralty may be served by a person deputized by the marshal by memorandum indorsed thereon.—The E. W. Gorgas, Case No. 4,585.

§ 63. Appearance or default.

See, also, post, § 66.

Default by garnishee, see, ante, § 61.

Objection to jurisdiction founded on personal privilege of declining the forum must be made before general appearance and answering to the merits.—The Bee, Case No. 1,219.

On a libel in rem where want of jurisdiction does not appear on the face of the libel, personal appearance without objection is equivalent to attachment.—Jones v. The Richmond, Case No. 7,492.

Where the record shows that on the return day a certain person "appears for the respondents, and has a week to perfect an appearance and to answer," it will not be regarded as an appearance which operates as a voluntary submission to the jurisdiction, and a waiver of the objection. —The Aberfoyle, Case No. 16.

An entry on the record that on the return day a certain person "appears, * * * and has a week to perfect an appearance," does not show a waiver of objection to jurisdiction.—Atkins v. Fibre Disintegrating Co., Case No. 602.

One who comes into admiralty, and asserts a claim to and demand due from a third person, which is sought to be subjected to the payment of a judgment in personam against another, is bound by the decision. Whatever other remedies he might have had, he lost them by his appearance.—Lee v. Thompson, Case No. 8,202.

Irregularities in entering default are waived by the voluntary appearance of respondent before the commissioner without objection, but such default will be set aside to permit a real defense.—Gaines v. Spann, Case No. 5,178; Same v. Travis, Id. 5,179.

Where the corporate owners of a steamboat voluntarily appear as claimants, though under the wrong name, they are parties to the suit, and no objection can be taken to the decree for want of process against them.—Virginia & M. Steam Nav. Co. v. United States, Case No. 16,973.

In cases of default, proclamation to appear should be made, and a decree entered for default and contumacy; and on reading the libel and proceedings thereon, with or without proof, as the court may direct, such a decree will be made as the case may require.—United States v. The Mollie, Case No. 15,795.

Upon a motion to vacate an order pro confesso, and for leave to answer, respondent must satisfactorily account for his laches, and exhibit by answer or affidavit a meritorious defense.—Scott v. The Young America, Case No. 12,550.

Sufficiency of excuse in the case of a foreign respondent and of affidavit of defense.—Scott v. The Young America, Case No. 12,550.

Default for want of an answer will not be set aside after a decree from which an appeal might be taken. Rule 29.—The Duiveland, Case No. 4,122.

Rules 29 and 40 apply as well to suits in rem as to those in personam.—The Duiveland, Case No. 4,122.

Where the marshal, without authority of the court, has discharged attached property from custody, and subsequently served defendants personally, the court will require them to give security as a condition of opening their default. —Van Winkle v. Jarvis, Case No. 16,883.

§ 64. Claim and intervention in proceedings in rem.

Under a libel of forfeiture, any one claiming an interest in the thing may intervene to contest the forfeiture.—The Mary Anne, Case No. 9,195.

The party seeking to defend, in a proceeding in rem, must file a claim to the property libeled. —The Spark v. Lee Choi Chum, Case No. 13,206.

No one can intervene and defend in a suit in rem unless it appear by the answer and claim that he has a lien or proprietary interest in the thing seized.—The R. W. Skillinger, Case No. 12,181.

The claim must be filed by the owner, or some authorized agent, and must state the facts in a direct issuable form, and not by way of recitals. —The Spark v. Lee Choi Chum, Case No. 13,206.

The interest of a person in a suit, arising solely from his agreement to indemnify respondents against the result of the litigation, is not sufficient to give him the right to intervene in the action.—The Idaho, Case No. 6,996.

A consul of a foreign power, though his sovereign is also represented by an ambassador, is entitled to intervene in a suit in admiralty for all subjects of that power interested.—Robson v. The Huntress, Case No. 11,971.

The consul of a nation may claim on behalf of its subjects, in the absence of any authorized agent.—The London Packet, Case No. 8,474.

The assignment, by the builders of a vessel, of the moneys to become due on the building contract, invests the assignee with no such proprietary interest as will enable him to appear as claimant and defend.—The Revenue Cutter No. 1, Case No. 11,713.

A creditor who has attached the thing before seizure under a libel of forfeiture may intervene as a claimant.—The Mary Anne, Case No. 9,195.

In the absence of the owner, a mortgagee may be permitted to appear as claimant.—The Selt, Case No. 12,649.

A mortgagee may intervene to contest claims affecting his lien upon the vessel.—Thomas v. The Kosciusko, Case No. 13,901; Elmore v. The Alida, Id. 4,419; The Old Concord, Id. 10,482; Home Ins. Co. v. The Concord, Id. 6,659; Furniss v. The Magoun, Id. 5,163.

On the arrest of a vessel, the mortgagee may intervene to protect his interest and contest a forfeiture.—Home Ins. Co. v. Concord, Case No. 6,659.

A default in payment of an installment due on a mortgage on a vessel gives the mortgagee the right to its possession, and he will be permitted to come in and defend a suit in rem commenced the day before the default.—The Jenny Lind, Case No. 7,287.

An indorser upon a note not yet matured gave a mortgage upon a vessel to secure his contingent liability. Afterwards the liability became fixed. The mortgage, however, entitled him to an extension of time for payment. *Held*, that the mortgagee was to be deemed a mortgagee for a valuable consideration, and entitled as such to intervene for the protection of his interest in a libel filed against the vessel to recover wages. —The Dubuque, Case No. 4,110.

The court may order a vessel libeled for wages to be delivered to the general owners, where the charterers, who are entitled to possession, refuse to claim her.—The Prometheus, Case No. 11,442.

When a vessel is arrested by a lien creditor, and has not been delivered on stipulation, all other such creditors may intervene by summary petition without having the vessel arrested again, and have their claims allowed.—The Young Mechanic, Case No. 18,182.

Creditors having obtained decrees against the proceeds of a vessel, where bottomry creditors come in and arrest the fund, may make themselves parties and contest the bottomry claims. —French v. The Superb, Case No. 5,103a.

Under Rule 34, the underwriter, who has accepted an abandonment, which devests the original claimant of all interest, may be admitted to

intervene and become the dominus litis, in a suit in rem.—The Ann C. Pratt, Case No. 409.

In a suit in rem on a bottomry bond, underwriters to whom an abandonment is made, which has not been accepted, are not admissible as claimants.—The Packet, Case No. 10,654.

Underwriters cannot make any claim for salvage property in admiralty, unless there has been an abandonment of the property to them, and it has been accepted by them.—The Henry Ewbank, Case No. 6,376.

An insurance company which has paid the amount of the insurance on the cargo of a vessel sunk by a collision may be joined as a colibelant with the owners of such vessel, after a decree has been given in their favor against the vessel causing the damage, and an order of reference to a commissioner made to ascertain the amount of damage.—The City of Paris, Case No. 2,766.

After the decision of the circuit court on appeal in a collision case is announced, an insurer of the cargo lost by the collision, who has paid the amount in full, may be admitted as a party to settle its rights to a share of the recovery as against the libelants.—The City of Paris, Case No. 2,767.

An administrator appointed in another state, who has not taken out letters within the jurisdiction of this court, may intervene in behalf of his intestate, in a suit in rem against a vessel which was the property of the intestate at his death.—The Boston, Case No. 1,669.

In a petitory or possessory suit material men cannot intervene to enforce a lien which they may have upon the vessel.—The Taranto, Case No. 13,751.

A material man's lien is not affected by a decree in such suit.—The Taranto, Case No. 13,751.

Where a foreign vessel is in the custody of the marshal on a claim made by an American citizen, the court may take jurisdiction of an intervening libel by one of the seamen, though his contract was made and performed in a foreign country, and all the parties are subjects thereof.—The Champion, Case No. 2,584.

A person who becomes interested in the subject-matter pending the litigation may come in and protect his interest if application is made within a reasonable time.—The Jenny Lind, Case No. 7,287.

A claim, to be available, must be interposed on the return day of the process, when proclamation is made.—Baxter v. The Dona Fermoas, Case No. 1,123a.

After trial of the right of a person to appear and claim a vessel as a mortgagee in possession, decided in his favor, leave will be granted to withdraw such claim, and file a new one as owner, where no other party is affected by the proceedings or suffers prejudice.—The Archer, Case No. 507.

An absent owner, on coming within the jurisdiction, may be substituted as claimant in place of his attorney in fact, on payment of costs of opposing the motion, and entering new stipulation for costs.—The Laurens, Case No. 8,121.

Where a party claims under an attachment he must file a caution in court to hold the proceeds remaining after satisfying prior claims.—The Louisetta, Case No. 8,535.

A court of admiralty has power to decide between conflicting claims to property seized by attachment or on execution.—Lee v. Thompson, Case No. 8,202.

In an action on a bottomry bond, the owner of the vessel and the mortgagee thereof having intervened, the court may pass on the validity of the mortgage.—The Panama, Case No. 10,703.

An objection to the right of a person to appear and defend a suit in rem cannot be taken for the first time at the hearing.—Thomas v. The Kosciusko, Case No. 13,901; The Prindiville, Id. 11,435.

A motion to strike the claim and answer from the files, upon the ground that the proofs on hearing show that claimant has no interest, cannot be entertained.—The Prindiville, Case No. 11,435.

The right to appear and defend a suit in rem must be put in contestation, by way of exception, if the disability appear upon the face of the claim, or an exceptive allegation putting the right in issue, if it does not so appear.—The Prindiville, Case No. 11,435.

An objection to the competency of an administrator to appear as claimant in a suit in rem must be taken on his appearance, and before sale of the property and payment of the proceeds into court.—The Boston, Case No. 1,669.

In an action on a bottomry bond, an objection to the right of a mortgagee to interfere and contest the validity of the hypothecation must be put forth in the pleadings and suggested on the argument, or it will be deemed to have been waived.—Furniss v. The Magoun, Case No. 5,163.

§ 65. Death of party.

In proceedings in rem in admiralty, the death of the claimant does not abate the suit or render a subsequent decree therein erroneous.—The James A. Wright, Case No. 7,191.

If a party to an action in admiralty dies pending the suit, and the cause of action survives, no disadvantage accrues therefrom to either party. A suggestion of the fact apud acta removes the technical difficulty.—Nevitt v. Clarke, Case No. 10,138.

An application by executors to be substituted as libelants in a suit in rem in admiralty, made more than eight years after libelant's death, granted, as claimants could have compelled such substitution at any time.—The Norway, Case No. 10,357.

On an appeal from a judgment for libelant entered after the death of the claimant, the court ordered that his death be suggested on the record, and that the judgment be against the sureties.—The James A. Wright, Case No. 7,191.

§ 66. Tender and payment into court.

Where, in an action to enforce a lien for wages on freight money due the boat, the cargo was arrested, the owners of the cargo should pay into court the freight acknowledged to be due, and thus obtain a release of the property and a discharge of their liability. They cannot be compelled to give bail for the value of the cargo.—The Monadnock, Case No. 9,704.

On a libel in personam against a subcharterer to recover freight, respondent, on petition, will be allowed to pay the freight moneys into court to abide the decision of a contest between the owner and charterer as to a claim for demurrage in which he is not interested, and the suit against him will be enjoined, though the result will be to turn the proceeding into one in rem against the freight.—Copp v. De Castro & Donner Sugar-Refining Co., Case No. 3,215.

Filing a libel in admiralty, and delivery of the writ to the officer, is a commencement of the suit, such that a tender afterwards made must include costs of suit, although the vessel has not been seized.—The Sunshine, Case No. 13,623.

On a bill to enforce a lien for wages upon freight money which was paid into the registry as a substitute for the freight attached, other parties claiming an interest in the freight money so paid in should file their claim and set

up rights by answer to the libel.—The Monadnock, Case No. 9,704.

§ 67. Bail.

In suits in personam, in whatever way defendant is brought into court, he must give a stipulation to satisfy the decree before he can be admitted to defend, instead of giving stipulation for costs only.—Millard v. Craig, Case No. 9,547.

In holding a respondent to bail, admiralty is governed much by equitable considerations.—Martin v. Walker, Case No. 9,170.

The admiralty court will not order a defendant to give a stipulation in the action under pain of imprisonment in a case in which he is not liable to arrest.—Louisiana Ins. Co. v. Nickerson, Case No. 8,539.

A bond for appearance to answer a libel is not a bail bond at common law, but a stipulation in admiralty, to be construed accordingly.—Lane v. Townsend, Case No. 8,054.

Under a stipulation for appearance to answer and abide the court's decision, the sureties are not irrevocably bound by a return of non est inventus; but they may surrender the principal at any time before decree against them on citation to show cause.—Lane v. Townsend, Case No. 8,054.

The stipulation for discharge from arrest is for the appearance of the party to abide by the decree, and not for the payment of the sum decreed.—Grace v. Evans, Case No. 5,650.

The principal and surety on the bond or stipulation given upon an arrest in personam stand upon the same footing.—Holmes v. Dodge, Case No. 6,637.

In admiralty the principal cannot be surrendered in exoneration of bail.—Cure v. Bullus, Case No. 3,486.

The standing rules of the district court relating to bail stipulations to be given on the execution of a warrant in personam, and to the method of enforcing them, are superseded by the supreme court rules of 1845, upon the same subject, and stipulations must now be exacted conformably to the supreme court rules.—Gardner v. Isaacson, Case No. 5,230.

The former practice in the district courts in matters of arrest in suits in personam, whereby on default of respondent his sureties were subjected only to the payment of the costs, is changed by Court Rule 3, making the respondent and his sureties liable for the full amount of the demand.—Gardner v. Isaacson, Case No. 5,230.

Quære, if a delivery on bail can be ordered by the court in vacation before the return term of the process.—Ex parte Robbins, Case No. 11,879.

§ 68. Bonds and stipulations in general.

District court in admiralty may deliver property on bail, either in the form of bond or stipulation, on which judgment may be rendered.—The Alligator, Case No. 248.

Where, in a possessory action, the disposal of the case upon the merits is not likely to be attended by delay, a motion to bond will not be granted.—Treat v. The Rainbow, Case No. 14,161.

Where the equal half ownership of a vessel and disagreement alleged in a libel for possession and sale of the vessel are denied, claimants will be allowed to retain possession, pending the hearing, on giving security.—Burr v. The St. Thomas, Case No. 2,195.

In a possessory action, the property will not be delivered on bail to a claimant having an interest of only one-eighth therein, when the court is sitting, and the case can be heard at once.—The Rainbow, Case No. 14,161.

In possessory actions, an application for delivery on bail, by a party who has not yet answered, is premature.—The Rainbow, Case No. 14,161.

Where the title to a vessel could not be determined pending an accounting between the parties, possession was awarded to the master, who was part owner, on his own stipulation.—Coverdale v. The North America, Case No. 3,289.

The amount due upon an accounting between the majority and minority owners cannot be applied to diminish the liability of the stipulators on a bond given for the safe return of a vessel.—The Susan E. Voorhis, Case No. 13,633.

A married woman will not be accepted as surety on a stipulation in admiralty.—The Antelope, Case No. 481.

Stipulations taken for the purpose of sustaining and rendering effectual the court's jurisdiction are to be construed by the intention of the court which required them, and not of the parties bound by them.—Lane v. Townsend, Case No. 8,054.

A stipulation directed to be taken in double the amount of the demand will not be construed as a stipulation simply for costs.—The Roslyn, Case No. 12,068.

The defective execution of a stipulation must be objected to by the party affected by it within the term of the court next subsequent to its becoming known to him.—The Infanta, Case No. 7,031.

A party is entitled to be discharged from a bail bond or stipulation in admiralty only on grounds which at law or in equity would avoid a common money bond, or entitle him to be relieved from it.—Cure v. Bullus, Case No. 3,486.

After the respondent has given a bond to the marshal, as provided by the rules, libelant cannot exact any additional stipulation.—Gaines v. Travis, Case No. 5,179.

A defective execution of a stipulation will be deemed waived unless excepted to before the close of the term next after the opposite party has notice of the defect.—The Infanta, Case No. 7,031.

§ 69. Security for dissolution of attachment.

To discharge a foreign attachment, where defendant is not found, he must furnish a bond to satisfy the full decree.—Bell v. Nelson, Case No. 1,257.

When property is taken for security by a warrant of attachment, the attachment may be dissolved and the property restored to the claimant on his filing a stipulation, with sureties, according to the form used by the court.—Poland v. The Spartan, Case No. 11,246.

Before property can legally be delivered on bail in cases in which the United States are a party, due notice must have been given to the district attorney.—Ex parte Robbins, Case No. 11,879.

In giving bond to relieve property taken by a clause of foreign attachment, defendant must pay costs of the motion before he can defend on the merits.—Millard v. Craig, Case No. 9,547.

A respondent in a suit in personam, whose vessel is attached because personal service cannot be made in the district, does not waive his right to plead to the jurisdiction by filing a stipulation to secure the release of the vessel.—Manchester v. Hotchkiss, Case No. 9,004.

On the dissolution of an attachment against a vessel it should be restored to the person who was in possession at the time when she was taken under process; and in the case of conflicting claims the marshal should not deliver

her without the order of the court.—The Two Marys, Case No. 14,300.

Sureties on a bond given by the wife who filed a claim to property attached on a libel against the husband and wife are discharged where the suit is dismissed against the wife, though a decree is rendered against the husband. —Jaycox v. Chapman, Case No. 7,243.

Where the respondent in a suit in personam has gone beyond seas, process may issue against the bail on motion, though no execution against the principal has been returned non est inventus. —In re Snow, Case No. 13,141.

§ 70. Bonds for release in proceedings in rem—When allowed.

Inasmuch as a suit brought in the district court in admiralty to enforce a lien on a vessel given by state laws is not a "proceeding under the laws of any state," but is under the laws of the United States, the government, if claimant in such suit, is not entitled to have the res discharged from arrest by giving stipulation under Rev. St. § 3753, providing that when property of the United States shall in a "proceeding under the laws of any state" be seized, etc., the secretary of the treasury may cause a stipulation to be entered into, etc.—The Revenue Cutter, Case No. 11,712.

The claimants and not the libelants will be allowed to bond the proceeds of a vessel where libelants' claim is denied in the pleadings.—The Archer, Case No. 508.

The default of libelant on an application to bond a vessel, *held* should be opened with leave to file objections to the right of the applicant to appear as claimant.—The Two Marys, Case No. 14,300.

Vessels and cargoes liable for forfeiture under Act April 18, 1818, may be delivered to the claimants upon giving a bond for value.—United States v. The Pitt, Case No. 16,052.

Act March 3, 1851, to limit the liability of shipowners, confers no power on the court to discharge the vessel from all liens upon her, on the filing of a stipulation by the owners in the full value of the vessel and freight, for the benefit of all parties having claims upon her. But this may be done under the general admiralty powers of the court.—The City of Norwich, Case No. 11,202.

On a dispute between the master and owners of a British vessel, the court ordered possession to be delivered to the owners on payment of a sum to secure the payment of any sum found due to the master on a suit to be instituted by him within 20 days.—Muir v. The Brisk, Case No. 9,901.

On a libel to recover possession of a vessel, where respondent appealed, the court refused leave to bond the vessel, but directed that the decree be executed unless the appeal was perfected in two days.—Muir v. The Brisk, Case No. 9,901.

A vessel may be released on bond under Rev. St. § 941, at any time before default is entered on the return of process.—The Martha C. Burnite, Case No. 9,147.

In an action in rem against the vessel alone by a single freighter a court of admiralty cannot order the release of the owners on giving a stipulation for value of vessel and freight.—Place v. The City of Norwich, Case No. 11,202.

§ 71. —— Validity, form, and sufficiency.

One who voluntarily executes a bond to a marshal for the purpose of being substituted for a vessel, and with full knowledge of the valuation, will not be permitted to resist execution on the ground that the bond was erroneously executed to the marshal, and that the valuation should have been made by commissioners appointed by the court.—United States v. The Little Charles, Case No. 15,613.

A bond voluntarily given upon the delivery of property on bail, on application of the claimant, is good, although the condition does not exactly conform to Act March 2, 1799, c. 128, § 89 (1 Story's Laws, 653; 1 Stat. p. 695, c. 20). —The Struggle, Case No. 13,550.

The court may permit a stipulation to be given to satisfy the decree, reserving to the stipulator the right to deny the legality of the custody claimed by the marshal, and, if successful in such denial, to ask to be relieved therefrom.—The Roslyn, Case No. 12,068.

A bond given to release a vessel attached under the nonimportation law need not conform to the provisions of Act March 2, 1799, c. 128. —The Struggle, Case No. 13,550.

§ 72. —— Amount.

Act March 3, 1847, does not abridge the power of the court to accept bail for less than double the amount of libelant's demand.—Peru v. The North America, Case No. 11,017a.

A vessel, cargo, and freight attached on a libel on a bottomry bond will be bonded for their full amount, although the proceeds of the vessel are alone sufficient to meet the claim.—The Archer, Case No. 507.

On a libel against a vessel, though the claims exceed her value, the amount of the freight is not to be included in the stipulation.—The Vivid, Case No. 16,977.

The vessel may be discharged on stipulation in its full value where the claims for which libels are filed exceed its appraised value.—The Antelope, Case No. 481.

In the case of separate suits for salvage by different salvors in different jurisdictions, for services rendered on the same voyage, where claimants have once bonded the property, the court will reduce the bail to a reasonable security for the claim.—Forbes v. The Merrimac, Case No. 4,927.

An agreement fixing the amount of penalty or liquidated damages is not conclusive as to the amount of bail in a suit in rem.—Peru v. The North America, Case No. 11,017a.

An appraisement by an appraiser nominated by the clerk without notice to the opposite party will be set aside.—Alliance Ins. Co. v. The Morning Light, Case No. 246a.

§ 73. —— Obligation of sureties.

The stipulation or bond in a suit joining the remedy in rem with that in personam only covers the value of the property attached and surrendered.—Draper v. The O. C. Clary, Case No. 4,071.

The obligations of the sureties of a vessel are not increased by amending the libel by increasing the amount claimed.—Darrell v. The Alice Gray, Case No. 3,579.

The undertaking of stipulators, on a libel in rem for the loss of a vessel and cargo by collision, is for their value, and they cannot interfere, in questions relating to the equity of the parties, to amend their pleadings so as to bring within the action all rights which may be legally determined by it.—McCready v. The Brother Jonathan, Case No. 8,732a.

A bond executed in the district court to secure the release of a vessel, conditioned that the parties shall perform the decree of "the court," means the court which shall ultimately decide the cause; so that where the district court dismissed the libel, but its decree was afterwards reversed on appeal, execution may issue on the bond.—United States v. The Little Charles, Case No. 15,613.

§ 74. —— Insolvency of sureties.

The claimant in an action in rem, who secures the discharge of the property by giving a stipulation for value, must keep his stipulation good in the matter of sureties until the final determination of the case.—The Virgo, Case No. 16,976.

Where, after an appeal by libelant from a decree dismissing the libel, the stipulators for value become insolvent, the circuit court will require the claimant to furnish new stipulators.—The Virgo, Case No. 16,976.

§ 75. —— Operation and effect.

The giving of a stipulation of value to obtain the release of the vessel waives all defects in the service of process.—The Acadia, Case No. 24.

The execution of a delivery bond by the owner of a vessel in a proceeding in rem for a penalty or forfeiture is a waiver of the objection of the want of a prior seizure.—The Lewellen, Case No. 8,307; The Lewellen, Id. 8,308.

A vessel discharged from arrest upon giving the required bond or stipulation is forever discharged from the lien which was the foundation of the action, and the court has no jurisdiction over her for the same cause of action and cannot order her rearrest.—Home Ins. Co. v. The Concord, Case No. 6,659. The Old Concord, Id. 10,482; United States v. Ames, Id. 14,440; The White Squall, Id. 17,570.

Such vessel cannot be again seized for the same cause of action, even by consent of the parties.—Senab v. The Josephine, Case No. 12,663.

Nor can she be rearrested for the same cause of action, though the former action was discontinued by consent. Case No. 13,855 affirmed.—The Thales, Case No. 13,856.

After such release an attachment for contempt will not lie for its forcible taking.—United States v. Towns, Case No. 16,534.

Where the libel was subsequently amended so as to claim a larger amount, the vessel, after a sale to a third person, cannot be ordered again into the custody of the marshal, nor can the owners be required to pay the purchase money into court.—The Union, Case No. 14,346.

A vessel discharged on stipulation of value fixed at the amount claimed in the libel returns into the hands of her owner subject to all previously existing liens or charges, the same as before her seizure, except that on account of which she was seized; and she is subject to any subsequently accruing liens or charges in the hands of her owner, or in the hands of any person to whom she may be transferred.—The Union, Case No. 14,346; Roberts v. The Huntsville, Id. 11,904; Carroll v. The Leathers, Id. 2,455.

Where a vessel has been released from arrest on stipulation for value, she may contract new debts which will operate as liens, which will have preference over the claim of the sureties who are subrogated to the rights of libelant.—Carroll v. The Leathers, Case No. 2,455.

Where a vessel has been released on stipulation for her value, the amount of damages recoverable in a collision case cannot exceed her actual value, though the bond is for a greater sum.—Wells v. The Ann Caroline, Case No. 17,389b.

§ 76. —— Release of sureties.

The sureties on a bond or stipulation for value cannot take advantage of any irregularity in the proceedings.—The Alligator, Case No. 248.

After a decree has been entered in admiralty dismissing a libel, and the stipulation to the action has been canceled, the claimant may, by waiving the decree and consenting to the reinstatement of the cause, revive the liability of the sureties on the stipulation, provided such proceedings do not affect them injuriously.—The Antelope, Case No. 480.

The amendment of the libel by adding a colibelant does not discharge the surety on the stipulation.—The Maggie Jones, Case No. 8,947.

The amendment of a libel by striking out the name of a sole libelant, and substituting another in its place, is virtually the institution of a new suit, and discharges the sureties upon the stipulation.—The Detroit, Case No. 3,832.

The taking of notes and mortgages from the owners as collateral security, after the seizure and bonding of the vessel, *held* not to operate to stay the suit nor to discharge the surety.—The Maggie Jones, Case No. 8,947.

A stipulator will be discharged from his undertaking where the vessel is subsequently rearrested on libels by others, and sold, and the proceeds brought into court.—Livingston v. The Jewess, Case No. 8,412.

§ 77. —— Cancellation of stipulation and rearrest of vessel.

Where a libel in rem is dismissed by default the claimant may without notice enter an order canceling the stipulation and bond.—The Antelope, Case No. 480.

A claimant who, after a libel in rem is dismissed by default and the stipulation and bond canceled, agrees to open the default, waives the decree and order of cancellation, and the court may vacate them so as to hold the stipulators liable.—The Antelope, Case No. 480.

Motion to remand vessel into custody, and cancel stipulation, *held* premature where made before process returned on other libels by which the security of the stipulators was endangered.—The Empire, Case No. 4,472.

If a bond given to release a vessel attached for violation of the nonimportation law (Act March 1, 1809, c. 91) is void because it does not conform to the terms of the statute, the court will enforce the redelivery of the property.—The Struggle, Case No. 13,550.

The court has power to order the rearrest of a vessel if the stipulation to answer a judgment has been accepted by mistake or fraud, and the sureties were never bound.—The Favorite, Case No. 4,698.

In case of any mistake or fraud committed in entering into the stipulation, and of the improvident discharge of the vessel, it would be competent for the court to relieve the parties concerned, on an application within a reasonable time, by ordering the vessel back into the custody of the officer.—The Union, Case No. 14,346.

§ 78. Custody, sale, and disposition of property pending suit.

When property seized for forfeiture is brought into admiralty for adjudication, it is in the custody of the court, and cannot be withdrawn but by some person who shall establish title to receive it.—United States v. The La Jeune Eugenie, Case No. 15,551.

The officer who has the possession of the property on proceedings in rem is the official keeper of the court, and, if it be taken from him, its redelivery will be enforced by summary process, though in the hands of a person not a party to the cause.—The Phebe, Case No. 11,066.

Where petitioner, without order of the court, has obtained possession of property from the marshal, who had seized the same on process in rem, the court will not order the marshal to deliver up possession.—The Roslyn, Case No. 12,067.

Where an arrested vessel in any manner again comes into possession of the owner, he cannot defeat a lien against her, on the ground

that the contract out of which it arose was made, and the consideration for it rendered, while the vessel was in the custody of the law.—The Witch Queen, Case No. 17,915.

The district court, by virtue of its admiralty jurisdiction, has the power to order the restoration of property, the right to the possession of which is in an officer of a court possessing similar powers in an adjoining district.—The Joseph Gorham, Case No. 7,537.

The custody of the law, having been once fixed by the valid levy of an officer duly authorized to seize, continues whether the officer be present or not, unless acts equivalent to a surrender and withdrawal are shown.—The Circassian, Case No. 2,721.

A prize schooner, in a perishing condition, was ordered to be sold, although one of the parties had not appeared, for the use of the person to whom it was finally decreed.—Stoddard v. Read, Case No. 13,470.

Where a vessel seized for forfeiture is sold pending the prosecution, to avoid expenses of keeping, and the libel is subsequently dismissed, the proceeds will be delivered to the claimant, free of all costs.—United States v. The Lion, Case No. 15,607.

IV. PLEADING, PETITIONS, AND MOTIONS.

Effect of amendment on liabilities of sureties on bond, see, ante, § 76.
Pleadings as evidence, see post, § 94.
In suits for forfeiture, see "Forfeitures," § 8.

§ 79. Allegations in general.

Admiralty will not entertain defenses inadequately pleaded and set up for the first time by formal objection at the trial.—Cohan v. The Rolling Wave, Case No. 2,959a.

Pleas or exceptions in admiralty need not embody the formalities required in pleading at common law or in equity, but they must set forth the matter in dispute in perspicuous and definite terms.—The Navarro, Case No. 10,059.

A neglect to state material facts within the knowledge of the party will be taken most unfavorably against him.—Poole v. The Washington, Case No. 11,271.

Maritime courts will not lay much stress on an objection of misnomer unsupported by evidence that the party was in fact not known by the name ascribed to him.—Henry v. Curry, Case No. 6,381.

§ 80. Libel.

It is immaterial whether a libel in admiralty be addressed to the judge or to the court in which he presides.—The Joseph Gorham, Case No. 7,537.

Admiralty has not jurisdiction over every floating structure on navigable rivers, and the pleadings should contain an averment to show jurisdiction.—Jones v. Coal Barges, Case No. 7,458.

A libel for assault and battery, alleged to have been committed in the harbor of Havana, is defective, if it does not further allege that the tide ebbs and flows in said harbor.—Thomas v. Lane, Case No. 13,902.

Libels in civil actions in rem need not state the occupation and residence of the libelant.—The J. R. Hoyle, Case No. 7,557.

Libels in admiralty should state the subject-matter in articles, with certainty and precision, and with averments admitting of distinct answers.—The Boston, Case No. 1,673.

Technical precision is not required; but the cause of action should be clearly set forth, so that a plain and direct issue may be made up on the charge.—Jenks v. Lewis, Case No. 7,280.

A libel in rem for breach of a charter party, demanding a stated sum in damages, is sufficient to hold the res to bail, although specific breaches showing a specific amount of damages are not alleged.—Peru v. The North America, Case No. 11,017a.

An allegation that a certain sum loaned by the master on a security of the first earnings of the vessel is still due and unpaid will dispense with an allegation that it has not been paid out of the earnings.—Brown v. The Cadmus, Case No. 1,997.

A complaint framed under Dakota territorial laws, giving a right of action in rem for supplies furnished a vessel, *held* sufficient to give jurisdiction to admiralty, though requiring amendments to conform it to the practice.—Comings v. The Ida Stockdale, Case No. 3,052.

A libel should set out clearly and explicitly the facts relied on.—The Havre, Case No. 6,232.

A libel for damages should state each distinct act of injury in a distinct article with reasonable certainty of time and place.—Treadwell v. Joseph, Case No. 14,157.

In a libel for a marine tort libelant must set forth in distinct allegations each separate and distinct wrong for which he claims damages.—Pettingill v. Dinsmore, Case No. 11,045.

General ill treatment and oppression on the part of a master, relied on in aggravation of damages in a suit by a seaman for assault, must be propounded in a distinct allegation.—Pettingill v. Dinsmore, Case No. 11,045.

The libel should show jurisdiction.—Boon v. The Hornet, Case No. 1,640.

A libel for a tort will be dismissed unless it contain on its face sufficient averments as to place to show that it is within the admiralty jurisdiction.—Thomas v. Lane, Case No. 13,902.

It is unnecessary to aver that the vessel in question is engaged in navigation, or capable of being so employed.—The Illinois, Case No. 7,004.

To give the admiralty court jurisdiction of a libel in rem for materials used in the construction of a vessel brought before she is launched, it must appear by the libel and record that the vessel is of the size for maritime employment, and that her business was to be maritime navigation on the Lakes or high seas.—The Charles Mears, Case No. 10,766.

A libel for salvage in the name of a British naval officer and the British consul, joining with him "for all other interests," where the vessel, rescued by the British naval vessel, was sent home in charge of the officer, *held* not fatally defective.—The Huntress, Case No. 6,912; Robson v. The Huntress, Id. 11,971.

A libel for possession of a vessel should unequivocally state the extent of libelant's interest, and that he was owner at the time of filing the libel.—Bradshaw v. The Sylph, Case No. 1,791.

A simple allegation of fraud in a petition to set aside a sale, without setting forth the facts which constitute the fraud, is insufficient.—The Kaloolah, Case No. 7,602.

A libel sufficient under the general maritime law is sufficient in cases arising upon the Lakes, and no averment is required to bring it within the act of 1845.—The Illinois, Case No. 7,004.

Facts will be assumed as broad as the libel will warrant, where it is not objected to for lack of precision and certainty.—Essler v. Worth, Case No. 4,533a.

A libel for a statute forfeiture should substantially agree with the terms of the statute.—The Betsy, Case No. 1,365.

§ 81. Answer.

An agreement for a reference before answer filed suspends the necessity of answer. If the reference is set aside, claimant may answer without terms.—The Nineveh, Case No. 10,276.

When the respondent wishes to avail himself of any particular matter of defense, he must present it with proper averments in his answer or by plea.—The William Harris, Case No. 17,695.

The defense of stale claim must be set up in the answer.—The Melissa, Case No. 9,400.

The objection that the vessel for which supplies or repairs are furnished is not one fitted for navigation on the high seas must be taken by answer.—Reppert v. Robinson, Case No. 11,703.

Matter of abatement may be set up in the answer, but the answer in such case must demand the same judgment as a plea.—Reed v. Hussey, Case No. 11,646.

The answer should set out clearly and explicitly the facts relied on.—The Havre, Case No. 6,232.

An answer to a libel for information must be full and explicit to each article.—The Sun, Case No. 13,612.

Where, to a libel for damage, a defense is put in by way of justification, it must admit the facts; and if the act complained of be relied on as a punishment, it must be so pleaded.—Treadwell v. Joseph, Case No. 14,157.

If the answer admits, to a reasonable intendment, facts stated in the libel, it will be sufficient, though loose and informal as a pleading.—The Aldebaran, Case No. 150.

Where the answer to a libel for seaman's wages sets up payment in full and a release under seal, the particulars of the release need not be set out, as it is only evidence.—The Western Metropolis, Case No. 17,438.

The answer should meet each material allegation of the libel with an admission, a denial, or a defense.—The Boston, Case No. 1,673.

An answer which neither admits nor denies a material averment in the libel is insufficient, and may be excepted to on that ground.—The Elizabeth Frith, Case No. 4,361.

Mere narrative statements in a libel, which allege no damages, and claim no particular remedy, need not be replied to specifically by answer.—The Aldebaran, Case No. 150.

Where an answer is made without oath, as authorized by rule 87, it should still respond fully and particularly to every material averment of the libel.—The Aldebaran, Case No. 150.

Where a libel alleges a particular agreement was made, and a written instrument was executed, and the instrument embodies the substance of such agreement, an admission by the answer of the execution of the instrument is substantially an admission of its contents.—The Aldebaran, Case No. 150.

Matter intended as a defensive allegation should not be blended with the response or answer to an allegation of the libel.—The California, Case No. 2,312.

Where several averments in an answer to a libel on a vessel are inconsistent, and are not excepted to, the court will adopt that one which operates most strongly against the claimant.—The Olbers, Case No. 10,477.

When a plea which sets up no matter of defense is overruled, it is in the discretion of the court to allow an answer to be filed.—The Sea Gull, Case No. 12,578.

§ 82. Reply.

Mere narrative statements need no specific reply.—The Aldebaran, Case No. 150.

Where a sworn answer is not demanded by the libel, libelant may contradict its allegations by proofs, without filing a replication thereto, or notice of such proof.—The Infanta, Case No. 7,030.

In the absence of a specific rule, a replication is necessary to put in issue facts set up by sworn answer; if none be filed, such facts will be taken as admitted.—The Mary Jane, Case No. 9,215.

A replication merely denying the truth of the answer is not required in the district of Massachusetts.—Taber v. Jenny, Case No. 13,720.

New facts must be presented by an amendment to the libel or answer, and not by way of replication and rejoinder.—The Sarah Ann, Case No. 12,342.

A special replication by the libelant under oath is not admissible, unless it be demanded by respondent, or ordered by the court.—Coffin v. Jenkins, Case No. 2,948.

A party cannot be allowed, after receiving a pleading and replying to it, to treat it, upon any ground of defect afterwards discovered, as a nullity, and proceed as if none had been served.—Gaines v. Travis, Case No. 5,179.

Advantage must be taken of the failure to file a replication when evidence is offered at the hearing, or it will be *held* to be waived.—Thomas v. Gray, Case No. 13,898.

§ 83. Interrogatories.

Each party has a right to require the personal answers of the other, under oath, to any interrogatories touching the matter in issue.—The David Pratt, Case No. 3,597.

In a suit for seamen's wages, libelant may compel the adverse party to answer special interrogatories.—Gammell v. Skinner, Case No. 5,210.

The charge in the libel to which a special interrogatory relates will be taken pro confesso where defendant refuses to answer.—The David Pratt, Case No. 3,597.

§ 84. Exceptions, demurrers, and pleas in bar.

The admiralty court may dismiss a libel on exceptions.—The Pauline, Case No. 10,848.

If the response in a general answer is not full, explicit, and distinct, exceptions for insufficiency lie to compel a sufficient answer.—The California, Case No. 2,312.

No exceptions will lie to an answer responsive to the libel, on the ground that it is not a defense to the suit, whether the matter is impertinent or not.—The California, Case No. 2,312.

Objections to a libel for want of specific allegations of fault should be taken by exceptions, and, if taken at the hearing, an amendment will be permitted.—The Coleman, Case No. 2,981.

An exception for irrelevancy taken to a pleading which is not irrelevant, but is only insufficient, will be overruled.—The Elizabeth Frith, Case No. 4,361.

Where no exceptions are taken to an answer which is not as full and explicit and distinct as required by rule 27, the reading of testimony cannot be objected to on the ground of its insufficiency.—The Rocket, Case No. 11,975.

An exception that a libel does not state facts sufficient to constitute a cause of suit or forfeiture is too general; it should state in what

particular the facts are insufficient.—The Active, Case No. 33.

Exceptions, dilatory or declinatory, should be interposed on the return day of process, or at the day appointed for answering the libel.—Furniss v. The Magoun. Case No. 5,163.

Exceptions in an answer to a libel will be deemed waived if not determined before proof taken at the trial.—Aumach v. The Queen of the South, Case No. 657a.

Exceptions to a pleading in admiralty have the effect of a demurrer, and also that of a motion to make the pleading more definite and certain.—Quinn v. The Transport, Case No. 11,516.

A demurrer does not prevent the party demurring from controverting the facts confessed, and compelling the other party to prove them.—Crawford v. The William Penn, Case No. 3,373.

In a libel on a bottomry bond, a demurrer to the replication alleging that the libeled vessel was employed as a cartel, and sailed under the protection of a flag of truce, is not such an admission as to prevent respondent from afterwards controverting it.—Crawford v. The William Penn, Case No. 3,373.

The objection of staleness of claim, or any other defense that does not go to the merits, must be propounded by special plea.—The Platina, Case No. 11,210.

In a libel on a bottomry bond, the overruling of a plea alleging the disability of libelants to sue, on the ground that at the time the suit was brought and the plea was filed they were alien enemies, does not prevent respondents from pleading in bar that, at the time the contract was entered into, libelants were alien enemies, and for that reason the contract was void.—Crawford v. The William Penn, Case No. 3,373.

§ 85. Amendments.

The district courts have an undoubted power, in the exercise of a sound judicial discretion, to permit a libel to be amended.—United States v. Distilled Spirits, Case No. 15,943.

The libel may be amended while the proceedings are in fieri and before judgment. (Judiciary Act 1789, § 32.)—Comings v. The Ida Stockdale, Case No. 3,052.

The court will permit amendment instanter in respect to defects of form first objected to at the hearing.—Nevitt v. Clarke, Case No. 10,138.

In the absence of written rules of practice, amendments in matters of substance are within the sound discretion of the court, and are allowable until final decree.—Lamb v. Parkman, Case No. 8,019; Nevitt v. Clarke, Id. 10,138.

Amendments to libels for forfeitures in admiralty, in substance or in form, are within the discretion of the court at any time before final decree.—The Meteor, Case No. 9,498.

An amendment of an information in rem will not be disallowed merely because it may affect the rights of sureties.—The Harmony, Case No. 6,081.

Though a libel for possession of a vessel should state the extent of libelant's interest, and that he was owner at the time of filing the libel, where the defect in that particular arises from accidental omission the court will allow an amendment.—Bradshaw v. The Sylph, Case No. 1,791.

A libel may be amended on motion by striking out unnecessary and impertinent allegations.—American Ins. Co. v. Johnson, Case No. 303.

Libelant may amend his libel in any of the points excepted to by the claimant. (Rule 24.)—Town v. The Western Metropolis, Case No. 14,114.

If an application to amend a libel proposes to introduce a new cause of action, it is usual to allow the amendment when the new cause of action corresponds in character and is kindred in nature to that presented in the original libel; but if the amendment introduces a new substantive cause of action and a new charge against the defendant, it is disallowed.—United States v. Distilled Spirits, Case No. 15,943.

The court will not allow a defendant to recast his entire answer, if he has discovered from the opinion of the district court how it may successfully be done, so as to shift the burden of proof, or obtain by successful pleading other legal advantages.—Lamb v. Parkman, Case No. 8,019.

A person who defends a suit in a certain right, and sets up an agreement consistent only therewith, which he stands by at the trial, will not be allowed, after he has failed in such contention, to set up a claim in a different right, and support the same by proof.—McCarthy v. Eggers, Case No. 8,681.

After alleging ownership and setting up a charter made as owners, respondents cannot, on failure to prove the charter, amend so as to show that they were mortgagees out of possession.—McCarthy v. Eggers, Case No. 8,681.

A claimant in admiralty will not be allowed, after the hearing has been had on claim and answer, establishing that he had no interest in the res at the time when the claim and answer were filed, to amend by showing that he was formerly the owner, and sold with a covenant to discharge all liens.—The Prindiville, Case No. 11,435.

An answer cannot be amended, so as to contradict a material admission, after the cause has been heard.—The Mary C., Case No. 9,201.

A joint libel against three vessels cannot be amended by substituting the name of the owner of one vessel so as to change it from a libel in rem to one in personam.—The Young America, Case No. 18,178.

The court has no power to permit a libel to be amended by striking out the name of a sole libelant, and substituting another in its place.—The Detroit, Case No. 3,832.

An information against a vessel for smuggling may be amended so as to change the allegations as to the ownership of the vessel.—United States v. The Queen, Case No. 16,107.

The court will permit an amendment seeking to withdraw an admission of a matter of fact, upon the ground that it was made because the respondent mistook the law, with great caution, and only under extraordinary circumstances, if ever.—Lamb v. Parkman, Case No. 8,019.

The answer, in an action on a bill of lading, which fails to allege that the damages claimed accrued from the sweating of the vessel, is amendable.—McCullough v. The Echo, Case No. 8,740a.

In an action of tort an amendment may be allowed increasing the damages demanded.—McCready v. The Brother Jonathan, Case No. 8,732a.

A possessory libel cannot be amended so as to proceed for damages in personam.—Kynoch v. The S. C. Ives, Case No. 7,958.

The libel in a proceeding to obtain the benefit of the limitation of liability will be amend-

ed so as to show the residence of the libelant.—The John Bramall, Case No. 7,334.

An amendment by inserting a new substantive offense will be disallowed where the statute of limitations has run against it.—The Harmony, Case No. 6,081.

A decree cannot be rendered upon proofs as to matter not embraced within the allegations, but the pleadings should be amended to embrace the merits.—Davis v. Leslie, Case No. 3,639.

Amendment of answer not allowed to make it correspond with the proofs, where the allegations were deliberately made, under a full knowledge of the grounds relied on by libelant.—The Iola, Case No. 7,057.

Where, in a collision case, the pleadings of both parties were defective, the court allowed proper pleadings after the case was closed on the proofs.—Star v. The White Cloud, Case No. 13,306.

Permission to amend a libel to enforce a general admiralty lien for supplies, so as to claim a lien under the local statutes, granted on condition that libelant's lien should be postponed to that of others.—Hudson Coal Co. v. The Minnie R. Childs, Case No. 6,836.

In a suit against a vessel and her master jointly to recover a penalty for importing goods not included in the manifest, it is proper to dismiss the suit as to the master, on the ground that he is entitled to a trial by jury and to proceed with it as against the vessel.—United States v. The Queen, Case No. 16,108.

Where the amendment consists in the denial of a fact previously admitted, or in the allegation of new facts amounting to a new defense, not originally exhibited, the court will require the grounds for the amendment, and the reasons why it has become necessary, and why its necessity was not earlier known, to be shown by affidavit.—Lamb v. Parkman, Case No. 8,019.

The court will require that each of the proposed changes in an answer should be exhibited separately, with apt references to the original answer, so that it can be seen how the original answer will be affected by each, and so that each, when allowed, can be incorporated into the original answer when taken into a new draft as an amended answer.—Lamb v. Parkman, Case No. 8,019.

A writing should be filed containing the matter of amendment as a distinct proceeding in the case, but such writing may extend to a new draft of the libel. (Adm. Rule No. 24.)—Comings v. The Ida Stockdale, Case No. 3,052.

On dismissal of a libel with leave to amend, it is improper to file a new libel setting out a valid cause of action, by adding a second cause, which was substantially a repetition of the libel which had been dismissed.—The Circassian, Case No. 2,723.

Where a decree for libelant in a collision case was reversed by the supreme court, which held both vessels to be in fault, claimant, who had failed to allege in his answer that he had sustained any damages by the collision, was allowed to amend his answer in that respect.—The Pennsylvania, Case No. 10,951.

§ 86. Supplemental pleadings.

Where libelant relies on new matter in avoidance, he should file a supplemental libel, which respondent should answer.—Taber v. Jenny, Case No. 13,720.

A supplemental libel, filed before the process is returnable, becomes part of the pleadings, without further notice to respondent, and he is bound to answer it.—Thomas v. Gray, Case No. 13,898.

A supplemental libel in replication is not necessary where the libelant intends merely to deny the truth of the allegations in the answer. Otherwise where it is sought to avoid them by new facts.—Gladding v. Constant, Case No. 5,468.

A supplementary libel alleging new matter and an answer may be filed after appeal, in the discretion of the court.—The Boston, Case No. 1,673.

Libelants were permitted to amend and file a supplemental bill for extra compensation as pilots, where their services were *held* not to constitute a claim for salvage.—Dexter v. The Richmond, Case No. 3,865.

§ 87. Signature and verification.

Admiralty requires a sworn libel as the foundation of process of arrest of person or property.—Martin v. Walker, Case No. 9,170.

The answer to a libel in personam should be sworn to, but the libelant is not bound to swear to the libel.—Coffin v. Jenkins, Case No. 2,948.

Libelant must verify the debt or cause of action on which his libel is founded by his oath.—Hutson v. Jordan, Case No. 6,959.

The respondent is required to verify his answer by oath.—Hutson v. Jordan, Case No. 6,959.

Libels in rem in civil causes in Indiana need not be supported by the affidavit of the libelant.—The J. R. Hoyle, Case No. 7,557.

In causes on the instance side, the answer of the claimant should be verified by oath.—Gammell v. Skinner, Case No. 5,210.

One verifying a libel as attorney in fact need not show his authority at the time. It is enough to show it when called in question.—Martin v. Walker, Case No. 9,170.

A mere general employment as proctor to prosecute an admiralty suit does not authorize the verification of a libel as attorney in fact.—Martin v. Walker, Case No. 9,170.

It may be shown, in opposition to a motion to set aside all proceedings for want of verification of the libel, that the oath was in fact regularly and duly administered, though the clerk's name was not subscribed.—Nelson v. Bell, Case No. 10,101a.

The absence of the notarial seal from the jurat of a verification of a libel in admiralty is, at most, but an irregularity, not available, after decree, in a collateral proceeding.—The E. W. Gorgas, Case No. 4,585.

§ 88. Filing and service.

Where respondent has been arrested in a suit in personam, the answer is not filed, within the meaning of the eighteenth rule, until bail is perfected.—Thomas v. Gray, Case No. 13,898.

Service of a cross libel, for damages under an independent stipulation, upon the proctor of the original libelant, who is out of the jurisdiction, is ineffectual.—Nichols v. Tremlett, Case No. 10,247.

§ 89. Issues, proof, and variance.

Allegations in a libel, neither admitted nor denied by the claimant, are not to be taken as true, but must be proved.—Clarke v. The Dodge Healy, Case No. 2,849.

Allegations in pleadings are admissions by the pleader, and need no proof unless denied and put in issue, and, as against the pleader, will be taken as matter conceded.—Ward v. The Fashion, Case No. 17,154.

Admission by answer of execution of agreement particularly set out in libel admits contents.—The Aldebaran, Case No. 150.

An allegation in the answer that all the parties are foreigners, and the ship is foreign property, must be proved by the respondent or claimant.—The Napoleon, Case No. 10,015.

In cases of tort, if the injury complained of is admitted by the answer, the burden of proof is cast upon the defense to show affirmatively the matters of justification or defense set up.—The Rhode Island, Case No. 11,745.

The court will not permit respondent to require formal proof of written documents, the authenticity of which was admitted by the original answer, without an affidavit denying the signatures, and explaining satisfactorily his former admission, nor permit respondent to require the production of original papers, copies whereof were admitted by the original answer to "be correct," without showing that such originals are under the control of libelant, and can be produced without delay, and that the production thereof is material.—Lamb v. Parkman, Case No. 8,019.

Where, in the case of a joint tort, separate answers are put in, each respondent must rely for his defense upon his own answer and the proofs.—Gardner v. Bibbins, Case No. 5,222.

No evidence is properly admissible but what applies to matters in issue between the parties, and nothing is in issue but what is averred on one side and denied by the other.—The William Harris, Case No. 17,695.

No evidence is admissible, except it be appropriate to some of the allegations in the libel or answer.—The Boston, Case No. 1,673; Davis v. Leslie, Id. 3,639; The Rhode Island, Id. 11,745; The Morton, Id. 9,864; Turner v. The Black Warrior, Id. 14,253; Campbell v. The Uncle Sam, Id. 2,372. But see The Cambridge, Case No. 2,334.

Allegations not sustained by proof will be rejected.—The Sarah Ann, Case No. 12,342; Kramme v. The New England, Id. 7,930.

The proctor of the libelant, having given notice to the respondent that he should ask only for a decree for costs, cannot at the hearing proceed for damages.—Angell v. Bennett, Case No. 387.

Evidence of special damage may be given under a general allegation.—West v. The Uncle Sam, Case No. 17,427.

Where the libel for damage to cargo alleges that the same was caused by certain specific faults, no others can be set up at the trial.—Soule v. Rodocanachi, Case No. 13,178.

A libel in personam brought solely for an accounting by one of four part owners against only two others (all claiming by an equitable title) cannot be maintained as a suit for wages, though the libelant rendered services on board the vessel as ship's carpenter.—Kellum v. Emerson, Case No. 7,669.

There is no technical rule of variance in admiralty causes.—The Cambridge, Case No. 2,334; The Clement, Id. 2,879; West v. Silver Wire & Skirt Mfg. Co., Id. 17,425; Same v. The Uncle Sam, Id. 17,427.

A variance in pleading is immaterial if the opposite party is not surprised.—Crawford v. The William Penn, Case No. 3,373.

A charter party under seal, made out in the name of a person who acted merely as agent for another, without stating that fact, is admissible in evidence on a libel for breach of contract brought by the principal.—Talbot v. Wakeman, Case No. 13,731; Id. 13,731a.

A party who sets up an admiralty lien which fails cannot set up and rely upon a common-law or statutory lien. Case No. 13,788 reversed.—Taylor v. Commonwealth, Case No. 13,787.

When a libel is filed claiming a forfeiture of a vessel, and the facts do not authorize the forfeiture alleged, but show an offense against other provisions of the same law under which the forfeiture is alleged to have accrued, the libel will be dismissed.—United States v. The Hunter, Case No. 15,428.

A libel on a bottomry bond claimed the freight as hypothecated contrary to the tenor of the bond. The bond, made part of the libel and referred to as the foundation of the hypothecation, showed that the freight was not hypothecated, and could not be demanded. *Held*, that the variance was immaterial.—Crawford v. The William Penn, Case No. 3,373.

In order to entitle either party to the benefit of a variance, objection must be taken when the evidence is offered at the trial, and it comes too late if made after the evidence is closed and the cause is under argument. The evidence must be material.—The Kirkland, Case No. 4,181.

Variations between the contract sued on and the pleadings and proofs, although sufficient in law to defeat the action, will not be so regarded in admiralty, in a case where substantial justice can be done.—Talbot v. Wakeman, Case No. 13,731a.

Objections for variance will not be allowed after the evidence is closed and the argument for the defense begun.—Dunstan v. The R. R. Kirkland, Case No. 4,181.

§ 90. Defects and objections.

A court of admiralty is not restrained from doing substantial justice by mere forms or technicalities.—Dexter v. Munroe, Case No. 3,863.

A claimant, who fails to put his objections upon the record, will be deemed to have waived them by appearing and contesting the case upon the merits.—The Detroit, Case No. 3,832.

Objections to defects of form in a libel in admiralty should be raised by special exception under rule 24. If the exceptions in an answer are not insisted upon at the opening of the trial, they will be considered as waived.—White v. The Cynthia, Case No. 17,546a.

On a libel for the nondelivery of goods the want of averment of ownership in the libelant is waived where the point is not raised in any way in the answer.—The Ville De Paris, Case No. 16,942.

Impertinent and irrelevant allegations in an answer will be stricken out on motion.—The Gustavia, Case No. 5,876.

§ 91. Petitions and proceedings thereon.

The court will not, upon a summary application of a claimant, inquire into damages caused him by an unfounded arrest of his ship.—The Oriole, Case No. 10,573.

Nor will it assume power to coerce parties into issues not raised in the pleadings filed in the cause.—The Oriole, Case No. 10,573.

§ 92. Motions and proceedings thereon.

A question of jurisdiction should not be disposed of on motion, but on hearing.—Cushing v. Laird, Case No. 3,508.

Property will not be discharged from the custody of the court on motion supported by affidavits, on the ground that it is the property of the United States. This question should be raised by claim and answer.—The Othello, Case No. 2,483.

Whether custody of a vessel by a sheriff under a writ alleged to be void is such as to prevent a court of admiralty from acquiring jurisdiction should not be determined on motion.—The Circassian, Case No. 2,721.

A prior decree on the same cause of action, as a defense in an admiralty cause in favor of the party for whom it was rendered, should be given in evidence, and not set up by summary motion to prevent further hearing or to try the

fact upon affidavits.—Reed v. The Fanny, Case No. 11,645a.

Questions as to the validity of bottomry claims will not be entertained on motion and notice.—French v. The Superb, Case No. 5,103a.

Where a paper has been intrusted to libelant for the benefit of both parties, the court, on motion, will order its production before answer. But a letter addressed to libelant, forming part of a contract, is not such a paper.—The Voyageur De La Mer, Case No. 17,025.

A motion to set aside an arrest for irregularity in libelant's proceedings will not be denied of course merely because not made at the earliest practicable day.—Martin v. Walker, Case No. 9,170.

Affidavits on motions incidental to a suit, when the facts cannot be supposed to be peculiarly within the knowledge of a party, may be made by his attorneys and proctors.—The Harriet, Case No. 6,096.

The strict rules of the common law are not applicable to admiralty practice. The proctor is, in many cases, in point of fact, dominus litis, clothed with all the authority of the party himself.—The Harriet, Case No. 6,096.

Without regard to that distinction, courts proceeding according to the civil law admit proctors to exercise all the functions of attorneys at law.—The Harriet, Case No. 6,096.

A motion to discharge respondent from arrest on the ground that the libelant has no legal cause of action against him will not be granted where the affidavits read upon the motion in behalf of the respective parties are contradictory as to the merits of the cause.—Wicks v. Ellis, Case No. 17,614.

Where admiralty records have been loosely kept, depositions may be read to prove that a certain order was made in the cause.—Jones v. Walker, Case No. 7,506.

V. EVIDENCE, AND TAKING AND FILING PROOFS.

§ 93. Rules of evidence and mode of proof in general.

The admiralty courts are not bound by the rules of evidence applied in common-law courts, and they may take notice of matters not strictly proved.—The J. F. Spencer, Case No. 7,315.

A court of admiralty, being judge both of the law and fact, is not confined to the strict rules of the common law, in respect to the admission of evidence.—Elwell v. Martin, Case No. 4,425.

The state laws of evidence are not applied in admiralty, and interested witnesses are not excluded except in certain cases of necessity.—The Independence, Case No. 7,014.

State statutes admitting parties as witnesses do not apply in admiralty.—The Australia, Case No. 667; The William Jarvis, Id. 17,697.

Where respondent's counsel does not object to the examination of the libelants themselves as witnesses, the court will receive their evidence.—Ferrara v. The Talent, Case No. 4,745.

Testimony given viva voce in open court should be taken down by way of narrative, and not by way of questions and answers.—The Syracuse, Case No. 13,718.

Upon the question of the bona fides of the purchaser of a vessel from one who, as mortgagor, was permitted to retain possession thereof, the court will determine the facts upon the principles which govern trials by jury.—The Romp, Case No. 12,030.

A proceeding in rem is not within the statute of 1789, which authorizes an order to produce books and writings on the trial of actions at law.—United States v. Twenty-Eight Packages of Pins, Case No. 16,561.

The testimony of the libelants themselves in an action in rem, the one for the other, although legally admissible, ought to be narrowly scrutinized, and received with caution.—Graham v. Hoskins, Case No. 5,669.

The testimony of a ship's crew, being joint libelants, each swearing for the other, will be received with great caution. The court will be more inclined to credit the master of the vessel, when the evidence between them is contradictory, and he has no interest in the action.—The Swallow, Case No. 13,665.

When there is an irreconcilable conflict in the testimony of witnesses, and circumstances of suspicion attach to the credit of them on both sides, the balance of evidence will be regarded as in favor of the party having the greatest number.—The Napoleon, Case No. 10,015.

A copy of a survey of a vessel, not purporting to have been made by any one connected with her, is not admissible against her, no witness able to prove or disprove its correctness being called or shown to be within reach.—The Vivid, Case No. 16,978.

Copies of documents relating to the condemnation and sale of a vessel were certified by the British consul to be copies of official documents on file in his office, and had been proved by deposition a considerable time before the trial, so that the parties were not taken by surprise. *Held*, that they were admissible in evidence.—The J. F. Spencer, Case No. 7,315.

Shipping articles, being the proper and usual documents of the ship for the voyage, are in the admiralty always admitted as evidence of the terms of hire, even of the master, or his apprentice, but the evidence is not conclusive.—Willard v. Dorr, Case No. 17,680.

A foreign master, who understands and speaks English imperfectly, will not be charged upon his declarations or admissions in that language, without clear proof that he well understood the meaning of what was addressed to him and that used by him in reply.—The Lotty, Case No. 8,524.

Papers which had been proved by deposition a considerable time before the trial *held* admissible in the admiralty without strict proof.—The J. F. Spencer, Case No. 7,315.

§ 94. Pleadings as evidence.

The allegations of one of the parties in a libel are not evidence for him unless called for by the other side, and are then to be weighed as they deserve, without requiring, in all cases, more than one witness to overcome them.—Jay v. Almy, Case No. 7,236.

Neither party can contradict by proof the averments set forth in his pleading, and the opposite party is entitled to rely thereon as an admission of facts.—Totten v. The Pluto, Case No. 14,106.

The answer to the libel, though on oath, is not evidence; but a party may be examined on interrogatories on the demand of the adverse party, and the answers are evidence in the case.—The Australia, Case No. 667.

The rule in equity requiring two witnesses, or one witness and strong corroborative circumstances, to overcome the denial in the answer, does not obtain in admiralty.—Sherwood v. Hall, Case No. 12,777; United States v. The Matilda, Id. 15,741; Hutson v. Jordan, Id. 6,959; Eads v. The H. D. Bacon, Id. 4,232.

How far the sworn answer of the respondent may be referred to, as in the nature of suppletory proof, or in aid of presumptions raised by other proofs in the cause.—The Crusader, Case No. 3,456; Hutson v. Jordan, Case No. 6,959.

A claim to a vessel and cargo filed in an admiralty cause, though sworn to, is not evi-

dence.—The Thomas and Henry, Case No. 13,919.

§ 95. Answers to interrogatories.

Answers under oath to special interrogatories are evidence in the cause, as well in favor of, as against, the party answering.—The David Pratt, Case No. 3,597.

Respondent's answer upon oath in reply to interrogatories does not, in admiralty, constitute positive evidence in his own favor.—Cushman v. Ryan, Case No. 3,515.

Answers to special interrogatories are not conclusive, and will not control when opposed to the weight of the other proof or open to suspicion.—The L. B. Goldsmith, Case No. 8,152.

Answers to interrogatories addressed to garnishees holding the proceeds of a vessel, in a libel for a tort committed by such vessel, *held* not evidence in their favor on a libel by another to recover such funds as owner.—Cushing v. Laird, Case No. 3,509.

§ 96. Depositions.

The oral cross-examination of witnesses on a commission abroad may be allowed as a condition of waiving objection of irregularity in the motion for the commission.—The Louisiana, Case No. 8,536.

A deposition, entitled in the district court, but not received by the clerk until after the trial there, and not sent up as a part of the record of that court, cannot be read on appeal.—The Buckeye State, Case No. 2,085.

The depositions of witnesses for claimant will not be suppressed because taken before answer, where prejudice to libelant does not appear.—The Pride of The Ocean, Case No. 11,419.

Where an application was made for a commission to examine a witness in the East Indies, it appearing that no one was known who could be named as commissioner, except the wife of the witness, she was named as commissioner.—The Norway, Case No. 10,356.

Evidence taken must be in writing—The Boston, Case No. 1,673.

In a suit for collision by the master of a vessel in behalf of the cargo owners, libelant cannot read in evidence a deposition taken in behalf of the owners of the vessel in a suit by them for the same collision.—The John H. Starin, Case No. 7,351.

When a witness is examined de bene esse out of court in an admiralty cause by the claimants, and is cross-examined by the libelant, who reads the cross-examination in support of his action, he cannot then except to the competency of the witness because interested in the cause, and exclude his testimony given in chief for the claimants.—The Osceola, Case No. 10,602.

Notwithstanding an order of court closing all testimony in a cause after a limited time under a commission, the court will enlarge it upon proof of newly-discovered evidence which the party could not procure to be taken under such commission, the same having come to his knowledge after the execution thereof.—The Ruby, Case No. 12,103.

VI. HEARING OR TRIAL, AND REHEARING.

§ 97. Course and conduct of hearing.

Libels or petitions against a vessel are heard by a court of admiralty in any order in which they are brought up.—The Fanny, Case No. 4,638.

A suit in admiralty will not be dismissed for neglect to prosecute, where it was placed on the calendar and noticed immediately after issue joined, but was not called for trial, by reason of the accidental absence of witnesses.—Chambers v. The Henry Kneeland, Case No. 2,581a.

A libel was dismissed for delay in prosecuting the same, where libelant refused the option of going to trial on the libel and answer and the replication filed on the day appointed for the special hearing.—Douglass v. The Washington, Case No. 4,033.

In a suit to enforce a bottomry bond executed in a distant foreign country, though an attested copy thereof is not admissible in evidence, yet, being produced, the court will grant a continuance, that the original may be procured.—The Jerusalem, Case No. 7,293.

Time given to permit production of evidence of payment of money to a third person at seaman's request alleged by way of set-off to his claim for wages.—Ingraham v. Albee, Case No. 7,044.

Before the defendant can be heard in his defense, or introduce evidence in the cause, he must appear and contest the suit, either by exceptions to the libel or by answering it. If he does neither, the court will hear and adjudge the cause ex parte, upon the evidence offered by the libelant.—The David Pratt, Case No. 3,597.

Objections to an action merely formal in their character cannot be taken on final hearing.—Furniss v. The Magoun, Case No. 5,163.

A statement by the advocate of the party, in open court, the day after the hearing, made by authority of the party, may be taken as an admission in contradiction of the evidence submitted by him.—The Harry, Case No. 6,147.

If libelant's proctor negotiates the postponement of the trial, he cannot thereafter allege ignorance of the fact that the answer was on file.—Warner v. The Ralph Post, Case No. 17,187.

§ 98. Trial by jury.

There is no right in admiralty to a trial by jury unless given by statute.—Gillet v. Pierce, Case No. 5,437.

By the Revised Statutes (section 566), however, the law is changed, and the right to a trial by jury is expressly given in the class of cases specified in Act 1845.—Gillet v. Pierce, Case No. 5,437.

The party demanding a jury must bring himself by his pleadings within the provisions of the act.—Gillet v. Pierce, Case No. 5,437.

An information in rem against the thing itself, in a case of admiralty and maritime jurisdiction, is not a suit at common law, but an admiralty proceeding, and does not require a trial by a jury.—Clark v. United States, Case No. 2,837.

§ 99. Decision.

The federal courts are governed, in commercial and maritime cases, by the general, and not by the local, law.—Mutual Safety Ins. Co. v. The George, Case No. 9,981.

Where a reciprocity of decision in certain cases in admiralty is necessary, the court of one country is often guided by the customs, laws, and decisions of the tribunals of another in similar cases.—Thompson v. The Catharina, Case No. 13,949.

Our courts of admiralty are not bound by the decision of a foreign court, not of admiralty, based on different principles than those here recognized, and leading to a different result, though professedly deciding according to our law.—Lang v. Holbrook, Case No. 8,057.

An action in a federal court for an assault and battery on a vessel anchored within the limits of a county in Alabama is governed by the maritime law of the United States giving the master the right to inflict reasonable chastise-

ment, and not by the law of Alabama, which prohibits a master from inflicting chastisement on his servant, as the general maritime law was adopted by the constitution of the United States, and no state can have a separate and distinct maritime law by itself.—Roberts v. Skolfield, Case No. 11,917.

The case of a French seaman for wages on a French vessel will be determined by the marine law of France.—Moran v. Baudin, Case No. 9,785.

Municipal ordinances concerning vessels are binding only as police regulations. Beyond that they have no force in the admiralty courts. But they may be read, and the court will determine for itself their application to the subject-matter. —The Palmetto, Case No. 10,699.

Admiralty causes are to be determined upon equitable principles, and according to the rules of natural justice.—Brown v. Burrows, Case No. 1,995.

Courts of admiralty, so far as their powers extend, act as courts of equity.—Brown v. Lull, Case No. 2,018.

On a libel by the mortgagee of a vessel which was left in possession of the owner, admiralty will determine the bona fides of the sale of the vessel by the owner to a third person upon the principles which govern trials by jury.—The Romp, Case No. 12,030.

In an action in rem against a vessel the court cannot take cognizance of collateral equities to enforce them against persons not made parties to the proceedings, where such decree may be prejudicial to their interests.—The Leonidas, Case No. 8,262.

In a case of seizure for violation of the steamboat inspection law, the court, in case of default, will exercise a discretion, according to Rev. St. § 923, whether to require proofs or not.—United States v. The Mollie, Case No. 15,795.

On a libel of forfeiture (Act 1813, § 6) for violation of the law relating to fishing bounties, in cases of default there must be some hearing before decree of forfeiture.—United States v. The Lion, Case No. 15,607.

This may be by merely examining the libel and the return of the marshal, with evidence that the owners had actual notice, and willfully made default, with knowledge of the material facts.— United States v. The Lion, Case No. 15,607.

Where, on a libel for wages, no one appears for the vessel, the amount claimed must be legally ascertained before the vessel will be sold.— Sanders v. The Sea Fowl, Case No. 12,296a.

Interest is allowed on liquidated demands in admiralty the same as at law, and on seamen's wages from the time they are due.—The Swallow, Case No. 13,665.

In a suit upon stale claims, not resting upon express contract, the court, in rendering a decree for libelant, may refuse interest.—Mitchell v. Kelsey, Case No. 9,664.

On an information of forfeiture under the registration laws, where the jury render a special verdict, the court cannot decide a question of law depending upon facts not found.—Peterson v. United States, Case No. 11,036.

Where the amount involved in an admiralty suit is not sufficient to permit a review by the supreme court of the judgment of the circuit court, a general finding of facts and law by the latter court is sufficient, under Act Feb. 16, 1875.—One Thousand Two Hundred and Sixty-Five Vitrified Pipes, Case No. 10,536.

The decree in admiralty must correspond with the issues in the pleadings, and the opinion of the court on collateral matters should not be incorporated therein.—Ward v. The Fashion, Cases Nos. 17,154, 17,155.

Where a point is reserved for further argument and consideration after a trial and decree in the case, it must be upon the pleadings and proofs as they stood on the original hearing. —Abbey v. The Robert L. Stevens, Case No. 8.

Where a court has jurisdiction of the res in a proceeding in rem, the record of its decree cannot be collaterally attacked for errors and irregularities appearing therein.—Otis v. The Rio Grande, Case No. 10,613.

In a libel on a bottomry bond, the overruling of a plea alleging the disability of libelants to sue, on the ground that at the time the suit was brought and the plea was filed they were alien enemies, does not prevent respondents from pleading in bar that at the time the contract was entered into libelants were alien enemies, and for that reason the contract was void.—Crawford v. The William Penn, Case No. 3,373.

In a joint libel against two or more persons for a marine tort, the court has authority to dismiss the libel as to one of them, even if there be some evidence against him, for the purpose of his being used as a witness, if the purposes of justice require it.—Elwell v. Martin, Case No. 4,425.

A libel in admiralty was dismissed pro forma for want of jurisdiction in order to allow an immediate appeal.—Swaim v. The Franklin, Case No. 13,660.

After pertinent evidence offered involving the merits, plaintiff cannot suffer a nonsuit, so as not to be barred, except by consent of the opposite party, or on leave given by the court for sufficient reason.—Folger v. The Robert G. Shaw, Case No. 4,899.

Where a husband, with the assent of his wife, filed a libel as owner for injury to a canal boat, wholly owned by her, and she gave material testimony at the trial, *held*, that she would be estopped from bringing another suit, and the libel could be maintained.—The Tillie, Case No. 14,049.

§ 100. Rehearing or new trial.

A motion will not lie to review a decree after writ of error lodged.—McGrath v. Candalero, Case No. 8,810.

Summary rehearings on motion are granted only during the term at which the decree was made. In defaulted actions this is limited to 10 days, irrespective of the term. (Rule 40.). —Snow v. Edwards, Case No. 13,145.

The court will not, on mere motion at a subsequent term, set aside a decree made at the hearing.—The Oriental, Case No. 10,569a.

A rehearing or review cannot be had after the end of the term at which a final decree was entered.—Sloman v. Wyssman, Case No. 12,955a; The New England, Case No. 10,151; The Martha, Case No. 9,144.

It is discretionary with the court to entertain, after a decree, a motion for a reargument on the question of costs.—Elliott v. The Leah H. Miller, Case No. 4,393a.

A new trial is not ordered in an admiralty suit, on the mere ground of oversight in not putting in evidence which might have been put in.—The Francis Wright, Case No. 5,044.

A rehearing in a collision case will not be allowed in the district court on the ground that since the trial libelant's witnesses testified differently in another suit, growing out of the same collision, as such evidence is admissible on appeal.—The John Cooker, Case No. 7,337.

The claimants of an informer's share after condemnation and sale of forfeited property may seek a review of a judgment or decree of distribution made by the district court.— Wheaton v. United States, Case No. 17,487.

After the term has passed in ordinary cases, and after 10 days in defaulted cases, the court can entertain a libel of review.—Snow v. Edwards, Case No. 13,145; Janvrin v. Smith, Case No. 7,220.

A petition for review, filed after the term at which the decree was rendered, and after it had been executed, will be entertained by the court, when actual fraud is charged, and the libelant is without fault, and would otherwise be without remedy.—Northwestern Car Co. v. Hopkins, Case No. 10,334.

A rehearing in the circuit court after the lapse of several terms since the decree was entered in a collision case will not be granted where the supreme court, in a libel by the other party, found the facts differently.—Petty v. Merrill, Case No. 11,051.

In a libel for review by defendant in a defaulted action, he can contradict the officer's return in the action.—Snow v. Edwards, Case No. 13,145.

VII. COMMISSIONERS AND PROCEEDINGS BEFORE THEM.

§ 101. Reference to commissioners.

A court of admiralty, on its own motion or at the instance of the parties, may submit any question of fact to commissioners or referees for their opinion and advice.—Lee v. Thompson, Case No. 8,202.

Where it appears on the hearing in court that the main question is one as to an account, the court may properly refer the case to a commissioner.—Shaw v. Collyer, Case No. 12,718.

The court will order a referee to ascertain and report the actual constituents of a bottomry lien, the validity of which is contested.—Furniss v. The Magoun, Case No. 5,163.

Where the rights of parties depend upon questions of nautical skill or seamanship in the management of a vessel, the court may refer the subject to persons skilled in navigation, and act upon their report thereon.—The Emily, Case No. 4,453.

The legality or propriety of an order of reference cannot be impeached upon exception to the report.—The Rhode Island, Case No. 11,740a.

§ 102. Proceedings before commissioners.

Under an order of reference to ascertain the amount, if any, due libelant, entered by consent, after defendant's default, defendant can only contest libelant's claim.—Mitchell v. Kelsey, Case No. 9,663.

Commissioners appointed to state damages should not hear ex parte evidence without notice to the other party.—The Lively, Case No. 8,403.

A neglect at the trial to object to the competency of evidence waives the right to object to the same evidence on a subsequent reference to the clerk.—The Trial, Case No. 14,170.

Application to the court in the case of improper or irregular proceedings by a commissioner, or to control the proceedings before him, can only be had on a certificate as to his proceedings.—The E. C. Scranton, Case No. 4,271; Id. 4,272.

§ 103. Report.

The clerk's report in matters referred to him should state facts and conclusions, and not detail the evidence at length.—The Trial, Case No. 14,170.

A report of a commissioner as to the amount of libelant's claim is not objectionable, in omitting a detail of the allowances, unless defendant has demanded a specification.—Mitchell v. Kelsey, Case No. 9,663.

An award, made under a rule directing the referee to determine the amount due and the question of costs, is sufficiently certain if it state the amount due, and that libelant is entitled to costs, without stating the amount of the costs.—The Liverpool Packet, Case No. 8,407.

The decision of commissioners or referees to whom a question of fact is submitted, unlike the verdict of a jury, is not conclusive thereon.—Lee v. Thompson, Case No. 8,202.

Commissioners appointed to award a full indemnity for certain losses will be presumed to have fulfilled their duty, and the compensation allowed by them will be presumed to be a full indemnity for a loss.—Brown v. Lull, Case No. 2,018.

Where the report of the commissioner was not excepted to, it is not necessary that the minutes of his testimony should be brought up.—The City of Paris, Case No. 2,767.

§ 104. Objections and exceptions.

An objection to a clerk's report on a reference to ascertain the amount of damages cannot be taken by argument, but must be by formal exception.—Howe v. The Lexington, Case No. 6,767b.

Findings of a commissioner on the merits, when his authority is limited by the order of reference to matters of fact and evidence, cannot be brought up by exceptions to his report. The remedy is a motion to reject the report or for a rehearing on the merits.—The New Jersey, Case No. 10,162.

Objections to the admission of evidence before a commissioner cannot be raised by exception to his report.—The Transit, Case No. 14,138; The Emilie, Case No. 4,451.

Objections to rulings of commissioner on admission of evidence, on reference to ascertain damages, may be brought up on exceptions after report made, or on certificate pending reference.—The Beaver, Case No. 1,200.

Objections to the exclusion of evidence cannot be raised by an exception to the report, but must be raised by an application to the court before the report is made.—The E. C. Scranton, Case No. 4,272.

The credibility and reliability of the witnesses on the reference cannot be investigated on exceptions to the report unless the objections rest wholly on questions of law.—Burton v. The Commander in Chief, Case No. 2,215.

The decree cannot be attacked by exceptions to the commissioner's report thereunder.—Waterman v. Morgan, Case No. 17,259; Burton v. The Commander in Chief, Id. 2,215.

A party cannot, by exceptions to the report of a commissioner to compute damages, raise a question on the merits which was previously decided by the court.—Hovey v. The Sarah E. Brown, Case No. 6,744.

An objection to the regularity of a commissioner's report cannot be brought forward by exception to the report, but should be raised by motion founded upon the irregularity.—The Columbus, Case No. 3,041.

An exception to a commissioner's report draws in question only the reasons upon which the report is founded.—The Columbus, Case No. 3,041.

The court will not hear questions arising on a reference to a commissioner to compute damages at the instance of the parties, unless they have submitted them to the commissioner, and he has decided them, or declined to do so.—The E. C. Scranton, Case No. 4,271.

An exception to the method adopted by a commissioner in ascertaining damages is unavailing, unless the report or the exception show what the method was.—The Transit, Case No. 14,138.

§ 105. Confirmation or recommittal of report.

The conclusion of the commissioner upon a disputed fact will be accepted by the court, unless there is a palpable preponderance of evidence against it.—Holmes v. Dodge, Case No. 6,637; The Narragansett, Id. 10,020.

The decision of experts to which a cause is referred will be adopted by the court unless there is a manifest preponderance of testimony against it.—The Isaac Newton, Case No. 7,090.

The assessor's report of the damages sustained in an action for the wrongful conversion of a whale will not be disturbed unless it be shown to be wrong.—Taber v. Jenny, Case No. 13,720.

An award will not be recommitted because libelant's counsel omitted to call the attention of the referee to a matter which might have influenced him to increase the amount of salvage.—The Liverpool Packet, Case No. 8,407.

VIII. DECREE AND ENFORCEMENT OR VACATING THEREOF, SALE OF PROPERTY AND DISPOSITION OF PROCEEDS.

§ 106. Rendition, form, and requisites.

All decrees in admiralty are deemed to be enrolled as of the term in which they are made.—The New England, Case No. 10,151.

In a suit in personam, defendants not being within the district, and not appearing, the decree will go only against the property attached, and a sale ordered where it consists only of specific articles.—Boyd v. Urquhart, Case No. 1,750.

Such sale will be only of the right of the debtor.—Boyd v. Urquhart, Case No. 1,750.

§ 107. Amendment, opening, or vacating.

The court has power to vary its decree.—Snow v. Edwards, Case No. 13,145.

After the lapse of the term in which a decree is rendered in a prize case, the authority of the court to revoke or alter it is extinct.—The Major Barbour, Case No. 8,984.

A court of admiralty has no general power—at least, after expiration of the term—to set aside a final decree on the ground of oversight, inadvertence, or mistake.—The Illinois, Case No. 7,003.

A decree of the district court will not be opened, and an amended answer allowed to be filed, on the ground of the subsequent discovery of a prior decision of the circuit court in conflict therewith.—Thomassen v. Whitwell, Case No. 13,930.

A decree against a vessel will not be opened, and the sale under it set aside, where the shipowners, with full notice of the proceedings, did not make application until after they were all perfected.—Seaver v. The Carroni, Case No. 12,593.

A party seeking to set aside proceedings against him must embody all objections presumably known to him at the time in one application.—Nelson v. Bell, Case No. 10,101a.

The 10 days allowed by rule 40 for setting aside a decree are restrictive, and a motion made after such time cannot be entertained.—The Illinois, Case No. 7,003.

It is no impeachment of a decree of sale of a vessel that the claim on which the libel was brought was purchased pending the suit.—Seaver v. The Carroni, Case No. 12,593.

After a decision for libelants in rem for freight and demurrage, it cannot be objected that freight has been found due libelants in a pending suit in personam.—Brookman v. Sixty Barrels of Molasses, Case No. 1,941a.

A motion to open a decree in admiralty entered by default must be made within 10 days days after entry; otherwise it must be denied.—Northrop v. Gregory, Case No. 10,327.

The motion must be accompanied by the proposed answer or a statement of the ground of defense, to enable the court to judge of its merits.—Northrop v. Gregory, Case No. 10,327.

A default decree in favor of the master was opened where his lien was disputed and it did not clearly appear that the sum claimed was due.—The George Prescott, Case No. 5,339.

Default decrees in admiralty, founded upon valid claims, *held* should not be set aside.—The George Prescott, Case No. 5,339.

Where a seaman libeled a vessel, and obtained a decree by default, it will be set aside, where claimant shows that libelant had contracted personally with the master, who was navigating the vessel on a lay.—The Caroline Casey, Case No. 2,421a.

Where the proceeds on a sale under a default decree are not sufficient to pay the lien, the default will not be set aside on petition of one alleging an inferior lien.—The Grapeshot, Case No. 5,702.

The court may receive evidence offered by defendant's counsel, where defendant was absent at the time of hearing, and, through ignorance, failed to answer.—The David Pratt, Case No. 3,597.

§ 108. Execution in general.

A court of admiralty may execute the decree of another court of admiralty.—The Centurion, Case No. 2,554.

The federal admiralty courts will carry into effect the sentences and decrees of foreign admiralty courts.—Otis v. The Rio Grande, Case No. 10,613.

An admiralty decree is not a lien on land, and has never been treated as a lien on land in either England or this country.—Ward v. Chamberlain, Case No. 17,152.

Admiralty decrees can only be enforced in the federal courts in the mode and by the process properly ordained by acts of congress and rules of court for their execution.—Ward v. Chamberlain, Case No. 17,152.

An admiralty decree can only be enforced only by an attachment or a capias against the person of the defendant, or a fieri facias against his goods and chattels. The admiralty court has no power to issue an execution against his lands.—Ward v. Chamberlain, Case No. 17,152.

No notice need be given the opposite party of a final decree before proceedings to enforce it.—Gaines v. Travis, Case No. 5,180.

A final decree for payment of money in a suit in rem is enforced, as prescribed by rule 21, by execution.—The Blanche Page, Case No. 1,524.

Taking out a fieri facias in the first instance without success does not prevent resorting to process of capias ad satisfaciendum, or to an attachment under Rule 21, providing that on a decree for the payment of money libelant may have, at his election, an attachment to compel defendant to perform the decree, or an execution against the property, or, for want thereof, against his body.—The Delaware, Case No. 3,762.

A decree from which an appeal may be taken cannot be executed within 10 days after it

has been rendered; but the delay is for no other purpose than to favor the right of appeal, and the mere entry of the decree is notice to all parties.—Gaines v. Travis, Case No. 5,180.

Where, after a decree in admiralty against two vessels for damages which does not apportion the same or settle the equities between their claimants, it is shown that the claimants of one vessel and their sureties stand in the relation of sureties for the claimants of the other and their sureties, the court, on application of the former, will stay proceedings against them until after return of execution first issued against the latter.—The Helen R. Cooper, Case No. 6,335.

§ 109. Enforcement against property in court.

If the property attached in a suit in personam against defendants not being within the district be money in the registry, the decree will be satisfied therefrom.—Boyd v. Urquhart, Case No. 1,750.

Under Act Cong. March 2, 1799 (1 Stat. p. 696, § 90), the notice of sale, in cases of condemnation under the act, must be published every day for 15 days in the newspapers directed by the act.—The Hornet, Case No. 6,704.

Under Rules 47 and 48 of the district court, notice of sale under venditioni exponas (except on condemnation of property on seizure by the United States) must be published for six days, and the sale will be set aside if this full number of publications is not made.—The Hornet, Case No. 6,704.

The court has no discretionary power to refuse or postpone an order of sale, where a libelant in rem establishes a clear right.—Davis v. New Brig, Case No. 3,643.

Where the purchaser on a marshal's sale takes possession without paying the price, the court will enforce by summary process either a redelivery of the property in specie or the payment of the purchase money.—The Phebe, Case No. 11,066.

A court of admiralty may compel a purchaser at a judicial sale to complete his purchase. The order need not be directed to any particular person, service of it upon the defaulting purchaser being sufficient.—The Kate Williams, Case No. 7,623.

On a motion for an attachment for contempt in refusing to comply with an order of court requiring the purchaser at a judicial sale of a tug to pay in the purchase money, the failure of the marshal to return the writ of venditioni exponas, and file a report of sale, is cured by an order of confirmation.—The Kate Williams, Case No. 7,623.

A proctor bidding at a sale is personally liable where his agency is not known to the marshal.—The Kate Williams, Case No. 7,623.

The fact that the bidder at a judicial sale of a tug was acting as agent for another person, and that the marshal might have inferred this from his being an attorney at law, is no defense to a motion for an attachment for contempt for refusing to pay in the purchase price in obedience to an order of court.—The Kate Williams, Case No. 7,623.

There is no warranty of a complete outfit on the sale of a vessel "as she lies," though the published notice read "her boats, tackle, apparel, and furniture."—The Kate Williams, Case No. 7,623.

The master of a tug whose tow is lost, through his negligence, is not bound to defend the tug against a valid claim for such loss, nor notify other persons having liens thereon, and he may purchase the same at a sale under a decree therefor.—The E. W. Gorgas, Case No. 4,585.

A sale under an admiralty decree, obtained without fraud, cuts off all claims of the builders of the boat, her owners and creditors.—Stewart v. Fagan, Case No. 13,426.

Foreign attachments are not proceedings in rem, and the sale of a vessel on adjudication therein will not give the purchaser a title superior to that of a prior mortgagee.—Cole v. The Brandt, Case No. 2,978.

The master of a tug whose tow is lost, through his negligence, is not bound to defend the tug against a valid claim for such loss, nor notify other persons having liens thereon, and he may purchase the same at a sale under a decree therefor.—The E. W. Gorgas, Case No. 4,585.

Sales in admiralty must be confirmed by the court before the purchaser takes the property.—The New Hampshire, Case No. 10,160.

Where the purchaser of a vessel at a judicial sale, not confirmed by the court, obtained possession of her without authority, and expended labor upon her, and a resale was afterwards ordered, he was not entitled to maintain a libel for his services.—The New Hampshire, Case No. 10,160.

The purchasers of property under a decree in admiralty take subject to the power of the court to vacate the sale, when such action is necessary to promote the ends of justice.—The Sparkle, Case No. 13,207.

All persons are bound by a decree in admiralty on the point then in controversy. But those who become interested by a purchase, under orders and proceedings of a court of admiralty, are not bound by a decree as to right of property between libelants and claimants.—Jones v. Walker, Case No. 7,506.

A motion to set aside a sale will not be granted where the party has been guilty of inexcusable laches.—Pease v. The Napoleon, Case No. 10,883.

A delay of six months after knowledge of the sale is inexcusable laches.—Pease v. The Napoleon, Case No. 10,883.

An application to set aside a sale of a vessel, regularly made, denied in the case of a delay of three months, where the parties could not be put back to their original position.—United States v. The Austin, Case No. 14,479.

The sale of a vessel under a default decree will not be set aside where it brought full value.—The George Prescott, Case No. 5,339.

An application will not lie to set aside a sale by default in admiralty, where it is not entitled in the same cause, and it does not appear that the promovents were parties or privies to that action.—Freeman v. The Albany, Case No. 5,083a.

A sale will be set aside for fraud of the purchaser, or of the officer who conducted it, or for fraudulent negligence or misconduct in any other person connected with it.—The Sparkle, Case No. 13,207.

A sale in admiralty was set aside where there was a combination between the persons in possession of the vessel and libelant, and the price was grossly inadequate, and petitioner was allowed to intervene and defend.—The Sparkle, Case No. 13,207.

Where property has been ordered to be sold on process in rem, the gross proceeds of the sale, deducting only the expenses of the sale, are paid into the registry.—The Phebe, Case No. 11,065.

§ 110. Enforcement against sureties or stipulators.

Under a stipulation for value, making the rules of court a part thereof, where the decree is in excess of the amount, interest is recoverable.—The Belle, Case No. 1,270.

The surety in a suit in personam cannot be compelled to pay more than the sum stated, although the stipulation is conditioned to pay such sum as shall be awarded by the final decree.—Brown v. Burrows, Case No. 1,996.

The amount due upon an accounting between the majority and minority owners cannot be applied to diminish the liability of the stipulators on a bond given for the safe return of a vessel.—The Susan E. Voorhis, Case No. 13,633.

Sureties in stipulations or appeal bonds are not required to appear before the court for examination concerning their property after final decree.—The Blanche Page, Case No. 1,524.

The liability of sureties on a stipulation for value cannot be enforced by an attachment to compel them to comply with its stipulations.—The Blanche Page, Case No. 1,524.

A court of admiralty has no power to punish sureties on a stipulation for value for contempt in failing to comply with the provisions of the decree.—The Blanche Page, Case No. 1,524.

Under Acts Feb. 28, 1839, and Jan. 14, 1841, a surety in a stipulation in admiralty is exempt from imprisonment on execution when he would be exempt under like process from the state courts.—The Kentucky, Case No. 7,717.

Where the respondent in a suit in personam has gone beyond seas, process may issue against the bail on motion, though no execution against the principal has been returned non est inventus.—In re Snow, Case No. 13,141.

A summary judgment may be rendered on a stipulation in the nature of recognizance given for the delivery of property for the appraised value thereof and costs.—The Alligator, Case No. 248.

The real estate of the sureties in a stipulation in admiralty is subject to execution issued from the admiralty court.—The Kentucky, Case No. 7,717.

A special notice to the surety, of application for execution against him, is not necessary.—Holmes v. Dodge, Case No. 6,637.

In the case of a stipulation given on an arrest in personam, a final decree against the principal may be enforced by summary process of execution against both principal and surety, under rule 3.—Holmes v. Dodge, Case No. 6,637; Gaines v. Travis, Id. 5,180.

Such rule repeals the former practice, whereby an order to show cause why the stipulator should not fulfill his engagement was served before execution issued.—Holmes v. Dodge, Case No. 6,637.

After affirmance of the sentence of condemnation of the district court, for a breach of the revenue or nonimportation laws, the court will forthwith, on motion, give judgment against the claimant and his sureties, on the bond given upon the delivery of the cargo to him at the appraised value.—Nelson v. United States, Case No. 10,116.

Where the circuit court, on appeal by the claimant, decrees against him for a sum allowing of an appeal to the supreme court, which may be a supersedeas, the circuit court can enter no summary judgment against the sureties on the appeal bond until 10 days from its decree.—The New Orleans, Case No. 10,181.

Where, in the case of an appeal in admiralty transferred to another circuit, a commissioner in the former circuit certifies to the giving of a stipulation by respondents with sureties, but such stipulation is not filed in court, a summary judgment cannot be entered against the sureties on the affirmance of the decree.—Sawyer v. Oakman, Case No. 12,403.

Judgment on a bail bond or stipulation taken in a case arising under the revenue laws cannot, it seems, be rendered until after 20 days from the decree of condemnation, and then in open court.—McLellan v. United States, Case No. 8,895.

In proceedings in rem, upon a bond for the appraised value given jointly and severally, if one of the obligors dies, the court will proceed against the survivors, or, at the option of the plaintiffs, against the representative of the deceased also.—The Octavia, Case No. 10,423.

A decree against a stipulator, after his death, is void.—The Clara Davidson, Case No. 2,791.

The right of the libelant to summary judgment against the surviving stipulator is not affected by the death of the other stipulator, or by the fact that libelant had not exhausted his remedy against the claimant of the vessel.—The C. F. Ackerman, Case No. 2,564.

§ 111. Disposition of proceeds.

Money or goods in the hands of the marshal by order of this court are subject to any further order of court.—Coulter v. L'Esperanza, Case No. 3,277.

Admiralty has jurisdiction of a petition for a surplus in the registry, though the application involves the settlement of partnership accounts.—The L. B. Goldsmith, Case No. 8,152.

Courts of admiralty have full jurisdiction, as incidental to proceedings in rem, to decree freight to the shipowner in proper cases.—The Nathaniel Hooper, Case No. 10,032.

By the forty-third rule, the party entitled to the remnant or surplus in court after a sale can only obtain it by petition or motion. Any person having an interest has a right to intervene pro interesse suo on due notice to adverse parties, whether his application may or may not involve the settlement of partnership accounts.—The L. B. Goldsmith, Case No. 8,152.

The claims of officers of the court for fees and expenses upon proceeds in the registry must be presented to the court for allowance.—The Phebe, Case No. 11,065.

In cases in which a common interest has been promoted by services of counsel which a mere selfish consideration of his client's interest would not have induced him to render, a part or even the whole of his compensation may occasionally be allowed from the general fund arising from the sale of the vessel.—The Wreath, Case No. 18,061.

If the evidence shows that certain parties not before the court were actual salvors, and entitled to compensation as such, it would be the duty of the court to retain their proportion in the registry subject to their order. In no event would such amount inure to the benefit of the claimants of the vessel.—The T. P. Leathers, Case No. 9,736.

A master, who has a right to sue in personam for wages, may proceed by summary petition against surplus proceeds in the registry.—The Stephen Allen, Case No. 13,361.

The decree of distribution does not follow the report of the auditor, as matter of course, because no exception has been taken thereto.—Harper v. New Brig, Case No. 6,090.

Where proceeds are prematurely ordered to be paid over, a rule to return will be granted.—The Ariadne, Case No. 526.

A creditor of libelant to whom money in court has been decreed to be paid cannot compel its appropriation to his debts.—Brackett v. The Hercules, Case No. 1,762.

On a libel by a bottomry holder, where both the mortgagee and owner appear and claim the proceeds, the court may decree distribution between the claimants, or require them to formally litigate their claims.—The Panama, Case No. 10,703.

In such proceeding the owner may set up in defense to the claim of the mortgagee that the mortgage is void for usury.—The Panama, Case No. 10,703.

The right of a surety in a stipulation to be paid out of the proceeds of the boat, which has been sold under his execution, is subordinate to the claims of those who have established liens thereon.—Carroll v. The Leathers, Case No. 2,455.

Sureties for the claimants, who are compelled to pay a salvage decree, are not entitled to priority over valid mortgages which antedated the salvage services.—Roberts v. The Huntsville, Case No. 11,904.

A libelant who consents to the release of a vessel libeled and seized under process waives his priority of claim as against subsequent libelants under whose libels the vessel is condemned and sold.—The A. R. Gray, Case No. 519.

IX. APPEAL.

Appeal from taxation of costs, see post, § 148. In salvage cases, see "Salvage," § 77.

§ 112. Appellate jurisdiction.

The circuit court of Massachusetts has no cognizance of causes of admiralty and maritime jurisdiction from the district court of Maine, except by appeal, and a writ of error thereon will be quashed.—McLellan v. United States, Case No. 8,895.

The court of appeals established by congress under the Articles of Confederation had full power to re-examine and reverse or affirm the sentences of the courts of admiralty established by the different states, though founded upon the verdicts of juries.—United States v. Bright, Case No. 14,647.

A seizure case triable by jury in the district court can be reviewed in the circuit court only on writ of error.—United States v. Fifteen Hogsheads of Brandy, Case No. 15,090.

§ 113. Decisions reviewable.

An appeal will not lie from a decree pro forma in admiralty.—Hindley v. The Wellington, Case No. 6,513.

A petition by an informer to be paid his proportion out of proceeds in the registry after condemnation is an original suit in admiralty, and from the decree therein an appeal lies to the circuit court.—Westcot v. Bradford, Case No. 17,429.

The allowance or nonallowance of costs in an admiralty case being a matter within the discretion of the court, is not a subject of appeal.—Taylor v. Woods, Case No. 13,809.

An appeal lies from a decree of the district court refusing an order for the sale of a vessel on an application by one of two equal part owners.—Davis v. The Seneca, Case No. 3,651.

There is no appeal to the circuit court from a decree dismissing a libel in rem in admiralty for want of prosecution.—The Merchant, Case No. 9,436.

A decree awarding a certain rate of salvage of the proceeds, after deducting charges and expenses and fees of court, is not a final decree, but, at most, is only an interlocutory decree in the nature of a final decree.—The New England, Case No. 10,151.

A party may appeal from an interlocutory decree, having the effect of a final decree; or he may, at his election, wait until the final decree is positively entered, and then may enter an appeal.—The New England, Case No. 10,151.

To make a decree in a salvage case positively final, all the charges and expenses should be ascertained, and the salvage apportioned, and the rights of each salvor definitely fixed, so that he may appeal therefrom, if he chooses.—The New England, Case No. 10,151.

A decree in a suit in rem on a bottomry bond referring the case to a commissioner, to ascertain the amount, and report to the court, with liberty to either party to move to frame the decree thereon, is not final and appealable.—The Yuba, Case No. 18,192.

On a libel for condemnation of merchandise and gold coin, a decree directing that the coin should be deposited in the registry to await further orders is not final; and an appeal will lie from a decree, made over two years later, ordering the gold to be paid over to a claimant.—United States v. Canoe, Case No. 14,718.

A decree final in other respects is not converted into an interlocutory one because it directs a taxation of costs.—Craig v. The Hartford, Case No. 3,333.

A decree against a person served with process of foreign attachment, requiring him to pay the money into court as property of the respondent, is not final and appealable.—Cushing v. Laird, Case No. 3,510.

Where the only question in dispute is the recovery of a sum of money, the record must show the amount to give jurisdiction to the circuit court on appeal in admiralty.—Agnew v. Dorman, Case No. 100.

No appeal lies by any party from a decree of the district court in admiralty unless on his part the matter in dispute exceeds the sum or value of $50.—Shirley v. Titus, Case No. 12,796.

Appeals are allowed to the circuit court from decrees in admiralty in all cases where sum in dispute exceeds $50. (Act March 3, 1803).—Ayer v. The Glaucus, Case No. 683.

In a suit for an assault and battery on the high seas, no appeal can be sustained from a decree of the district court unless there be an ad damnum laid in the libel exceeding $50.—Jenks v. Lewis, Case No. 7,279.

An appeal lies to the circuit court in admiralty where the amount of the claim, with interest, amounts to more than $50 when the decree is entered.—Godfrey v. Gilmartin, Case No. 5,498.

On the sale of a vessel on a decree for wages amounting to more than $50, the proceeds, after paying charges, were less than $50. *Held*, that the owner was entitled to appeal, the wages being the matter in dispute.—The Enterprise, Case No. 4,497.

A suit in admiralty in which the libel claimed more than $50 is not appealable to the circuit court where libelant admitted that a sum less than $50 was all that was due him.—McGinnis v. Carlton, Case No. 8,799.

The respondent cannot appeal to the circuit court where the libel claimed $300 damages, and a decree was given for libelant for $40, and acquiesced in by him.—Greigg v. Reade, Case No. 5,804.

Though the jurisdiction of the circuit court is limited to cases involving more than $50, respondent may appeal from a judgment for no more than the sum tendered and paid into court by him, which libelants refused to accept. The tender was not an admission so as to reduce the amount in controversy below the jurisdictional limit.—Lubker v. The A. H. Quinby, Case No. 8,586.

§ 114. Right of review.

On the erroneous refusal of an appeal by the district court in admiralty, application may be made to the circuit court, which will require the proper security to be given.—The Enterprise, Case No. 4,497.

§ 115. Preservation and reservation in lower court of grounds of review.

Where the amount due for supplies to a vessel is determined by report of commissioner before libelant's right to recover is established, no objection to allowances can be made on appeal which were not raised in the court below.—Harris v. Wheeler, Case No. 6,129.

§ 116. Parties.

On a joint decree against respondents for a maritime tort there may be separate appeals where respondents have severed in their pleadings, or jointly pleaded a general denial.—Thomas v. Lane, Case No. 13,902.

An appeal or writ of error will not lie in the name of a steamboat.—The Spark v. Lee Choi Chum, Case No. 13,206.

§ 117. Proceedings for taking appeal—Time of taking appeal.

An appeal from a decree of the district court must be taken in open court before the adjournment sine die, unless a different period be prescribed by the court.—Norton v. Rich, Case No. 10,352; The New England, Id. 10,151.

If in either case an appeal is entered within the prescribed term, it relates back to the time of the decree, although actually entered in vacation.—The New England, Case No. 10,151.

Appeals in admiralty should be taken to the term of the circuit court next succeeding the term of the district court at which the decree was rendered. If not so taken they will be dismissed. (Rev. St. § 635, is inapplicable.).—The New England, Case No. 10,151; The Oriental, Id. 10,570; United States v. Five Thousand One Hundred Dollars in Specie, Id. 15,119; Same v. The Glamorgan, Id. 15,214.

An appeal from the district court is properly entered at the term of the circuit court begun next after the entry of the decree in the district court, though the term of the latter was not ended when the term of the circuit court began.—United States v. Certain Hogsheads of Molasses, Case No. 14,766.

After a final decree has been made by a district court sitting in admiralty, and the court has adjourned without day, the decree cannot be set aside or opened, so as to allow an appeal to the circuit court, a term whereof has intervened since the decree was made.—United States v. The Glamorgan, Case No. 15,214.

§ 118. —— Appeal bond.

An appeal to the circuit court in admiralty is not regular unless appellant gives security for costs.—Chew v. Baker, Case No. 2,663; Hayford v. Griffith, Id. 6,263.

To effectuate an appeal so as to suspend execution, it is necessary for libelants to give security by stipulation within 10 days after decree is rendered (Dist. Ct. Rule 153), and also to serve upon claimants four days' notice of the names of the sureties proposed, and of the time and place of giving stipulation (Rule 154).—The Infanta, Case No. 7,031.

In the absence of rules specially prescribed, the practice of the court will govern as to notice of appeal and appeal bonds.—Otis v. Rio Grande, Case No. 10,614.

§ 119. —— Citation and notice.

On an appeal to the circuit court in admiralty, no citation is necessary, but only a written notice by the proctor to the proctor of the adverse party.—The Ellen, Case No. 4,375.

In the absence of rules specially prescribed, the practice of the court will govern as to notice and appeal bonds.—Otis v. Rio Grande, Case No. 10,614.

Appeal in admiralty *held* well taken, where notice was given in open court, and a written notice and bond in an approved amount were subsequently filed during the term, though such facts were not entered on the docket or minutes of the district court.—Otis v. Rio Grande, Case No. 10,614.

§ 120. Effect of appeal, and stay of execution.

An appeal in admiralty supersedes altogether the decree of the court below, and the case is to be tried in the appellate court as if no decree had been passed in the court below.—The Saratoga v. Four Hundred and Thirty-Eight Bales of Cotton, Case No. 12,356.

An appeal from the district court in admiralty to the circuit court carries with it the property which is the subject of the suit, and the former cannot make any order in regard thereto.—Davis v. The Seneca, Case No. 3,651; The Grotius, Id. 5,844; United States v. Towns, Id. 16,534. CONTRA, see Jones v. Walker, Case No. 7,506.

An appeal to the circuit court in admiralty carries with it all the funds belonging to the case, which funds still remain in the circuit court on a further appeal to the supreme court.—Hayford v. Griffith, Case No. 6,263.

A commission to take testimony cannot be issued by the circuit court in an admiralty case after an appeal has been taken to the supreme court, until after the supreme court on motion has decided the question as to the admissibility of the evidence.—The Ocean Queen, Case No. 10,411.

The decree of the district court in admiralty is of no effect where, on appeal, security of damages is given; otherwise when security is not given.—Dutcher v. Woodhull, Case No. 4,204.

Where an appeal is taken to the supreme court on the affirmance by the circuit court of a decree for libelants, and appellant fails to serve a copy of his petition of appeal within the 10 days, so as to make the appeal operate as a stay of execution under Act Sept. 24, 1789, § 23, and Act March 3, 1803, § 2, the court has no power to permit such service to be made nunc pro tunc.—The Roanoke, Case No. 11,875.

§ 121. Record.

Where a seizure case, by agreement of the parties, is tried by the district court without a jury, the record should be made up as in the case of a writ of error, with the proper exceptions to the admissions or rejections of testimony, etc.—United States v. Fifteen Hogsheads of Brandy, Case No. 15,090.

On appeal to the circuit court in admiralty, the whole decree is brought up, though only a part of it is appealed from.—The Roarer, Case No. 11,876.

Admiralty cases should not be taken by appeal to the circuit court, without the evidence, upon the facts found by the district court.—Gloucester Ins. Co. v. Younger, Case No. 5,487.

In the case of six months' delay to perfect the appeal, the appellee was allowed to notice the cause for a hearing, and was required to take his depositions during the session of the court.—Nall v. The Illinois, Case No. 10,005.

§ 122. Hearing and rehearing.

If the appellant delay to perfect his appeal, so that the record is filed a very short time before the term of this court, the appellee may notice the cause for hearing or continue it, at his option.—Backus v. The Marengo, Case No. 713.

Where an appeal in a prize case was taken from an order overruling a motion for further proofs, and also from the decree on the merits, *held*, that the appellate court would not grant a separate hearing on the motion, but would consider the entire appeal at the same time.—United States v. The Lilla, Case No. 15,600.

An appeal from a decree rendered on the report of a commissioner awarding damages cannot

be dismissed on motion, but must be heard in the usual way, where appellant appeared before the commissioner, and contested the damages, though he took no exception to the report of the commissioner to whom the cause was referred on appellant's default on the merits.—Farrell v. Campbell, Case No. 4,682.

The circuit court on appeal cannot rehear a cause or admit a claim at a term subsequent to that in which the cause was finally decided.—The Avery, Case No. 672.

§ 123. Trial of cause anew, amendments, and new pleadings and proofs.

The hearing on appeal from the district court in admiralty is de novo, but, on questions of fact, the burden is on appellant.—Ayer v. The Glaucus, Case No. 683.

On an appeal in admiralty to the circuit court, the trial there is de novo, and the opinion of the district judge cannot be read.—Two Hundred and Fifty Barrels of Molasses v. United States, Case No. 14,293.

An objection that certain repairs for which a lien was enforced in the district court were made in the home port cannot be set up for the first time in the circuit court on appeal, especially when not averred in the pleadings.—Meagher v. The Lizzie, Case No. 9,377.

Where libelants appeal in a salvage case the appeal opens the whole case. They cannot be allowed to claim the benefit of the decree below, and, standing secure on that, try new claims in the appellate court.—The Saratoga v. Four Hundred and Thirty-Eight Bales of Cotton, Case No. 12,356.

The circuit court on an appeal in admiralty may allow amendments.—Anonymous, Case No. 444; The Morton, Id. 9,864.

Such amendments may be allowed so as to permit new evidence, and new grounds of defense.—Reppert v. Robinson, Case No. 11,703.

Amendments may be allowed on appeal in revenue cases or proceedings in rem in district court.—Anonymous, Case No. 444.

Amendment not allowed on appeal to the circuit court in admiralty so as to allege damages in an amount to give jurisdiction, though the testimony shows the amount.—Agnew v. Dorman, Case No. 100.

The circuit court on appeal will give leave to amend by striking out the names of parties improperly introduced, where necessary to enable it to dispose of the appeal upon its real and substantial merits.—Taylor v. Harwood, Case No. 13,794.

The appellee may amend his libel so as to make a claim for damages above costs caused by a vexatious appeal.—Weaver v. Thomson, Case No. 17,311.

The circuit court on appeal will not admit new matters of defense or allegation, known to exist at the time of the hearing in the district court.—Coffin v. Jenkins, Case No. 2,948.

On appeal from a decree dismissing a libel in rem for the foreclosure of a mortgage on a vessel, the circuit court will not permit the libel to be amended so as to convert the suit into an action to recover possession of the vessel.—The John Jay, Case No. 7,352.

The power of the court, upon appeal, to allow amendments to the pleading so as to let in new evidence and new grounds of defense, ought only to be exercised to bring the merits of the controversy fairly before the court.—Reppert v. Robinson, Case No. 11,703.

In admiralty, amendments in sworn answers in the appellate court should introduce new substantive facts previously unknown, or correct substantial mistakes in matters of fact, and cannot be allowed on account of any mere defect of skill in drafting the original answer, in consequence of which respondent's case was not presented on the record in the best possible manner, or so as to secure to him all possible legal advantages.—Lamb v. Parkman, Case No. 8,019.

On appeal to the circuit court, either party can take new evidence.—Carrigan v. The Charles Pitman, Case No. 2,444.

After an appeal, the court may allow evidence, not received in season, to be put upon the record de bene esse, with a memorandum of the fact.—The London Packet, Case No. 8,474.

Time will be given to produce new evidence, where it appears that appellant was not guilty of laches in not producing it in the court below.—Rose v. Himely, Case No. 12,045.

New testimony, introduced on an appeal in admiralty, except under peculiar circumstances, is not entitled to the same consideration as testimony introduced in the first instance.—Taylor v. Harwood, Case No. 13,794.

Material evidence, the production of which in the court below is not excused, is subject to suspicion in the circuit court.—The Busy, Case No. 2,232.

In the case of a collision between vessels mutually in fault, an insurer of a cargo of one lost by the collision who has paid the loss cannot be permitted on appeal, and where the carrier vessel has been sold several times since the collision, and his remedy over has been lost by delay, to make proof of the innocent ownership of the cargo so as to charge the other vessel with the entire damages.—The City of Paris, Case No. 2,767.

§ 124. Review.

On an appeal in admiralty the appellee cannot raise the question of the right of the district court to entertain a libel of review.—The Enterprise, Case No. 4,497.

The action of the court in respect to amendments is not reviewable on appeal.—Brown v. The Cadmus, Case No. 1,997.

Though the question of costs is perhaps not per se the proper subject of appeal, it is yet reviewable when the case is properly before the appellate court.—Lubker v. The A. H. Quinby, Case No. 8,586.

The objection that the district court has not jurisdiction of a cause of seizure, under the laws of impost, navigation, and trade, because it does not appear that the property was seized before the proceeding was commenced, may be urged successfully upon appeal in the circuit court, notwithstanding it was not taken in the district court.—The Fideliter, Case No. 4,755.

Where damages are discretionary, the burden of proof is on the appellant to show some clear mistake or error in the court below, either in awarding excessive damages, or in promulgating an incorrect rule of law, or to offer new and materially important testimony, which must go to the proof of the new allegations without contradicting the former evidence.—Cushman v. Ryan, Case No. 3,515.

On an appeal to the circuit court in admiralty if the libelant does not appeal he cannot ask to have the damages increased on claimant's appeal except by an allowance for the delay in payment.—Allen v. Hitch, Case No. 224; Airey v. Merrill, Id. 115; Merrill v. Arey, Id. 9,468.

Appeals in admiralty on questions of mere fact will be discouraged.—Hill v. The Emma Peterson, Case No. 6,490.

The decree of the district court, where no question of law is involved, is entitled to the same weight as a verdict in a suit at law, not to be disturbed unless it is contrary to the clear result of the evidence on the facts in issue.—Palmer v. Dallet, Case No. 10,689.

The circuit court, on an appeal in admiralty, will not disturb the finding of the district court on a question of fact depending upon the weight of the testimony and credibility of witnesses, though differing from such court.—The Sunswick, Case No. 13,625.

A decree in a case of marine tort will not be reversed on appeal, on a question of the amount of damages, unless clearly excessive.—Smith v. Jordan, Case No. 13,068.

On appeal in admiralty, the circuit court will not reverse a decision of the district judge upon a question depending on conflicting testimony, unless it clearly appears that the decision was against the weight of evidence.—Davison v. Sealskins, Case No. 3,661; Baker v. Smith, Id. 781; Baker v. The Potomac, Id. 778; Cushman v. Ryan, Id. 3,515; Lee v. Thompson, Id. 8,202; McGuire v. The Golden Gate, Id. 8,815; Taylor v. Harwood, Id. 13,794.

To warrant a reversal on a question of fact on an appeal in admiralty, the preponderance of evidence must be such as would justify the granting of a new trial in a court of common law.—The Grafton, Case No. 5,655.

§ 125. Determination and disposition of cause.

Where a specific relief is asked for, even though there be a prayer for general relief, the circuit court, on appeal in admiralty, cannot grant a relief which is inconsistent with, or entirely different from, that which is prayed.—Wilson v. Graham, Case No. 17,804.

On appeal in a salvage case, the whole cause, including costs, is before the court, irrespective of the decree below, and the court may decree more, or less, or nothing.—Lubker v. The A. H. Quinby, Case No. 8,586.

Where the record shows that the court was controlled by the findings of the jury, to which issues of fact were submitted, without consideration of the evidence, the proceeding is irregular, but where all the evidence is before the appellate court such judgment will be rendered as the evidence warrants.—Lee v. Thompson, Case No. 8,202.

Where, on an appeal in admiralty, the court was of the opinion that the damage sustained by a charterer for breach of a condition in the charter party should be deducted from the freight in an action therefor, the court, to save expense and prevent delay, made the proper deduction itself, instead of sending the case back to the clerk to take proof.—Parsons v. Ogden, Case No. 10,781.

On an appeal to the circuit court in admiralty, the appellate court, after decision, must execute the decree, and it has no power to remit the proceedings to the district court.—The Roarer, Case No. 11,876.

On an appeal in admiralty, after the case is entered, plaintiff, who is appellant, and recovered judgment below for less than he asked, cannot become nonsuit without prejudice, on payment of costs, if defendant object.—Folger v. The Robert G. Shaw, Case No. 4,899.

A motion to dismiss an appeal already taken from the district court on the ground that notice of appeal and affidavit of service had not been filed in time, should be made in the circuit court.—The Josephine, Case No. 7,545.

The respondent in an admiralty suit appeared before the commissioner, and contested the damages after a default, but did not take any exceptions to his report. *Held*, that a motion to dismiss an appeal taken by him was not the proper remedy.—Farrell v. Campbell, Case No. 4,682.

Where libelant in admiralty recovered a small amount, and appealed, *held*, that the circuit court could dismiss the libel at libelant's costs, although claimant had not appealed.—The Saratoga v. Four Hundred and Thirty-Eight Bales of Cotton, Case No. 12,356.

Reasonable diligence should be used in prosecuting an appeal in admiralty from the district to the circuit court.—Nall v. The Illinois, Case No. 10,005.

If, in a prize cause, claimant appeals, and deserts his appeal, the circuit court may affirm the decree below, with costs.—The Montgomery v. The Betsey, Case No. 9,734.

Where both parties appeal from a decree for salvage, which is affirmed, libelants will not be allowed interest from the date of decree in the court below.—The Rebecca Clyde, Case No. 11,622.

On a hearing on appeal from a decree dismissing a libel in personam on the ground that there was no proof of incorporation of defendant, or that it owned the vessel, where such objections were removed by evidence, the circuit court, on reversing the decree, allowed both parties to take proofs on the merits, with liberty to either to amend his pleadings.—Remington v. Atlantic Royal Mail Steam Nav. Co., Case No. 11,695.

The portion of the decree unappealed from, in case of a reversal, remains in full force, to be executed in the circuit court, and becomes a part of its decree.—The Roarer, Case No. 11,876.

On affirmance by the circuit court of a decree for libelant in admiralty, no execution can issue until the entry of a formal decree awarding a recovery to libelant.—Harris v. Wheeler, Case No. 6,130.

The question of damages in admiralty may be raised upon a remand after affirmance of a decree silent upon such question.—American Ins. Co. v. Canter, Case No. 302b.

When a decree in admiralty is reversed in the supreme court and the cause remanded, the circuit court may allow interest unless expressly forbidden to do so by the decree of the supreme court.—The Grapeshot, Case No. 5,703.

The fact that the proceeds had remained for a long time in the registry, without producing interest, is no reason for refusing interest on the sum found due.—The Grapeshot, Case No. 5,703.

§ 126. Liabilities on appeal bonds.

Where the amount claimed is sufficient to allow an appeal to the supreme court, summary judgment cannot be rendered by the circuit court against the sureties in the appeal bond on dismissal of the libel until after the expiration of 10 days after the rendering of the decree.—The Jesse Williamson, Jr., Case No. 7,297.

But summary judgment can be rendered against the sureties on the appeal bond where the decree is for a sum not sufficient to allow an appeal to the supreme court.—The Blanche Page, Case No. 1,525.

X. COSTS.

In collision cases, see "Collision," § 160.
In salvage cases, see "Salvage," § 76.
In suits for seamen's wages, see "Seamen," § 143.
Right of proctor to costs on compromise by parties, see "Attorney and Client," § 6.

(A) PARTIES TO AND AGAINST WHOM AWARDED.

§ 127. Power to award in general.

Courts of admiralty will dispose of the question of costs according to the general equities of the case.—The Martha, Case No. 9,144.

Costs in admiralty are in the sound discretion of the court, to be exercised according to settled practice and in furtherance of justice.—Lubker v. The A. H. Quinby, Case No. 8,586; Hill v. The Triumph, Id. 6,500.

§ 128. Want of jurisdiction of suit.

The district court, on dismissing a libel for want of jurisdiction, has no power to award costs against libelant.—The McDonald, Case No. 8,756; Abbey v. The Robert L. Stevens, Id. 8.

A successful respondent should not be denied costs because libelant has mistakenly sued in admiralty, instead of in the state courts, in disregard of a long-settled law.—Kegan v. The Amaranth, Case No. 7,646.

Where, on the face of a libel, the court has jurisdiction, and lack of jurisdiction is only disclosed by plea and evidence, costs may be awarded to defendant.—Lowe v. The Benjamin, Case No. 8,565.

§ 129. Other adequate remedy.

Costs will not be allowed where vessel is arrested for a small cause of action, for which the party has another adequate remedy, and the suit is prosecuted vindictively.—The Boston, Case No. 1,672.

A libelant in admiralty, for services on board a vessel on the Hudson river, cannot recover costs, where less than $50 is in demand, and he had a clear remedy, known to him, in the local courts, the burden of showing which is on claimant.—The Harriet, Case No. 6,095.

The object of this rule was to prevent an unnecessary resort to the expensive proceeding in rem. It will be so enforced as to compel the mariner to resort to the local courts only in case his remedy there is convenient and sure.—The Harriet, Case No. 6,095.

Costs will not be refused on a libel for wages because libelant did not sue in the state court, where there was no apparent intention to annoy respondents.—Jones v. Crowell, Case No. 7,459.

§ 130. Sufficiency and effect of tender.

Libelant cannot recover costs where the amount of liability is tendered before suit.—The Alaska, Case No. 129.

A tender of the amount due, and costs, will throw costs upon libelant.—The M. M. Caleb, Case No. 9,682.

Failure to tender the amount admitted to be due by the answer gives libelant a right to costs, though no more is recovered.—Nine Thousand Six Hundred and Eighty-One. Dry Ox Hides, Case No. 10,273.

In the absence of proof or allegation of a tender of wages due, which were paid into court after libel filed, the seaman will be entitled to costs.—The Cortes, Case No. 3,258.

A tender or offer of payment relied on to bar costs should be set up in the pleading, and should be a continuing offer.—The Walter W. Pharo, Case No. 17,124.

On a libel in rem against cargo for freight and demurrage, where freight was previously offered and was paid into court after suit brought, where libelant fails to recover demurrage, he is liable for costs.—One Hundred and Twelve Sticks of Timber, Case No. 10,524.

Circumstances *held* equivalent to a tender of the balance of freight after sale of damaged cargo, and before suit brought.—Dedekam v. Vose, Case No. 3,729; Id. 3,732.

Costs were refused a seaman who sued to recover wages, where the difference between the tender and claim was only $2, although the money was not paid into court under Rule 72.—The Brothers, Case No. 1,968.

A mere attempt to negotiate a compromise of a claim at an amount specified, unaccompanied with a tender or direct offer to pay such amount, does not operate as an equitable bar to costs.—The H. B. Foster, Case No. 6,290.

An offer by a shipper to pay a balance of freight, deducting damages to the goods, to be ascertained by arbitration or sale at auction, *held* a sufficient tender to relieve him from payment of costs.—Dedekam v. Vose, Case No. 3,732.

An offer to pay wages at the owner's counting house, and a refusal to pay elsewhere, does not exonerate him from costs.—The Sarah Jane, Case No. 12,348.

In salvage cases the court will not deny libelant compensation nor award costs to respondent on a plea of tender alleged in a supplemental answer, where there was not a legal tender of a specific amount by a deposit of the money in court, and the propositions for a compromise were not so made as that they could be made a matter of judicial cognizance.—Evans v. Charles, Case No. 4,556.

Where, in a suit for salvage, the proctors for respondent offer to deposit in court for the benefit of libelants a fair compensation, the court will decree costs against the libelants out of such amount.—Hessian v. The Edward Howard, Case No. 6,436.

Where each party had made an offer of settlement, libelant is entitled to costs where he recovered more than he was offered, though much less than he had demanded.—The Walter W. Pharo, Case No. 17,124.

§ 131. Demand and notice of claim.

Where a minority owner of a vessel objects to a proposed voyage, he is entitled to a bond for the safe return of the vessel, and his failure to demand it will not prevent his recovering costs on a libel therefor.—Sturges v. The Mary Staples, Case No. 13,566a.

Where a libel for salvage is filed without notice to the owner of the vessel to whom the service was rendered, costs will not be allowed.—The Jack Jewett, Case No. 7,122.

Costs were awarded where the suit was defended in the interest of a former owner, though no demand had been made of the claimants.—The Melissa, Case No. 9,400.

Costs were denied libelant, and given to claimants, on a libel against a steamer for injuries caused by her swells, by passing at rapid speed near a pier at which libelant's vessel was moored, where no notice of the claim was given in advance of bringing suit.—The Rhode Island, Case No. 11,742.

Costs denied to owners of canal boats sunk by swells, because they delayed for 30 days to give notice of their claim.—The Massachusetts, Case No. 9,258.

Where libelant in a suit on a bottomry bond included in the bond unauthorized charges, and brought his action, without giving claimant a reasonable time to examine into the the question of the amount really due, the court refused him costs.—The Edward Albro, Case No. 4,290.

A libelant who demands an entire sum when part of it has been paid according to his directions, and compels the respondent to defend, impairs his equity to costs in a court of admiralty.—Shaw v. Thompson, Case No. 12,726.

Though a plea in abatement on the ground that the action was prematurely commenced has not been interposed, the court will protect the parties in the adjustment of costs from any injustice arising from a too early commencement of the suit.—The Isaac Newton, Case No. 7,089.

§ 132. Effect of false claim.

A factor setting up title to proceeds in admiralty as general owner, where he has in equity merely a lien, will be denied costs.—The Packet, Case No. 10,655.

An unfounded claim for a lien was dismissed without costs, the vessel owners being personally liable.—M'Dermott v. The S. G. Owens, Case No. 8,748.

§ 133. Prevailing and losing parties generally.

The common-law rule to give costs in all cases to the successful suitor is not recognized in admiralty as the law of costs, and they are awarded at the sound discretion of the court, without regard to the ultimate termination of the action.—The Moslem, Case No. 9,876.

Admiralty courts, in adjudging costs in their discretion, regard the essential merits and equities of the parties rather than the result of the litigation.—Shaw v. Thompson, Case No. 12,726.

Costs in admiralty, though resting in the discretion of the court, are usually given to the prevailing party.—Regan v. The Amaranth, Case No. 11,664.

Prima facie the prevailing party is entitled to costs.—Leland v. Medora, Case No. 8,237; The Moslem, Id. 9,876.

Costs will not be awarded against claimants in a suit on a bottomry bond, where there appeared some reason for contesting it.—The Robert L. Lane, Case No. 11,892.

Costs will be decreed a libelant, though no debt is recovered, where he was misled into bringing suit by the misconduct of defendant.—Case of Pettit, Case No. 11,047.

Where both parties in an admiralty suit are in the wrong, costs will not be awarded to either.—Shaw v. Thompson. Case No. 12,726.

Costs will not be allowed where the libel is dismissed on a dilatory plea after a trial in which the court overrules the defense on the merits.—The Martha, Case No. 9,144.

Where a libel in a collision case which fails to convey any idea of the manner in which the collision occurred is not excepted to, and is dismissed at the hearing, no costs will be given.—The Warren. Case No. 17,192.

Where the question as to the liability for injuries in a collision was novel the court refused to award costs.—The Leo, Case No. 8,250.

On a libel for salvage, where a special agreement is shown in defense, but no tender of the balance of the stipulated price is shown, a decree will be entered for such amount, with costs.—Dominy v. Anchors, Sails, etc., of The D'Alberti, Case No. 3,977.

A stipulation to abide the decision of a suit by another party will not prevent the successful claimant recovering costs, because not given in the suit prosecuted against an administratrix who was substituted as libelant.—The Buffalo, Case No. 2,110.

On a dismissal of a libel against a vessel for damages to the cargo, libelants *held* chargeable with costs.—Faber v. The Newark, Case No. 4,602.

Costs in admiralty upon exceptions to a commissioner's report made in the alternative.—The Joshua Barker, Case No. 7,547.

Where a vessel, libeled on behalf of the United States, was afterwards libeled for seamen's wages, sold on an interlocutory order, and finally decreed to be restored, it was *held* that the custody fees should not be borne by the owners, nor by the seamen, but by the United States.—The Louisetta, Case No. 8,535.

§ 134. Partial success only.

Libelant who proves either of two claims sued on is entitled to costs, but only for the evidence required to prove such claim.—Borden v. Hiern, Case No. 1,655.

A party will not be allowed, by tacking a small undisputed claim, upon which he has never made a demand, to a contested claim for wages denied him, to recover costs on the demand denied him.—The Swallow, Case No. 13,664.

A libelant in admiralty who fails as to the greater part of his claim cannot recover costs.—The Gomez De Castro, Case No. 5,525; The John Walls, Jr., Id. 7,432.

A respondent who contests the entire demand of a libelant when a portion of it is justly claimed, although he defeats the suit in the main matters in contestation, loses his equity to costs.—Shaw v. Thompson, Case No. 12,726.

Where the opposite parties in an admiralty suit each prevail on one of the two issues involved, each is entitled to taxation of costs of the issue decided in his favor, and the two bills of costs should be set off against each other, and any balance paid.—Simpson v. Caulkins, Case No. 12,880; Thomas v. Gray, Id. 13,898.

Costs will be allowed neither party on libel for collision where both claim a greater amount of damages than they were able to prove.—The David Morris, Case No. 3,596.

Where both parties except to commissioners' report in a collision case, and libelant's exceptions are overruled, and respondent's allowed, the latter is entitled to costs of the reference.—The Baltic, Case No. 824.

When seven exceptions are filed to a commissioner's report, and six are sustained by the court, costs will be allowed therefor, to be deducted from the amount decreed to the libelant.—The New Jersey, Case No. 10,162.

The circuit court allowed to a libelant his costs in the district court, and, as the claimant had been partially successful on the appeal, it divided the costs in the circuit court.—The Shady Side, Case No. 12,692.

§ 135. Several suits or parties.

Where two libels are filed in admiralty, where only one is required, costs in one only are allowed.—The R. P. Chase, Case No. 12,099.

A seaman, who needlessly brings suit separate from his fellows will not be allowed costs.—The Cabot, Case No. 2,277.

Where two separate suits in admiralty by seamen were filed and process issued, and afterwards a number of other suits were consolidated therewith, *held*, that the costs of the first two suits to the date of consolidation should be taxed separately, but that a single bill of costs, only, could be allowed to either party after the consolidation.—Simpson v. Caulkins, Case No. 12,880.

Where several seamen joined in a libel for shares of a whaling voyage, and the decrees in favor of some were final and the others were appealed, *held*, that the former were entitled to recover all the costs which they had advanced, or for which they were liable.—In re Two Hundred and Ninety Barrels of Oil, Case No. 14,294.

Where several seamen unite in an action in personam to recover wages, a seaman recovering less than $50 can tax full costs, and enforce his decree by execution, where the decrees for the others are appealed.—Collins v. Hathaway, Case No. 3,014.

Where both a libel by the master against consignees for freight and a libel by the consignees against the vessel for damages to the cargo are sustained, a decree will be given for each

party, with costs.—The Isabella, Case No. 7,099.

Several material men may unite in one libel, for various supplies furnished in repairing a single vessel; and where they do not join, and no good reason for refusing is shown, costs in one suit, only, should be allowed.—The Young Mechanic, Case No. 18,182.

Where two libels are unnecessarily filed for salvage, the increased costs must be borne by the libelants in the second libel.—The Maryland, Case No. 9,218.

Taxation of costs in case of a claim on proceeds of a vessel in admiralty where other parties are interested.—The Jerusalem, Case No. 7,294.

Practice as to costs and charges where several parties intervene in admiralty for separate interests.—The Louisetta, Case No. 8,535.

§ 135a. Amount of recovery.

Full costs decreed claimant in admiralty, although the demands of libelants are less than $50 each.—The Swallow, Case No. 13,664.

Act March 3, 1847, regulating costs in admiralty proceedings in rem where less than $100 is recovered, is repealed by Act Feb. 26, 1853.—The Young Mechanic, Case No. 18,182.

(B) SECURITY FOR PAYMENT.

§ 136. When required.

On a libel under Act July 7, 1838 (5 Stat. 304), providing for the better security of passengers on steam vessels, the court may require the informer to give security for costs, and on his failure to do so may strike out his name, and let the suit proceed in the name of the United States alone. Aliter, if the informer is an officer whose duty it is to institute the proceedings.—The Planter, Case No. 16,054.

A person may sue in admiralty without giving security for costs on proof of inability.—Wheatley v. Hotchkiss, Case No. 17,483.

Where libelant, in consequence of poverty, is unable to find sureties, his juratory caution will be taken, instead of a stipulation with sureties.—Polydore v. Prince, Case No. 11,257.

Seamen will not be compelled to give security for costs on suing for wages, because the amount is small.—The Arctic, Case No. 509a.

The rule allowing seamen to libel without giving security must be modified in cases where they have been paid off before a shipping commission.—The Niveto, Case No. 10,279.

A claim for damages for the breaking up of a voyage is not a claim for seamen's wages, and libelant must file security for costs.—The Caroline & Cornelia, Case No. 2,420.

A seaman will be required to file a stipulation for costs when suing in rem to enforce a conditional agreement outside the written articles.—The Great Britain, Case No. 5,736.

Security for costs will not be required on a libel for a seaman's wages, where the answer was "forfeiture for desertion," and an attachment was issued after hearing on the summons, but such defense was not then interposed.—Chambers v. The Henry Kneeland, Case No. 2,581a.

The rule relieving seamen from stipulations for costs produces no unreasonable inequality as against shipowners.—Collins v. Hathaway, Case No. 3,014.

In a case of forfeiture, on a suggestion that the owners were unable to give security for costs, *held*, that an affidavit of ownership, inability, and merits would be exacted, before the government would be required to make further proofs.—United States v. The Lion, Case No. 15,607.

§ 137. Demand and waiver.

Respondent will not be required to file a stipulation for costs in a suit in personam where libelant does not move therefor until after a decree and a notice of appeal.—Pharo v. Smith, Case No. 11,062.

The respondent may waive the right to require the libelant to give security for costs.—Polydore v. Prince, Case No. 11,257.

§ 138. Additional security.

Increased stipulation for costs should not be required of claimants on account of delays in the suit occasioned by libelant.—The Laurens, Case No. 8,121.

The affidavit on a motion for additional security for costs may be made by the proctor of the party.—The Harriet, Case No. 6,096.

§ 139. Liability of surety.

A consent to a rehearing by the parties to a suit will not affect the rights of a surety in a stipulation for costs, who has been discharged by a previous final decree.—The Martha, Case No. 9,144.

§ 140. Right to object.

Libelant is not entitled to ground any proceedings on the omission of respondent to give security for costs allowed for the protection of the officers of the court.—Gaines v. Travis, Case No. 5,179.

(C) AMOUNT, ITEMS, AND TAXATION OF COSTS.

§ 141. In general.

Where process in rem is commenced without notice to the owners who reside within the district, no more costs will be allowed than in a case of a monition to show cause.—Chatfield v. The Wolga, Case No. 2,632.

Libelant having asked no costs, but disbursements, only disbursements were awarded against him on dismissal of the libel.—The Seneca, Case No. 12,668.

Where claimants in admiralty, in different rights, appear by the same counsel, but one bill of costs will be taxed.—The Jeremiah, Case No. 7,290.

§ 142. Clerk's fees.

Clerk's fees in admiralty for filing and entering claim, answer, appearance, and consent, for jurats, for attendance on the justification of sureties, and making up costs on the bonding of the vessel.—The F. Merwin, Case No. 4,893.

A clerk may tax as costs $2 for notices of trial.—The Siren, Case No. 12,910.

A calendar fee of one dollar paid to the clerk on delivering a note of issue on an appeal in admiralty is taxable.—The Alice Tainter, Case No. 196.

§ 143. Marshal's fees and disbursements.

The custody fees where a vessel is held by virtue of two warrants to arrest, in different suits, are chargeable equally upon the two suits.—The John Walls, Jr., Case No. 7,432; The Circassian, Id. 2,725.

The charge of $2.50 a day allowed to the marshal by statute for "expenses of keeping vessels," does not include wharfage, and a bill for wharfage paid by the marshal for the vessel, while she is in his custody, can be properly taxed as a disbursement.—The F. Merwin, Case No. 4,893.

Money paid by the marshal for insurance of arrested vessel cannot be taxed as costs.—Burke v. The M. P. Rich, Case No. 2,162.

§ 144. Proctor's or advocate's fees.

Since the adoption of the circuit court rules of 1845, Rule 96 of the district court of 1838, refusing to a proctor in a suit fees as advocate,

is abrogated, in respect to all fees other than those specifically introduced and appointed by the district court; and fees for services as proctor and as advocate are taxable to the same person.—Manchester v. Milne, Case No. 9,007.

In actions for seamen's wages, counsel fees will not be allowed as costs, unless the defense is merely vexatious, or there are special reasons for the allowance.—The Elizabeth Frith, Case No. 4,361.

In cases of claims on proceeds in the custody of the court, where other parties are entitled, no attorney's fee, or other costs beyond actual charges of court, can be allowed.—The Jerusalem, Case No. 7,294.

Counsel who successfully resisted a lien claim which would have absorbed the proceeds in court *held* entitled to a fee of $250 out of the proceeds.—Shannon v. The Angelique, Case No. 12,705.

The rate of compensation of proctors in admiralty is controlled by the statutes in force at the time the right to costs accrues, or at the time of taxation.—Sturgis v. The Joseph Johnson, Case No. 13,576a.

Counsel fees cannot be allowed as part of the taxable costs, beyond the amount mentioned in Act 1853, c. 80 [10 Stat. 161].—The Liverpool Packet, Case No. 8,407.

Since the act of Feb. 26, 1853, the district court in admiralty has no power to award an additional sum to libelants in the court's discretion under the name of a counsel or proctor's fee.—Sturgis v. The Joseph Johnson, Case No. 13,576a.

Where libelant cannot proceed in a cause without application to the court and its specific order, his proctor will be allowed 62½ cents for every necessary motion made in court on every necessary proceeding in a cause.—Sanborn v. Stetson, Case No. 12,291.

The proctor may charge $1.25 in each of several sequent motions before the court, when necessarily in attendance to make one of them.—Sancho v. Atwood, Case No. 12,291a.

Costs will be taxed for opposing motions made on notice to put the cause over the term, but not where the applications were without notice, and only to defer the hearing to another day in the same session.—Manchester v. Milne, Case No. 9,007.

Costs are not taxable in admiralty for services rendered by a proctor or advocate on a motion to postpone the hearing of a cause called in its order on the calendar.—Manchester v. Milne, Case No. 9,007.

Costs cannot be taxed in admiralty for services rendered by an advocate or proctor on merely supposititious motions, such as motion for final decree, motion for costs, for reference, etc., when the objects of the supposed motions are embraced in the decretal order of the court.—Manchester v. Milne, Case No. 9,007.

Costs cannot be taxed in admiralty for attending court, and for motions made in writing, merely formal, as for time to enable the defendant to answer, etc.—Manchester v. Milne, Case No. 9,007.

Costs are not taxable for the preparation of written arguments, except upon a stipulation in writing to that effect.—Manchester v. Milne, Case No. 9,007.

The $20 docket fee allowed to a proctor or attorney by Act Feb. 26, 1853 (10 Stat. 151) can be taxed only on a final hearing or final disposition of a cause on a calendar, and can be taxed but once in a cause.—Dedekam v. Vose, Case No. 3,730; Id. 3,731; Hayford v. Griffith, Id. 6,264.

Such docket fee may be taxed on dismissal of the appeal for an irregularity in failing to give security for costs.—Hayford v. Griffith, Case No. 6,264.

That fee is not taxable, after a decree on an appeal in admiralty, on a motion that the stipulators on the appeal pay into court the amount of their stipulations.—Dedekam v. Vose, Case No. 3,731.

§ 145. Miscellaneous items.

In ordinary cases an independent charge for costs of a reference to a commissioner in a suit for seamen's wages is not allowed.—Holmes v. Dodge, Case No. 6,637.

Where, however, the reference is solely for the benefit of the respondent, the court will modify the order of reference so as to require the extra costs incurred to be defrayed by him.—Holmes v. Dodge, Case No. 6,637.

Such modification must be asked for on obtaining the order of reference.—Holmes v. Dodge, Case No. 6,637.

Act Aug. 12, 1848 (9 Stat. 284), limiting the fees of commissioners for taking testimony to two dollars, applies only to suits of the United States, and to fees to be paid out of the treasury of the United States.—Sancho v. Atwood, Case No. 12,291a.

The commissioner is entitled to charge for taking depositions though the examination is not had before him, where the witnesses are first sworn before him, and subsequently swear to the depositions before him.—The F. Merwin, Case No. 4,893.

The fact that the notary public who took the depositions was a clerk of the proctor of the claimant does not affect the right to tax the amount of usual compensation which was paid to him.—The F. Merwin, Case No. 4,893.

Costs are not allowed for illegible depositions.—The Avid, Case No. 678.

An auctioneer cannot have costs or disbursements taxed in his favor by the court in invitum.—The Tubal Cain, Case No. 14,212.

Witness' fees and mileage for the attendance of a party to an admiralty suit cannot be taxed in his favor against the other party.—The Elizabeth and Helen, Case No. 4,354.

§ 146. Amount dependent upon amount of recovery.

The district court in admiralty does not tax plenary costs when the sum in dispute does not exceed $50, although the proceedings are plenary.—McGinnis v. Carlton, Case No. 8,799.

Summary costs only are recoverable on a libel in admiralty where libelant admits that a sum less than $50 is all that is due, irrespective of the claim in the libel.—McGinnis v. Carlton, Case No. 8,799.

Where a libelant unites a demand for contract wages unpaid with a claim for a short allowance, and obtains a decree for the wages, he will only obtain costs on that demand, and is liable for costs on the other branch of the litigation.—The Childe Harold, Case No. 2,676.

A libel joined a claim of $6.75 for wages with one of $75 for salvage service. The salvage claim was disallowed, and a decree entered for wages due, "with costs." *Held*, that plenary costs were taxable.—The Caithneshire, Case No. 2,294.

§ 147. Retaxation.

A retaxation will be allowed where, by mistake or other casualty, the original taxation was not opposed.—Collins v. Hathaway, Case No. 3,014.

An irregularity in the taxation of costs may be corrected by the court, on motion, after final decree rendered.—Collins v. Hathaway, Case No. 3,014.

§ 148. Appeal from taxation.

The discretionary power of the court over the award of costs cannot be exercised on an appeal from taxation, especially after the expiration of the term in which the decree is rendered.—The Caithneshire, Case No. 2,294.

(D) COSTS ON APPEAL.

§ 149. When allowed and amount.

The action becomes a plenary suit in the circuit court on appeal in admiralty, and full costs may be taxed where the decree is affirmed with costs.—Godfrey v. Gilmartin, Case No. 5,498.

Costs will not be awarded on affirmance where both parties appeal.—The Atlas, Case No. 634.

A decree for salvage services was modified on appeal by awarding compensation for towage services merely. *Held*, that libelant should be allowed his costs in the district court, while claimant should have costs of appeal.—The Emily B. Souder, Case No. 4,458.

No costs on appeal awarded to either party where a decree of the district court was affirmed in so far as it dismissed the libel, but reversed as to the award of costs to claimant.—The McDonald, Case No. 8,756.

On reversal in the circuit court of the decree of the district court in admiralty, the successful party is entitled to costs on the appeal, unless new evidence was introduced which might have affected the judgment in the court below.—The Margaret v. The Connestoga, Case No. 9,070.

Counsel fees to the successful party in such case may be allowed in the discretion of the court, but such power is sparingly exercised.—The Margaret v. The Connestoga, Case No. 9,070.

Costs allowed on reversal in the circuit court on new evidence in an admiralty case, where there was a transparent contrivance to rescue freight from attachment.—Gonzales v. Minor, Case No. 5,530.

When the decree of the district court is reversed on account of a different state of the evidence as presented in the circuit court, the party succeeding on the appeal does not have costs.—Carrigan v. The Charles Pitman, Case No. 2,444.

Claimants in admiralty, not tendering the actual amount due until after appeal, allowed only costs of appeal, on reversal.—Davis v. Five Hundred and Seventy-Four Bags of Coffee, Case No. 3,633a.

The clerk may charge for including the evidence in a suit in admiralty in the final record on final decree, notwithstanding the provision of Act Feb. 16, 1875, § 1, in regard to appeals in admiralty to the supreme court.—The Alice Tainter, Case No. 196.

A fee of $2.50 for reading, on an appeal in admiralty, a deposition read below, is not taxable.—Dedekam v. Vose, Case No. 3,730.

On removal to the circuit court of an appeal in admiralty before the passage of Act Feb. 26, 1853, the fee for removal is not taxable.—Dedekam v. Vose, Case No. 3,730.

(E) PAYMENT AND REMEDIES FOR COLLECTION.

§ 150. Priority.

The claims for costs of parties appearing in admiralty voluntarily, to protect their own rights, are entitled to only the same priority with their other claims.—The Rodney, Case No. 11,993.

§ 151. Stay of prosecution.

Where property is attached in a suit in personam, after return of "Not found," respondents must pay costs of the attachment before they can defend on the merits.—Millard v. Craig, Case No. 9,548.

§ 152. Enforcement against stipulators.

The regular proceeding against a surety in a stipulation for costs is by petition after notice, and the decree may be final and peremptory. Upon proceeding by motion after personal demand, a conditional decree only is awarded.—The Baltic, Case No. 826.

On default of stipulators for costs an order or decree must be obtained, on which execution may issue against the entire estate of the parties.—The Delaware, Case No. 3,762.

Taking out a fi. fa. in the first instance, without success, for costs in admiralty, does not prevent resorting to process of ca. sa. or to an attachment.—The Delaware, Case No. 3,762.

The remedy on attachment for costs, etc., in admiralty is to be governed by the rules which belong to courts of admiralty as contradistinguished from courts of common law.—The Delaware, Case No. 3,762.

ADMISSIONS.

As evidence in civil actions, see "Evidence," §§ 27–38.
—— in criminal prosecutions, see "Criminal Law," § 60.
By demurrer, see "Pleading," § 43.
In pleading, see "Pleading," § 33.

ADOPTION.

Right of adopted child to pension, see "Pensions," § 2.

§ 1. Inheritance by adopted child.

An adopted child cannot take as next of kin of the adopting parents in the District of Columbia.—Moore v. Hoffman, Case No. 9,764a.

ADULTERY.

See "Bigamy."

ADVANCEMENTS.

See "Wills," § 51.

ADVERSE CLAIM.

To real property, see "Quieting Title."

ADVERSE POSSESSION.

I. NATURE AND REQUISITES.

§ 1, Statutory provisions. § 2, Actual possession. § 3, Duration and continuity. § 4, Hostile character. § 5, Payment of taxes.

II. OPERATION AND EFFECT.

§ 6, Extent of possession. § 7, Property and estates affected. § 8, Title or right acquired.

III. PLEADING AND EVIDENCE.

§ 9, Pleading title or right. § 10, Presumptions and burden of proof.

See. also, "Limitation of Actions."
By co-tenant, see "Tenancy in Common," § 2.

I. NATURE AND REQUISITES.

§ 1. Statutory provisions.

Construction of the statute of limitations of California in relation to Mexican titles and

land grants.—Palmer v. Low, Case No. 10,693.

The statute of 21 Jac. I. as to 20 years' possession was not adopted in New Jersey by force of the act of 1727.—Gardner v. Sharp, Case No. 5,236.

A party claiming land under the Illinois limitation laws must deduce a title directly from a specified source, and by a chain of genuine conveyances.—Hedges v. Paulin, Case No. 6,319.

§ 2. Actual possession.

An actual residence on land is not necessary to constitute an adverse possession; but there must be such an occupancy, by exercising acts of ownership, enjoying profits, etc., as to give notice to the public and all concerned of the claim.—Ewing v. Burnet, Case No. 4,591.

Possession may be held by other means than actual residence or by a fence.—Ellicott v. Pearl, Case No. 4,386.

"Rodeo boundaries," under the California customs and usages, constituted as notorious evidence of possession as cultivation or fencing in an old-settled country.—Boyreau v. Campbell, Case No. 1,760.

The possession of lands by an agent or manager is an actual possession, upon which adverse possession may be predicated.—Roberts v. Moore, Case No. 11,905.

Where there is no visible adverse seisin of any part of the land, an entry by one of the co-tenants gives a seisin of the whole according to their titles.—Thomas v. Hatch, Case No. 13,899.

Information, knowledge, or belief, obtained since the possession commenced, cannot impair the efficacy of such possession as a ground of prescription.—Gaines v. Agnelly, Case No. 5,173.

§ 3. Duration and continuity.

To acquire title by adverse possession, the possession must have been open, adverse, and continuous for 20 years under a claim of title.—Sacket v. McDonnell, Case No. 12,202.

Possession for 15 years, under Act Pa. 1785, to bar ejectment, must have commenced when the law was passed.—Griffith v. Bradshaw, Case No. 5,821.

Twenty years' continuous, adverse possession of real estate in Oregon bars an action to recover possession; but the burden of proof is on the party alleging such possession.—Shuffleton v. Nelson, Case No. 12,822.

Ejectment *held* barred by 60 years' possession under Act N. J. June 5, 1787.—Gardner v. Sharp, Case No. 5,236.

The same length of possession by defendant which will bar a recovery is sufficient, if had by plaintiff, to sustain a recovery.—Holtzapple v. Phillibaum, Case No. 6,648.

The limitation under the Pennsylvania statute begins to run from the time of an actual, adverse possession, and not before.—Potts v. Gilbert, Case No. 11,347.

The statute of limitations of 1863 commenced to run in favor of the adverse possession of such lands at such time.—Harris v. McGovern, Case No. 6,125.

A grant made by an alcalde of San Francisco after the transfer of California to the United States is a Mexican title, within the meaning of the proviso to section 6 of the California statute of limitations.—Palmer v. Low, Case No. 10,693.

When defendant allowed to tack possession of prior occupant to his own to bar action by length of possession.—Barger v. Miller, Case No. 979.

Several successive, unconnected disseisins or adverse possessions, amounting in the aggregate to 20 years, cannot be tacked together to make a continuous possession.—Shuffleton v. Nelson, Case No. 12,822; Potts v. Gilbert, Id. 11,347.

The possession of part of a tract of land cannot be joined to the possession of another part so as to make up the 21 years.—Potts v. Gilbert, Case No. 11,347.

Successive adverse possessions may be tacked together to form a continuous adverse possession when there is a privity of possession between the successive occupants, and such privity arises from a mere parol bargain and sale, followed by delivery of possession, as well as by a formal conveyance.—Shuffleton v. Nelson, Case No. 12,822.

The possession of the disseisor and of his grantee, who immediately succeeds thereto in pursuance of the conveyance, constitutes one entire and continuous possession.—Harris v. McGovern, Case No. 6,125.

The sale by one intruder to another without an exact definition of the property conveyed, will not aid the purchaser in establishing a continued adverse possession.—Potts v. Gilbert, Case No. 11,347.

On the forfeiture of land to the state for failure to pay taxes, the adverse character of a possession by a third person ceases, and it cannot be revived.—Morrill v. Armstrong, Case No. 9,822.

Plea of prescription is unavailing where there had been a mixed possession of the property in controversy, and a continual contest over it.—Brownsville v. Cavazos, Case No. 2,043.

On service of citation on one only of two debtors bound in solido, prescription in favor of the other is suspended during the pendency of the action, and it is not merely interrupted.—Ellery v. Brown, Case No. 4,383.

A claim to land is not barred by lapse of time where the right has been asserted at various times, and possession has been taken of a part of the land.—Walton v. Coulson, Case No. 17,132; Sawyer v. Shannon, Id. 12,405.

§ 4. Hostile character.

Possession must be hostile both in its origin and continuance to be adverse.—Adams v. Burke, Case No. 49.

But the jury may infer that a possession is adverse where a person entered upon and inclosed the premises more than 20 years before suit brought, without any recognition of a hostile title.—Wilkes v. Elliot, Case No. 17,660.

To avoid the bar of a statute by entry, it must be shown that the entry was made with intent to claim possession, and some act done indicative of such intention.—Holtzapple v. Phillibaum, Case No. 6,648.

Where a person's occupancy of land is necessary to the performance of his contract with the government, he will not be considered to have held the same adversely.—Jackson v. Porter, Case No. 7,143.

Possession under a purchase to be paid for in certain work to be done, when the deed is to be made, cannot by lapse of time ripen into a title; otherwise where a deed is given.—Stansbury v. Taggart, Case No. 13,292.

The possession must be under claim or color of title.—Arrowsmith v. Burlingim, Case No. 563; Granger v. Swart, Id. 5,685; McIver v. Reagan, Id. 8,832; Nelson v. Madison, Id. 10,110; Patton v. Hynes, Id. 10,835; Taggart v. Stanbery, Id. 13,724; Wilkes v. Elliot, Id. 17,660.

Color of title or entry under a formal deed is only necessary to adverse possession, when

such possession, as to part of the premises, is merely constructive.—Shuffleton v. Nelson, Case No. 12,822.

Color of title in good faith must be such as would pass the land if a better title were not shown.—Arrowsmith v. Burlingim, Case No. 563; Dubois v. McLean, Id. 4,107. But see Roberts v. Pillow, Case No. 11,909.

A purchase at a tax sale, and inclosed possession under it, give color of title.—Wilkes v. Elliot, Case No. 17,660.

But the possession of a purchaser at a tax sale is not to be considered under claim and color of title until the tax deed is actually executed.—Holden v. Collins, Case No. 6,599.

A tax deed which shows upon its face that legal notice of the sale was not given is void, and does not set running the statute of limitations.—Moore v. Brown, Case No. 9,753.

Lapse of time short of 20 years will not bar an action to recover possession of real property, where defendant claims under a sale by an administrator, except where the sale was made under Code Or. c. 5, § 42, to pay decedent's debts, and plaintiff claims under such decedent.—Wythe v. Myers, Case No. 18,119.

The possession of an occupant of a lot in Coffin's addition to Portland, Or., was not adverse to the title of Coffin until the passage of the donation act, because the legal title of the latter did not accrue until then.—Shuffleton v. Nelson, Case No. 12,822.

An entry into possession, claiming title to the entirety under a deed, where the title turns out to be defective as to a moiety, is a disseisin of the parties entitled to that moiety.—Prescott v. Nevers, Case No. 11,390.

No other deed or title than that originally asserted can be set up to help out the possession.—Jackson v. Porter, Case No. 7,143.

If a man having two titles to land, one defeasible, and the other indefeasible, enters generally, the law adjudges that he entered under his better title.—Gardner v. Sharp, Case No. 5,236.

§ 5. Payment of taxes.

Paying taxes, suing trespassers, etc., is not enough to constitute an adverse possession.—Ewing v. Burnet, Case No. 4,591.

Payment of taxes for 21 years, without an adverse possession during such time, gives no color of title.—Girard v. Philadelphia, Case No. 5,459.

II. OPERATION AND EFFECT.

§ 6. Extent of possession.

The possession of the disseisor does not extend beyond the particular part occupied, and the legal possession of the owner revives the moment the intruder quits such part.—Potts v. Gilbert, Case No. 11,347.

Where one enters into land having title, his seisin is not bounded by his actual possession, but is coextensive with his title; otherwise where he enters without title.—Jackson v. Porter, Case No. 7,143; Ellicott v. Pearl, Id. 4,386; Fraser v. Hunter, Id. 5,063.

§ 7. Property and estates affected.

No length of occupancy under an Indian grant can ripen into a title by adverse possession.—Jackson v. Porter, Case No. 7,143.

If the statute of limitations has once run against a tenant in tail, it is a complete bar to a subsequent tenant in tail upon a descent cast.—Inman v. Barnes, Case No. 7,048.

§ 8. Title or right acquired.

By the common law, land held adversely cannot be conveyed.—Bowman v. Wathen, Case No. 1,740.

In California, adverse possession for the time prescribed vests title.—Meeks v. Vassault, Case No. 9,393.

Adverse possession for the time limited by the statute not only bars the remedy, but extinguishes the right, and vests a perfect title in the adverse holder.—Four Hundred and Twenty Min. Co. v. Bullion Min. Co., Case No. 4,989.

The alienee of a disseisor in possession has a good title as against all persons not having a paramount title.—Flagg v. Mann, Case No. 4,847.

III. PLEADING AND EVIDENCE.

§ 9. Pleading title or right.

A plea which alleges just title, good faith, the requisite period of possession, and that possession continued peaceful and without interruption, is sufficient (in Louisiana) to show title by prescription.—Gaines v. Agnelly, Case No. 5,173.

§ 10. Presumptions and burden of proof.

A deed is not to be presumed where the evidence shows that plaintiffs frequently remonstrated, and consulted counsel about redressing their wrong.—Stillman v. White Rock Mfg. Co., Case No. 13,446.

A perception of the esplees is evidence of seisin, but this is presumed under a deed.—Barr v. Galloway, Case No. 1,037.

Possession, accompanied with a claim of ownership in fee, is prima facie evidence of such an estate.—Jackson v. Porter, Case No. 7,143.

ADVERTISEMENT.

Publication of process, see "Process," § 5.

AFFIDAVITS.

§ 1, Authority to take. § 2, Entitling. § 3, Venue. § 4, Jurat or certificate of officer. § 5, Affidavits taken in other state or foreign country.

See, also, "Depositions."

Right of attorney to make, see "Admiralty," § 138.

Use in particular proceedings.

See "Appeal and Error," § 12; "Arrest," § 6; "Attachment," § 5; "Bail," § 4; "Ne Exeat," § 3; "New Trial," §§ 21, 22; "Removal of Causes," § 42.

On motions in admiralty, see "Admiralty," § 92.

Verification of pleading, see "Admiralty," § 87; "Equity," § 87; "Pleading," §§ 57–59.

§ 1. Authority to take.

An affidavit may be sworn to before affiant's counsel, though wholly in his handwriting.—Atkinson v. Glenn, Case No. 610.

Affidavits taken by justices of the peace and masters in chancery of the state of Arkansas are good in the circuit court of the United States.—Gray v. Tunstall, Case No. 5,730.

Notaries public have no power under the Revised Statutes to administer oaths in the United States circuit court.—Buerk v. Imhaeuser, Case No. 2,107a.

Affidavits taken before notaries public cannot be read in bankruptcy proceedings.—In re McKibben, Case No. 8,859.

An affidavit not sworn to before a judge of the court, or a commissioner appointed to administer an oath, cannot be read in evidence.—Haight v. Morris Aqueduct, Case No. 5,902.

§ 2. Entitling.

Affidavits not entitled in the cause are not admissible.—Buerk v. Imhaeuser, Case No. 2,107a.

An affidavit taken in a suit in equity, sworn to before bill filed, must not be entitled in the suit.—Baldwin v. Bernard, Case No. 797.

An affidavit entitled as in a cause pending, but taken before it existed, cannot be read in evidence with such title, nor after the title is rejected, if the absence of the title renders material portions meaningless.—Blake Crusher Co. v. Ward, Case No. 1,505.

§ 3. Venue.

The venue in affidavits taken before a United States commissioner should be "United States of America, District of ——," and not "State of ——, County of ——."—Sterrick v. Pugsley, Case No. 13,379.

§ 4. Jurat or certificate of officer.

An affidavit whose certificate does not state the place where it is taken is not admissible as evidence.—United States v. Burr, Case No. 14,692c.

A certificate stating that a person of the same name with the one who administered the oath is a magistrate, but not stating that the person who administered it is a magistrate, is an insufficient authentication.—United States v. Burr, Case No. 14,692c.

§ 5. Affidavits taken in other state or foreign country.

Where a clerk certifies the mayor, it is not necessary that the mayor should certify the clerk.—Wright v. West, Case No. 18,102.

AFFIRMANCE.

See "Oath."

AFFREIGHTMENT.

Contracts in general, see "Shipping," §§ 128–193.
—— enforceable in admiralty, see "Admiralty," §§ 14, 15.

AFTER-ACQUIRED TITLE.

Estoppel to assert, see "Estoppel," § 5.

AGENCY.

See "Principal and Agent."

AGGRAVATION.

Of damages, see "Damages," § 5.

AGREED CASE.

Submission of controversy to court, see "Submission of Controversy."

AGREEMENT.

See "Contracts."

AIDER BY VERDICT.

In civil actions, see "Pleading," § 70.

AIDERS AND ABETTORS.

Criminal responsibility, see "Criminal Law," §§ 6–8.

ALIENATION.

Suspension of power of alienation of property, see "Perpetuities."

ALIENS.

§ 1, Disabilities—Who are aliens. § 2, —— Protection of persons and property. § 3, —— Real and personal property. § 4, —— Actions. § 5, Exclusion or expulsion. § 6, Immigration. § 7, Naturalization—Power to naturalize in general. § 8, —— Persons capable. § 9, —— Qualifications in general. § 10, —— Jurisdiction of courts. § 11, —— Proceedings. § 12, —— Record and certificate. § 13, —— Offenses against naturalization laws.

See, also, "Indians."
Alien enemies, see "War," § 3.
Escheat, see "Escheat."
Jurisdiction in bankruptcy proceedings, see "Bankruptcy," § 8.
—— of suits by and against, see "Courts," §§ 44, 57.
Liability to militia duty, see "Militia," § 2.
Qualification as juror, see "Jury," § 20.
Removal of suits by or against aliens to United States courts, see "Removal of Causes," § 14.
Right to copyright, see "Copyrights," § 13a.
—— to patents, see "Patents," § 65.
Sale of vessel to, see "Shipping," § 33.

§ 1. Disabilities—Who are aliens.

On a transfer of territory by one nation to another the political relations between the inhabitants of the ceded territory and the former government are changed.—Tobin v. Walkinshaw, Case No. 14,070.

Naturalized citizens of such ceded country, who owe allegiance, purely statutory, when released therefrom, are remitted to their original status.—Tobin v. Walkinshaw, Case No. 14,070.

§ 2. —— Protection of persons and property.

Under the treaty of July 28, 1868, art. 6, Chinamen can reside in the United States on the same terms as the subjects of Great Britain and France.—Chapman v. Toy Long, Case No. 2,610.

The right to reside in the United States, given by treaty, implies the right to labor there, which right the states have no power to restrict.—Baker v. Portland, Case No. 777.

A treaty with a country giving its subjects the same privileges that are granted "to the most favored nation" does not include rights granted by special convention.—Weiberg v. The St. Oloff, Case No. 17,357.

§ 3. —— Real and personal property.

A British subject could not, in 1793, inherit lands in the United States from a citizen of the United States.—Contee v. Godfrey, Case No. 3,140.

If one of four parceners be an alien, the whole descends to the remaining three.—Contee v. Godfrey, Case No. 3,140.

An alien to whom an interest in real estate is devised is entitled to hold the same until the state interposes its prerogative claim.—Cross v. De Valle, Case No. 3,430.

The rule which prevails at common law, that an alien can take lands by purchase, though not by descent, prevails also in equity.—Cross v. De Valle, Case No. 3,430.

A deed upon a secret trust for an alien, of which the grantee has no knowledge, is not invalid where the alien is incapacitated from acquiring or holding realty, the trust, only, being void.—Hammekin v. Clayton, Case No. 5,996.

The title to land held in trust by an unnaturalized alien *held* to vest in a new trustee, appointed by a court of competent jurisdiction, on the death of the first trustee, though the heirs were all unnaturalized aliens, where the commonwealth had not consummated her title by inquest and office found.—Randall v. Jaques, Case No. 11,553.

Under Act Md. Dec. 1791, § 6, no alien can take by descent the real estate of an alien or naturalized citizen, but he can take real estate

by deed or will.—Dixon v. Walker, Case No. 18,291.

By the Mexican law in force in Texas from March 17, 1836, to January 20, 1840, aliens were prohibited from holding lands except by titles issuing directly from the government.—Hammekin v. Clayton, Case No. 5,996.

But a title under a deed not emanating from the government is good against all persons until declared void in some proceeding analogous to office found.—Hammekin v. Clayton, Case No. 5,996.

After the passage of the Mexican law of 1842 relating to foreigners, no unnaturalized foreigner could receive a grant of land without the express license of the supreme government.—United States v. Cambuston, Case No. 14,713.

A state has power to give capacity to aliens to hold lands within it.—Beard v. Rowan, Case No. 1,181.

The Mexican governors of California had no authority to remove the disabilities of foreigners in respect to holding lands under the Mexican laws of 1836 and 1842.—United States v. Cambuston, Case No. 14,713.

An act giving capacity to aliens "which shall have resided in the state two years" applies as well to future as to past residence.—Beard v. Rowan, Case No. 1,181.

The statute of 7 Anne, c. 5, § 3, does not apply to children born under the same allegiance with that of their father.—Contee v. Godfrey, Case No. 3,140.

The personal property of an alien or naturalized citizen dying intestate will be distributed according to the law of the domicile of the deceased.—Dixon v. Walker, Case No. 18,291.

§ 4. —— Actions.

Alien friends are entitled to claim the same protection of their rights in the federal courts as citizens.—Taylor v. Carpenter, Case No. 13,784; Id. 13,785.

An executor may recover rents for the use of the heir who is an alien.—Wise v. Resler, Case No. 17,911.

A plea in bar in a suit between aliens, that the contract was made abroad, *held* good.—Fields v. Taylor, Case No. 4,777.

§ 5. Exclusion or expulsion.

A state in the exercise of its police powers cannot discriminate against citizens of a foreign treaty power.—In re Ah Fong, Case No. 102.

Exclusion of foreigners when convicts, lepers, etc., within police power of states.—In re Ah Fong, Case No. 102.

§ 6. Immigration.

A state statute imposing conditions on Chinese immigrants not imposed on other immigrants is in violation of Act May 31, 1870.—In re Ah Fong, Case No. 102.

§ 7. Naturalization—Power to naturalize in general.

A state possesses concurrent authority with congress upon the subject of naturalization, but cannot use such authority to contravene a rule established by the latter.—Collet v. Collet, Case No. 3,001.

An alien could not become a citizen either of a state or of the United States, by compliance with state naturalization laws, after congress passed a naturalization law.—Matthew v. Rae, Case No. 9,284.

A state cannot make a foreigner a citizen of the United States.—Lanz v. Randall, Case No. 8,080.

An attempted naturalization under the Pennsylvania act of 1789, after the adoption of the new state constitution, *held* ineffectual.—United States v. Villato, Case No. 16,622.

§ 8. —— Persons capable.

A married woman may be admitted to be naturalized.—Ex parte Pic, Case No. 11,118.

A native of China, of the Mongolian race, is not a white person entitled to naturalization. (R. S. § 2169.)—In re Ah Yup, Case No. 104.

§ 9. —— Qualifications in general.

An alien in the United States before 1802 may be admitted to the rights of citizenship without proof of having resided, etc., five years.—O'Brien v. Woody, Case No. 10,398.

To entitle an alien to naturalization, under the act of 1802, he must have a territorial residence. Continuous service on board a United States naval vessel is not sufficient.—Anonymous, Case No. 465.

To entitle an alien to be naturalized, the five years' residence in the United States under the acts of 1802 and 1804 must be a continued residence.—Ex parte Saunderson, Case No. 12,378; Ex parte Walton, Case No. 17,127.

Constant service as a sailor after domicile acquired will not affect right to naturalization. (Acts April 14, 1802, § 1, and March 3, 1813, § 12.)—In re An Alien, Case No. 201a.

A foreign mariner, residing in Alexandria five years, but sailing occasionally during that time in American vessels from that port, may be naturalized.—Ex parte Pasqualt, Case No. 10,788.

A person who serves an apprenticeship in the United States, and thereafter is in constant service as a sailor, spending the intervals between voyages at his mother's home in the United States, is entitled to naturalization under Act May 26, 1824.—In re An Alien, Case No. 201a.

The word "armies," as used in acts admitting enlisted aliens to citizenship, does not include "marines."—In re Bailey, Case No. 728.

To entitle an alien to naturalization, he must prove that he has behaved as a man of good moral character during all the period of his residence in the United States.—In re Spenser, Case No. 13,234.

A person who commits perjury is not entitled to admission to citizenship, though he has received a pardon.—In re Spenser, Case No. 13,234.

§ 10. —— Jurisdiction of courts.

A court of record without a recording officer distinct from the judge is not competent to receive an alien's declaration of intention. (Act 1802.)—Ex parte Cregg, Case No. 3,380.

The probate courts of Ohio, which are courts of record, with common-law jurisdiction in many cases, and which have a seal and clerk, possess jurisdiction in matters of naturalization, under the act of congress of 1802.—Ex parte Smith, Case No. 12,969.

The city court of Yonkers is a court having common-law jurisdiction, within Rev. St. § 2165, and may naturalize an alien.—United States v. Power, Case No. 16,080.

§ 11. —— Proceedings.

The clerk of the court may receive the preliminary application and oath of an alien to be naturalized. Act May 26, 1824.—Butterworth's Case, Case No. 2,251.

A deposition, made in 1802, that deponents have known the applicant "since the year 1793, in New York," is not evidence that he was residing in the United States before Jan. 29, 1795. (Act April 14, 1802.)—Ex parte Tucker, Case No. 14,214.

The registry required by Act April 14, 1802, § 2, must have been made five years before the application for naturalization.—Anonymous, Case No. 468.

The applicant must also prove the period of his residence and also the other matters required by such section. Parol evidence of the arrival of the applicant five years prior to the application is not sufficient.—Anonymous, Case No. 468.

§ 12. —— Record and certificate.

The question as to what constitutes a record of naturalization considered.—In re Coleman, Case No. 2,980.

The applicant who has complied with all the conditions of admission to citizenship cannot be prejudiced by the failure to record all the proceedings.—In re Coleman, Case No. 2,980.

The validity of a judgment admitting a person to citizenship is not impaired by inaccurate recitals, not intended to deceive, it being clear that the applicant was entitled to naturalization.—In re McCoppin, Case No. 8,713.

§ 13. —— Offenses against naturalization laws.

The words, "if any person shall make, forge," etc., a certificate of naturalization (Act March 3, 1813, § 13), are intended to be general in their operation, and are not confined to seamen.—United States v. Randolph, Case No. 16,120.

The certificate or evidence of citizenship, the sale of which is made criminal by the act of March 3, 1813, is a certified copy of the act by which one was naturalized, and which authorizes his employment on an American vessel.—United States v. Makins, Case No. 15,710.

ALIMONY.

See "Divorce," § 2.
Effect of discharge in bankruptcy, see "Bankruptcy," § 630.
Proof of claim in bankruptcy, see "Bankruptcy," § 386.

ALTERATION OF INSTRUMENTS.

§ 1, Materiality. § 2, Person making alteration and intent. § 3, Rights founded on original transaction or consideration. § 4, Pleading and evidence.

See, also, "Forgery"; "Reformation of Instruments."

§ 1. Materiality.

An alteration of the recitals of a bond, which does not in any manner prejudice the obligees or affect their rights or obligations, is immaterial.—Crawford v. Dexter, Case No. 3,368; Walton v. Coulson, Case No. 17,132.

An alteration of a patent by scratching out the dot over the letter "i" in the name of the grantee *held* not sufficient to exclude the patent as evidence.—Morgan v. Curtenius, Case No. 9,799.

The addition of the names of others as joint makers to a promissory note will not avoid it.—Bingham v. Reddy, Case No. 1,414.

The insertion of the words "Value received" after an indorsement is not a material alteration, and does not avoid the note, unless done with the privity of plaintiff.—Riggs v. St. Clair, Case No. 11,829.

The addition of the name of a place to the signature of the maker of the note, to make it negotiable according to the law of such place, is a material alteration.—Commercial & Farmers' Bank v. Patterson, Case No. 3,056.

The erasure of the place of payment from a promissory note is not a material alteration, as it enlarges and does not limit the rights of the maker; and, where done by an unauthorized person, will not prevent recovery against the maker.—Major v. Hansen, Case No. 8,982.

Erasing the words "after date," in a printed blank, following "on demand," will not avoid a note.—Bingham v. Reddy, Case No. 1,414.

An alteration of the date of a promissory note, whereby the time of payment is prolonged, does not invalidate it as against the maker.—Union Bank v. Cook, Case No. 14,349.

§ 2. Person making alteration and intent.

A deed is not avoided by the seal's being torn off fraudulently or innocently by the obligor.—Cutts v. United States, Case No. 3,522.

§ 3. Rights founded on original transaction or consideration.

An obligee who has torn off the seal and canceled a bond, in consequence of fraud and imposition practiced by the obligor, may maintain an action on such bond, and set forth the special facts in the profert.—United States v. Spalding, Case No. 16,365.

§ 4. Pleading and evidence.

In the absence of direct evidence, an altered check will be presumed to have been altered in the first state where it is known to be altered.—United States v. Britton, Case No. 14,650.

Where the maker changes the date of maturity to enable him to discount the note, he has the burden of proof as to the consent of the other parties to the alteration, and such consent will not be presumed from the fact that they subsequently participated in the benefits of the discount.—Bank of Washington v. Way, Case No. 957.

Under the plea of non est factum, an erasure in a deed must be shown to have been made before its execution by the party asserting its validity.—Prevost v. Gratz, Case No. 11,406.

On a question whether an alteration was made by the original draftsman or by a stranger, other proved writings of his, and also testimony of witnesses, are admissible to show that the peculiarities were such as the draftsman frequently used in his ordinary handwriting.—Smith v. Fenner, Case No. 13,046.

AMBASSADORS AND CONSULS.

§ 1, Evidence of recognition by government. § 2, Powers and duties. § 3, Privileges and immunities. § 4, Bonds. § 5, Consular courts. § 6, Actions. § 7, Criminal prosecutions.

Authorities and duties of consuls in relation to seamen, see "Seamen."
Liability of consul to arrest, see "Arrest," § 1.
Right of consul to intervene in admiralty, see "Admiralty," § 64.

§ 1. Evidence of recognition by government.

Parol evidence is admissible to prove the period when a person was considered by the United States government as a minister.—United States v. Liddle, Case No. 15,598.

§ 2. Powers and duties.

Consuls represent the subjects of their respective nations, if not otherwise represented, where such consuls reside.—Gernon v. Cochran, Case No. 5,368.

A consul in a foreign port, under whose authority a vessel is sold, cannot acquire an interest therein under the sale.—Riley v. The Obell Mitchell, Case No. 11,839.

§ 3. Privileges and immunities.

The willful injury to the dwelling of a foreign minister is an attack on the minister and his sovereign, and punishable as such.—United States v. Hand, Case No. 15,297.

An attaché to a foreign legation is a public minister, within Act 1790 prohibiting an officer

from executing process on a public minister.—United States v. Benner, Case No. 14,568.

A consul is not entitled, by the laws of nations, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides.—Gittings v. Crawford, Case No. 5,465.

The privileges of a foreign minister are not extended to a person having a commission from a revolutionary government not acknowledged by the United States.—United States v. Skinner, Case No. 16,309.

It is a breach of diplomatic privilege for an officer to enter the dwelling house of a secretary of legation, and seize there a runaway slave.—United States v. Jeffers, Case No. 15,471.

To support an indictment under Act 1789, § 27, for executing process on a foreign minister it is not necessary that defendant, who executed the process, should know the person arrested to be a foreign minister, or that he was in fact an officer.—United States v. Benner, Case No. 14,568.

It is no defense to an indictment for an assault on a foreign minister that defendant was ignorant of his public character.—United States v. Ortega, Case No. 15,971.

A foreign minister cannot waive his privileges or immunities, and his submission or consent to an arrest is no justification.—United States v. Benner, Case No. 14,568.

If a foreign minister commits the first assault, he forfeits his immunity so far as to excuse defendant for returning it.—United States v. Liddle, Case No. 15,598; Same v. Ortega, Id. 15,971.

It is the duty of the state court to quash proceedings therein in violation of the privilege of a foreign minister.—Ex parte Cabrera, Case No. 2,278.

Upon an indictment for assaulting a member of legation, the certificate of the secretary of state, dated subsequently to the assault, is the best evidence to prove the diplomatic character of the person assaulted.—United States v. Liddle, Case No. 15,598.

A certificate by the secretary of state, under seal, that a person has been recognized by the department of state as a foreign minister, is sufficient to prove his immunity from arrest.—United States v. Benner, Case No. 14,568.

Upon an indictment for an assault committed on a foreign minister, proof that the person assaulted is received and recognized by the executive of the United States is conclusive as to his public character.—United States v. Ortega, Case No. 15,971.

§ 4. Bonds.

The surety of a consul for the faithful discharge of his duties and for his truly accounting for all moneys coming into his possession by virtue of Act April 14, 1792, is not responsible on account of moneys remitted to him for purposes not comprehended within his consular duties, as prescribed by such act.—United States v. Bell, Case No. 14,565.

§ 5. Consular courts.

The consular court is a court of limited jurisdiction, and all the jurisdictional facts must be alleged in a libel or petition.—The Spark v. Lee Choi Chum, Case No. 13,206.

On an appeal from the consular and ministerial courts of China and Japan to the circuit court of the United States of the district of California, the record must show an allowance of the appeal.—The Spark v. Lee Choi Chum, Case No. 13,206.

Form and sufficiency of record on appeal from a consular court of Japan to the circuit court for the district of California.—Tazaymon v. Twombley, Case No. 13,810.

§ 6. Actions.

The constitutional provision vesting in the supreme court "original jurisdiction" in all cases affecting ambassadors, other public ministers, and consuls, does not make that jurisdiction exclusive.—United States v. Ravara, Case No. 16,122.

The circuit court of the United States has jurisdiction of a suit against a foreign consul.—Graham v. Stucken, Case No. 5,677; St. Luke's Hospital v. Barclay, Id. 12,241.

The state courts have no jurisdiction of suits against foreign consuls, but they have jurisdiction of suits brought by them.—Sagory v. Wissman, Case No. 12,217.

The federal district court has jurisdiction of a suit by an alien against the consul of his nation, residing within the district, to recover the amount of official fees improperly exacted.—Lorway v. Lousada, Case No. 8,517.

The consul of a foreign nation can be sued alone in the federal district court on a contract executed by him jointly with another person.—Valerino v. Thompson, Case No. 16,813a.

See, also, "Courts," § 101.

§ 7. Criminal prosecutions.

Under section 11, Judiciary Act, giving the circuit court jurisdiction of all crimes and offenses cognizable under the authority of the United States, such courts have jurisdiction to try an indictment against a foreign consul for offenses committed in this country.—United States v. Ravara, Case No. 16,122.

A foreign consul is indictable and triable in the federal courts for the common-law offense of sending anonymous letters and threats, with intent to extort money.—United States v. Ravara, Case No. 16,122a.

AMENDMENT.

In admiralty, see "Admiralty," §§ 85, 107.
In bankruptcy, see "Bankruptcy," §§ 25–27, 40, 421.
In equity, see "Equity," §§ 25, 78–83, 123.
Of application for patent, see "Patents," § 79.
Of charter, see "Corporations," § 12; "Railroads," § 8.
Of decree in admiralty, see "Admiralty," § 107.
—— in equity, see "Equity," § 123.
Of deposition, see "Depositions," § 32.
Of judgment, see "Judgment," §§ 25–34.
—— on appeal, see "Appeal and Error," § 40.
Of letters patent, see "Patents," § 95.
Of petition for removal of cause, see "Removal of Causes," § 41.
Of pleadings, see "Bankruptcy," §§ 119–122, 572; "Bills and Notes," § 98; "Collision," § 126; "Equity," §§ 78–83; "Executors and Administrators," § 48; "Forfeitures," § 8; "Patents," § 225; "Pleading," §§ 45–55.
Of proof in bankruptcy, see "Bankruptcy," § 421.
Of record, see "Criminal Law," § 110.
Of schedule in bankruptcy, see "Bankruptcy," §§ 25–27.
Of scire facias, see "Scire Facias," § 1.
Of statutes, see "Bankruptcy," § 4; "Statutes," §§ 11, 12.
Of verdict, see "Trial," § 22.
On appeal, see "Admiralty," § 123; "Appeal and Error," §§ 30, 40.
To bring in new parties, see "Equity," § 25.

Of particular legal proceedings.

See "Indictment and Information," § 24; "Judgment," §§ 25–34; "Pleading," §§ 45–55; "Process," § 8; "Trial," §§ 22, 25.

AMNESTY.

See "Pardon."

ANCIENT DOCUMENTS.

As evidence, see "Evidence," § 59.

ANCILLARY ADMINISTRATION.

See "Executors and Administrators," § 71.

ANCILLARY GUARDIAN.

See "Guardian and Ward," § 10.

ANIMALS.

§ 1, Pasturing. § 2, Cruelty to animals. § 3, Trespassing.

Carriage of live stock, see "Carriers," § 37.
Injuries to trespassing animals, see "Railroads," § 72.
Right of property in carcass of whale, see "Fish," § 2.

§ 1. Pasturing.

A lien given by state law for pasturing stock *held* waived by voluntarily surrendering possession thereof, and allowing a sale without claiming a lien.—In re Mitchell, Case No. 9,657.

§ 2. Cruelty to animals.

Public cruelty to a horse is an indictable offense.—United States v. Logan, Case No. 15,623.

It is an indictable offense at common law to incite a fierce and dangerous dog to bite and tear a cow.—United States v. McDuell, Case No. 15,672.

Beating to death a cow in or near a public street is indictable at common law as a public nuisance.—United States v. Jackson, Case No. 15,453.

§ 3. Trespassing.

Where cattle are impounded for damage feasant, the badness of plaintiff's fence is no justification of pound breach, but may be given in evidence in mitigation of damages.—Young v. Hoover, Case No. 18,158.

ANSWER.

In pleading, see "Admiralty," § 81; "Equity," §§ 44–54, 59; "Pleading," §§ 16–36.

ANTENUPTIAL CONTRACTS.

See "Husband and Wife," § 2.

APPEAL AND ERROR.

§ 1, Nature and form of remedy—Statutory provisions. § 2, —— Proper mode of review. § 3, Decisions reviewable—In general. § 4, —— Amount in controversy. § 5, —— Finality of determination. § 6, —— Nature, scope, and effect of decision. § 7, Right of review—Estoppel. § 8, Presentation and reservation in lower court of ground of review—Objections. § 9, —— Exceptions. § 10, —— Cases certified. § 10a, Parties. § 11, Requisites and proceedings for transfer of cause—Time of taking proceedings. § 12, —— Prayer, allowance, and affidavit. § 13, —— Bonds or other securities. § 14, —— Writ of error and notice. § 15, —— Entry. § 16, Effect of transfer of cause or proceedings therefor. § 17. Supersedeas or stay of execution. § 18, Record and proceedings not in record—Matters to be shown by record. § 19, —— Scope and contents of record. § 20, —— Necessity and sufficiency of bill of exceptions or case. § 21, —— Transmission and filing of record. § 22, —— Questions presented for review. § 23, —— Matters not apparent of record. § 24, Assignment of errors. § 25, Dismissal. § 26, Hearing—Continuance. § 27, Rehearing. § 28, Review—Scope and extent in general. § 29, —— Parties entitled to allege error. § 30, —— Amendments. § 31, —— Additional proofs and trial of cause anew. § 32, —— Presumptions. § 33, —— Discretion of lower court. § 34, —— Questions of fact, verdicts, and findings. § 35, —— Harmless error. § 36, Determination and disposition of cause—Decision in general. § 37, —— Affirmance. § 38, —— Modification. § 39, —— Reversal. § 40, —— Mandate and proceedings in lower court. § 41, Liability on bonds and undertakings—Unauthorized appeal. § 42, —— Discharge of sureties. § 43, —— Grounds and accrual of liability. § 44, —— Extent of liability. § 45, —— Summary remedy. § 46, —— Action.

See, also, "Audita Querela"; "Certiorari"; "Exceptions, Bill of"; "New Trial."
Appellate jurisdiction of particular courts, see "Courts," § 13.
Costs on appeal or error, see "Admiralty," § 149; "Bankruptcy," § 669; "Costs," § 26.
In actions by or against corporations, see "Corporations," § 60.
—— executors or administrators, see "Executors and Administrators," §§ 55, 67.
In admiralty, see "Admiralty," §§ 112–126, 148; "Collision," § 159; "Salvage," § 77; "Seamen," § 144.
In bankruptcy, see "Bankruptcy," §§ 170, 427, 681–695.
In criminal prosecutions, see "Criminal Law," §§ 112, 113.
In extradition proceedings, see "Extradition," § 13.
In forcible entry and detainer, see "Forcible Entry and Detainer," § 2.
In foreclosure suits, see "Mortgages," § 42; "Railroads," § 53.
In habeas corpus proceedings, see "Habeas Corpus," §§ 14, 15.
In land cases, see "Public Lands," § 91.
In patent cases, see "Patents," §§ 81, 83–86, 210, 264.
In prize proceedings, see "War," § 69.
In probate proceedings, see "Wills," § 21.
In revenue cases, see "Customs Duties," §§ 51, 63; "Internal Revenue," §§ 13, 20.
Removal after reversal on appeal, see "Removal of Causes," § 33.
Review of proceedings of justices of the peace, see "Justices of the Peace," §§ 12–16.

§ 1. Nature and form of remedy—Statutory provisions.

The power to issue "all other writs not specially provided for by statute" (Judiciary Act, § 14) only applies where jurisdiction already exists.—United States v. Plumer, Case No. 16,056.

§ 2. —— Proper mode of review.

Appeal and writs of error at common law considered; and Act 1807 and Act April 17, § 50, construed.—Clark v. Shelton, Case No. 2,833b.

The nature of a writ of error, and when it lies, discussed in an opinion by Clifford, J.—United States v. Plumer, Case No. 16,056.

Where a new jurisdiction, unknown to the common law, is created, a writ of error will not, and a certiorari will, lie to it.—Campbell v. Strong, Case No. 2,367b.

A writ of error coram nobis is issued by a court to reverse its own judgment.—Ledgerwood v. Pickett's Heirs, Case No. 8,175.

A writ of error coram nobis lies to set aside an erroneous execution.—Phillips v. Russell, Case No. 11,105a.

A writ of error coram nobis does not lie in the circuit court, either from its own judgment, or the judgment of the district court.—United States v. Plumer, Case No. 16,056.

A writ of error is the proper process to correct errors of the district court in common-law

actions. No appeal lies from the district to the circuit court except in civil causes of admiralty and maritime jurisdiction.—United States v. Wonson, Case No. 16,750; United States v. Haynes, Id. 15,335.

Confiscation causes are not admiralty, but common-law, cases, and are to be reviewed by writs of error.—Brown v. United States, Case No. 2,032.

A petition by an informer for his proportion of the penalty recovered in an action on a coasting license bond is a proceeding at common law, and from the sentence on the petition no appeal lies. The remedy is by writ of error.—Westcot v. Bradford, Case No. 17,429.

A seizure case triable by jury in the district court can be reviewed in the circuit court only on writ of error.—United States v. Fifteen Hogsheads of Brandy, Case No. 15,090.

Where property seized upon land is libeled as forfeited to the United States for violation of the revenue laws, the case can only be reviewed by writ of error.—United States v. Thirty-Seven Barrels of Rum, Case No. 16,467.

If the alleged error be in the judgment itself, and not in the process, a writ of error does not lie in the same court to correct it.—United States v. Plumer, Case No. 16,056.

Questions of fact cannot be re-examined on a writ of error.—Ruddick v. Billings, Case No. 12,110.

A writ of error does not lie from the supreme court to the circuit court.—United States v. Plumer, Case No. 16,055.

A writ of error does not lie on an allowance against an executor or administrator under Act Ark. 1825, § 30.—Campbell v. Strong, Case No. 2,367b.

Erroneous proceedings must be reversed on a writ of error, or they are binding.—Thompson v. Phillips, Case No. 13,974.

§ 3. Decisions reviewable—In general.

A supreme court justice sitting in the circuit will not review a ruling by a district judge holding a circuit.—Appleton v. Smith, Case No. 498.

An action of debt to recover a penalty is a "civil cause" (Act 1789, § 9), in which a writ of error lies from the federal district to the federal circuit court.—Jacob v. United States, Case No. 7,157.

Where the circuit court enters a decree dismissing the bill, where a certificate of division of opinion on a question of jurisdiction is dismissed by the supreme court because of an equal division of opinion, an appeal may be taken from such decree, and the case reviewed in the supreme court, the same as if the decree were pronounced by the judgment of the circuit court.—Coleman v. Hudson River Bridge Co., Case No. 2,983.

§ 4. —— Amount in controversy.

No appeal lies from a decree of a federal district court unless the matter in dispute exceeds the sum or value of $50.—Shirley v. Titus, Case No. 12,796.

An appeal does not lie to the superior court of Arkansas in cases where the sum in controversy is less than $100.—Murphy v. Byrd, Case No. 9,947a.

No final judgment or decree of the circuit court can be re-examined in the supreme court, unless the matter in dispute exceeds $5,000. (Act Feb. 16, 1875, § 3.)—Robbins v. Firemen's Fund Ins. Co., Case No. 11,882.

In a suit in equity by or against an assignee, an appeal to the circuit court is allowed only upon final decrees of the district court where the sum in controversy exceeds $500.—In re Zug, Case No. 18,222.

§ 5. —— Finality of determination.

An appeal will not lie except from a final decision or judgment; and, where none is given, the appellate court has not jurisdiction.—Blakely v. Fish, Case No. 18,240.

The words "ideo consideratum est" in the entry of a judgment are not essential to show that it is final.—Whitaker v. Bramson, Case No. 17,526.

An appeal does not lie from an interlocutory judgment dissolving an injunction.—Clark v. Shelton, Case No. 2,833b.

The decision of the district judge, awarding a perpetual injunction against a treasury warrant of distress, is a final decree within Act March 3, 1803, and appealable to the circuit court.—Porter v. United States, Case No. 11,290.

A decree against a person served with process of foreign attachment, requiring him to pay the money into court as property of the respondent, *held* not final and appealable.—Cushing v. Laird, Case No. 3,510.

A decree final in other respects is not converted into an interlocutory one because it directs a taxation of costs.—Craig v. The Hartford, Case No. 3,333.

An order in railroad foreclosure proceedings, approving, only on certain conditions, a consent contract for the erection of a bridge, *held* not appealable.—La Crosse Railroad Bridge, Case No. 7,969.

A denial of a motion for a nonsuit is not reviewable on error.—Miller v. Jones, Case No. 9,576.

A judgment of the orphans' court against petitioner, on demurrer to his petition for review, is subject to an appeal.—Mauro v. Ritchie, Case No. 9,312.

On a libel for condemnation of merchandise and gold coin, a decree directing that the coin should be deposited in the registry to await further orders is not final; and an appeal will lie from a decree, made over two years later, ordering the gold to be paid over to a claimant.—United States v. Canoe, Case No. 14,718.

A party may appeal from an interlocutory decree having the effect of a final decree, or may wait until final decree is entered.—The New England, Case No. 10,151.

§ 6. —— Nature, scope, and effect of decision.

The refusal of a court to amend a verdict cannot be assigned for error.—Stearns v. Barrett, Case No. 13,337.

Irregularities committed by the jury relative to their verdict cannot be examined by writ of error.—United States v. Gillies, Case No. 15,206.

A writ of error does not lie at common law for the refusal of a court to grant a new trial.—United States v. Gibert, Case No. 15,204.

Allowing a party to open and close is not the subject of a bill of exceptions.—United States v. Dunham, Case No. 15,006.

The issue of nul tiel record is an issue of fact, and, as such, no writ of error lies from the judgment of the federal district court on that fact to the circuit court. (Act Sept. 24, 1789, c. 20, § 22.)—United States v. Cook, Case No. 14,851.

A finding of fact by the federal district court is not a subject of review by a writ of error when the record does not show that any rules of law were violated, or that any erroneous construction of statute was applied to the facts proved.—United States v. Sixty ⅝ Carats Brilliants, Case No. 16,305.

The federal circuit court has jurisdiction to review a judgment or decree of distribution

made by the district court among various claimants of the informer's share in a forfeiture after condemnation and sale of the forfeited property.—Wheaton v. United States, Case No. 17,487.

Defendant cannot appeal from a superseded judgment. (Act Md. 1791, c. 67.)—Coumbe v. Nairn, Case No. 3,278.

The decision on a challenge for favor is not reviewable.—United States v. McHenry, Case No. 15,681.

§ 7. Right of review—Estoppel.

A tender, by answer and payment into court of a certain sum as salvage, is not an admission that such sum is due; and if the tender is refused, and the same sum is decreed, respondent may still appeal.—Lubker v. The A. H. Quinby, Case No. 8,586.

§ 8. Presentation and reservation in lower court of ground of review—Objections.

Mere technical objections taken for first time in appellate court are unavailing.—Babbitt v. Burgess, Case No. 693.

An exception cannot be taken to a verdict for the first time on appeal.—Campbell v. Strong, Case No. 2,367a.

Where defendant acquiesces in a reference, and appears before the auditor, and contests the claim, he cannot, on writ of error, object that the case should have been tried by a jury.—Kelly v. Smith, Case No. 7,675.

§ 9. —— Exceptions.

Objections to evidence are not available where no exceptions were taken to the ruling of the court at the time.—Locke v. United States, Case No. 8,442.

A bill of exceptions which shows that the exceptions were taken for the first time four days after the verdict and judgment will not be considered.—Strain v. Gourdin, Case No. 13,521.

§ 10. —— Cases certified.

A division in opinion between the judges holding the circuit court in respect to granting a new trial is not a case which can be certified to the supreme court.—Lanning v. London, Case No. 8,075.

No civil suit where there is a certificate of division of opinion can be taken to the supreme court, except upon final judgment, and by a writ of error or appeal. Rev. St. §§ 650, 652, 693.—Robbins v. Firemen's Fund Ins. Co., Case No. 11,882.

The judges of the federal circuit court on a motion for a new trial cannot certify to a division of opinion at the trial itself, unless both were present.—Taylor v. Carpenter, Case No. 13,785.

Practice stated in regard to certificates of division of opinion where the court is held by two judges.—United States v. Fullerton, Case No. 15,175.

§ 10a. Parties.

An appeal or writ of error will not lie in the name of a steamboat, or in the name of a firm without stating the names of the individuals.—The Spark v. Lee Choi Chum, Case No. 13,206.

§ 11. Requisites and proceedings for transfer of cause—Time of taking proceedings.

An appeal from a decree of the district court must be taken in open court before the adjournment sine die, unless a different period be prescribed by the court.—Norton v. Rich, Case No. 10,352.

An appeal from the district to the circuit court must be prayed for and allowed to the next circuit court held within the district.—United States v. Haynes, Case No. 15,335.

An appeal in a suit to confirm a land grant will be granted on application made after the expiration of the term at which the decree was rendered.—Noe v. United States, Case No. 10,286.

The limitation of the time for bringing writs of error to five years after rendition of the decree complained of (Act 1789, § 22) does not apply to writs of error coram nobis.—Strode v. The Stafford Justices, Case No. 13,537.

A district judge sitting in the circuit court may, in a proper case, enlarge the time for filing an appeal in the circuit court.—Morris v. Brush, Case No. 9,828.

Time for appeals from the orphans' court of the county of Alexandria, D. C.—Tracy v. Scott, Case No. 14,126.

§ 12. —— Prayer, allowance, and affidavit.

An appeal taken to the superior court of the territory of Arkansas without the affidavit prescribed by law must be dismissed.—Janes v. Buzzard, Case No. 7,206b.

The prayer for appeal, and an order granting it upon terms, is not evidence that the terms were complied with or the appeal prosecuted.—Lambert v. Smith, Case No. 8,028.

Where an appeal bond was presented and approved, but no formal appeal prayed, *held*, that the court might afterwards allow the appeal nunc pro tunc.—Nicholson v. Chicago, Case No. 10,248.

§ 13. —— Bonds or other securities.

An executrix may appeal from the orphans' court to the circuit court of the District of Columbia without giving security.—Deneale v. Young, Case No. 3,785.

Where the writ of error operates as a supersedeas, the security is to be for costs, and such damages as the supreme court may award for the delay.—Renner v. Bank of Columbia, Case No. 11,699.

Where an appeal ties up a fund in court, the bond should provide for payment of interest during the pendency of the appeal.—Turner v. Indianapolis, B. & W. Ry. Co., Case No. 14,260.

The practice of requiring a bond in double the amount of the decree and costs will not be departed from except under special circumstances rendering it unnecessary.—American Nicholson Pavement Co. v. Elizabeth, Case No. 310.

Where the judgment is for a large amount, the court may approve an appeal bond whose penalty is not double such amount.—Hatch v. Coddington, Case No. 6,205.

On writ of error from the supreme court, a justice refused to order an increase in the bond given, though, by reason of the supersedeas, the fees and emoluments coming to plaintiff from defendant would greatly exceed the amount of the bond given.—Butchers' Ass'n v. Slaughter House Co., Case No. 2,234.

The affidavit of the surety on an appeal bond, as to his responsibility, where he does not personally appear, is not sufficient. There must be independent evidence of his responsibility.—Hobson v. Johnson, Case No. 6,553.

The usual affidavit of the ability of the sureties accompanying the bond when approved, *held* sufficient justification.—Hatch v. Coddington, Case No. 6,205.

A bond with security is a substantial compliance with the statute requiring a recognizance.—Deen v. Hemphill, Case No. 3,736a; Dowlin v. Standifer, Id. 4,041a.

A bond which does not set out the nature of the action, nor the court to which the appeal is

prayed, is informal, but not void.—Smith v. Walker, Case No. 13,123a.

Where an appeal bond is defective, a new one may be filed at any time before the case is finally acted on, and the appeal will not be dismissed.—Deen v. Hemphill, Case No. 3,736a.

The bond is waived by an appearance and failure to object, and the want of it does not affect the jurisdiction.—Dillingham v. Skein, Case No. 3,912a.

When a condition in an appeal bond is in the disjunctive, defendant in an action thereon must, by his plea, show which part he has performed.—Tucker v. Lee, Case No. 14,221.

§ 14. —— Writ of error and notice.

After a reversal in the supreme court, where defendant entered an appearance, he cannot object that no writ of error was sued out.—Evans v. Eaton, Case No. 4,560.

Where the record is actually returned and filed in due time, and the copy of the writ of error is correct, a mere clerical error in the return day in the original writ is immaterial, and is cured.—United States v. Six Lots of Ground, Case No. 16,299.

Circuit court obtains jurisdiction on appeal by filing and serving notice of appeal, and not by filing of transcript. — Baldwin v. Raplee, Case No. 802.

If the appeal is prayed on the day of trial, notice is unnecessary, and the appeal bond may be given at any time within 10 days.—Billingsley v. Bell, Case No. 18,237.

§ 15. —— Entry.

An appeal from the district court is properly entered at the term of the circuit court begun next after the entry of the decree in the district court, though the term of the latter was not ended when the term of the circuit court began.—United States v. Certain Hogsheads of Molasses, Case No. 14,766.

§ 16. Effect of transfer of cause or proceedings therefor.

The pendency of an appeal from a final decree, where no supersedeas exists, does not deprive the court below of the power to compel the decree to be executed.—Farmers' Loan & Trust Co. v. Central Railroad of Iowa, Case No. 4,664.

The purchaser under a judgment pending a writ of error or appeal, where no stay of proceedings was obtained, acquires a good title.—South Fork Canal Co. v. Gordon, Case No. 13,189.

After a case has been appealed from the circuit to the supreme court, it is not the proper practice to apply to the circuit court for a request to the supreme court to send the case back for a rehearing.—Roemer v. Simon, Case No. 11,998.

A substantial defect in a declaration cannot be amended in the circuit court while the case is pending in the supreme court.—Marsteller v. McClean, Case No. 9,140.

After a writ of error has been served and returned to the supreme court, the record cannot be amended in the court below, though the writ has been dismissed in the court above.—United States v. Hooe, Case No. 15,386.

On an appeal from a final decree dissolving an injunction, taken in such form as to operate as a supersedeas, the court below has no jurisdiction to restrain the successful party from prosecuting the previously enjoined work pending the appeal.—Eureka Consol. Min. Co. v. Richmond Min. Co., Case No. 4,549.

§ 17. Supersedeas or stay of execution.

Where the terms of a bond on appeal comply with the provisions of Rev. St. § 1000, in regard to a supersedeas and stay of execution, the bond operates as a supersedeas and stay of execution without any order to that effect.—Arnold v. Frost, Case No. 558.

Further action of a justice of the supreme court of the United States is superseded by the application for and allowance of a writ of error.—Butchers' Ass'n v. Slaughter House Co., Case No. 2,234.

A writ of error to the judgment of the circuit court of the District of Columbia awarding a peremptory mandamus is a supersedeas.—United States v. Columbian Ins. Co., Case No. 14,840.

Both appeals and writs of error operate as a supersedeas without express order, if taken within the proper time and with an offer of the requisite security. — Butchers' Ass'n v. Slaughter House Co., Case No. 2,234.

The allowance of an appeal to the supreme court relates back to the time when the original application was made to the judge of the circuit court, and entitles the party to a stay.—Thornhill v. Bank of Louisiana, Case No. 13,991.

An appeal and the bond given in pusuance thereof do not vacate or suspend an order of injunction.—Whitney v. Mowry, Case No. 17,592.

A writ of error to a decree dissolving an injunction restraining enforcement of a judgment at law *held* not a supersedeas. — Grundy v. Young, Case No. 5,850.

A writ of error is not a supersedeas unless a copy is filed in the clerk's office for the adverse party within the ten days. Act 1789, § 23.—Moore v. Dunlop, Case No. 9,759; Ex parte Ben, Id. 1,285.

The 10 days within which a writ of error must be sued out to operate as a supersedeas, where a motion for a new trial is denied, commences to run from the entry of the rule for judgment in the clerk's office.—Hatch v. Coddington, Case No. 6,205.

A writ of error is not a supersedeas unless served within 10 days after rendition of the judgment, irrespective of agreements of the parties for a stay of execution.—Thompson v. Voss, Case No. 13,979.

Where the writ of error pending in the supreme court was not taken out in time to operate as a supersedeas, execution against the bail will not be stayed, nor will an injunction issue.—Foyles v. Law, Case No. 5,024.

A bond on appeal from a decree for plaintiff *held* not to cover the amount directed to be paid to the master, and the collection thereof not subject to be stayed by the proceedings for appeal.—Myers v. Dunbar, Case No. 9,990.

Execution on a judgment obtained in a suit on a judgment obtained in another state will not be stayed pending an appeal from the original judgment, where such appeal is not a supersedeas.—Troy City Bank v. Lauman, Case No. 14,194.

§ 18. Record and proceedings not in record—Matters to be shown by record.

When one tribunal reviews the judgment of another, or the action of its own subordinate bodies or officers, it should never reverse without having before it all the facts and conditions upon which the decision to be reviewed was based.—In re Weber Furniture Co., Case No. 17,331.

The ground of objection to the admissibility of evidence must appear, to render the exception available.—Locke v. United States, Case No. 8,442.

§ 19. —— Scope and contents of record.

Where a seizure case is, by agreement of the parties, tried by the district court without a

jury, the record should be made up as in the case of a writ of error, with the proper exceptions to the admission or rejection of testimony, etc.—United States v. Fifteen Hogsheads of Brandy, Case No. 15,090.

A note sued on is not part of the record, unless produced on oyer.—Cook v. Gray, Case No. 3,156a.

A statement by counsel of the evidence, not made a part of the bill of exceptions, though formally certified by the clerk, is no part of the record.—Strain v. Gourdin, Case No. 13,521.

§ 20. —— Necessity and sufficiency of bill of exceptions or case.

The proceedings and judgments of the district court in actions at law cannot be reviewed where the facts are controverted and no case is stated for the opinion of the court.—Blair v. Allen, Case No. 1,483.

A statement in the clerk's minutes that a bill of exceptions was sealed and placed on file is not available unless the exception was seasonably reduced to writing, and embodied in a regular bill of exceptions.—Locke v. United States, Case No. 8,442.

The findings of fact by a referee cannot be reviewed on writ of error to the circuit court, where his report was not excepted to, and a case containing exceptions forming part of the record contained only proceedings which took place prior to the making of such report.—Tyler v. Angevine, Case No. 14,306.

Where objection is made to the admissibility of testimony, the bill of exceptions must set it out so that the court may judge of its admissibility, and, if this is not done, the judgment will be presumed to be correct.—Wiley v. Robinson, Case No. 17,656a.

Where the rulings of the court on documentary evidence are made the subject of exceptions, the documents must be inserted in the bill of exceptions.—United States v. Dunham, Case No. 15,006; Stockwell v. United States, Id. 13,466.

§ 21. —— Transmission and filing of record.

The appellant in Maryland is not bound to prosecute his appeal, and transmit the record, until the term next after the approval of the appeal bond.—Scott v. Law, Case No. 12,537.

If a term intervenes between the issuing of the writ of error and filing the record and writ, plaintiff in error will be non prossed.—Janes v. May, Case No. 7,206c.

Time for filing transcript on appeal in the circuit court may be extended by consent of parties beyond statutory time.—Baldwin v. Raplee, Case No. 802.

§ 22. —— Questions presented for review.

Judgment will not be reversed because the court refuses to give a charge abstractly correct, but which the bill of exceptions does not show was pertinent to the case.—United States v. Three Hundred and Thirty-Seven Cases of Wine, Case No. 16,506.

Error in excluding depositions cannot be considered when the bill of exceptions does not identify them, but they are inserted in the copy of the record by the clerk, more than two months after the bill is signed.—United States v. Three Hundred and Thirty-Seven Cases of Wine, Case No. 16,506.

§ 23. —— Matters not apparent of record.

On review by writ of error, facts not stated in the bill of exceptions will not be noticed.—Pendleton v. United States, Case No. 10,924.

§ 24. Assignment of errors.

Nothing can be assigned for error which contradicts a record.—Field v. Gibbs, Case No. 4,766.

§ 25. Dismissal.

An appeal from the orphans' court, Washington county, D. C., will be dismissed if the record is not transmitted within 30 days after the order appealed from.—Mauro v. Ritchie, Case No. 9,312.

It is too late to object to an appeal where both parties have treated it as valid.—The Native, Case No. 10,054.

The authority of the district court in cases pending on appeal extends only to the protection of parties against unreasonable delay. A motion to dismiss must be made in the circuit court.—The Josephine, Case No. 7,545.

The appellate court may sustain the appeal in part, and dismiss it in part, on the ground that, as to such part, the case could not be brought up for review on appeal.—Westcot v. Bradford, Case No. 17,429.

A writ of error, in exceptional cases, will be dismissed without prejudice to another writ, or to an effectual process to remove the cause.—Ruddick v. Billings, Case No. 12,110.

After dismissal of an appeal, the appellate court cannot affirm the judgment.—Maxwell v. Williams, Case No. 9,324a.

§ 26. Hearing—Continuance.

The appellee may continue the cause where the record is filed only a short time before the term.—Backus v. The Marengo, Case No. 713.

§ 27. Rehearing.

Circuit court, on appeal, cannot rehear a cause or admit a claim at a term subsequent to that in which the cause was finally decided.—The Avery, Case No. 672.

§ 28. Review—Scope and extent in general.

On error to the circuit court from a judgment of the district court based on the report of a referee, conclusions of law alone can be reviewed, and these only so far as excepted to below.—Sicard v. Buffalo, N. Y. & P. Ry. Co., Case No. 12,831.

On a writ of error to a district court in Iowa, its ruling on a motion to the jurisdiction may be reviewed under Act June 1, 1872, § 5, making the practice of the state courts applicable to the federal courts.—Nazro v. Cragin, Case No. 10,062.

§ 29. —— Parties entitled to allege error.

A party not appealing from the decision of the district court cannot be heard in opposition thereto.—Bush v. The Alonzo, Case No. 2,223.

§ 30. —— Amendments.

Amendments may be made in the appellate court only when the suits are on the admiralty side.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,503.

The circuit courts, on appeal from the district courts, may allow any amendments of defects in form occurring in the court below, or may disregard them; otherwise as to defects in substance.—Smith v. Jackson, Case No. 13,065.

§ 31. —— Additional proofs and trial of cause anew.

New evidence cannot be heard upon an appeal from the orphans' court.—Gittings v. Burch, Case No. 5,464.

Where a cause has once been tried by a jury in the district court, there cannot be a new trial by a jury at the circuit court.—United States v. Wonson, Case No. 16,750.

§ 32. —— Presumptions.

Instructions will be presumed to be correct where the evidence is not spread upon the record by exception or otherwise.—Blakely v. Ruddell, Case No. 18,241.

Where the record states that the jury were sworn, it will be presumed that the proper oath was administered.—Dillingham v. Skein, Case No. 3,912a.

The appointment of an elisor, to summon a jury, will be presumed to be correct, and to have been done for reasons satisfactory to the court.—Campbell v. Strong, Case No. 2,367a.

§ 33. —— Discretion of lower court.

The decision of the court on a motion for a continuance will not be disturbed save in a flagrant case.—Campbell v. Strong, Case No. 2,367a.

§ 34. —— Questions of fact, verdicts, and findings.

A decision on a question of fact, established with reasonable satisfaction, will not be disturbed.—Baker v. The Potomac, Case No. 778.

A decree will not be disturbed on appeal as against evidence, where the evidence is conflicting and the preponderance is doubtful.—Davison v. Seal-Skins, Case No. 3,661.

A finding of fact by the district court will not be reversed unless clearly erroneous.—In re Clark, Case No. 2,802.

A decree of the district court, based wholly upon a question of fact, will not be reversed where the evidence raises only a doubt as to the fact.—Baker v. Smith, Case No. 781.

Where there is a good and bad count in a declaration, and it appears that the evidence applied solely to the bad count, the judgment will be reversed.—Scull v. Roane, Case No. 12,570c.

It is reversible error to allow evidence to go to the jury which would constitute the ground of a separate action.—Wyatt v. Harden, Case No. 18,106a.

§ 35. —— Harmless error.

An appellate court will not reverse a judgment on technical grounds, where substantial justice has been done.—Fisher v. Reider, Case No. 4,822a.

A new trial will not be granted for error in instructions if it be apparent that justice has been done.—Mirick v. Hemphill, Case No. 9,647a.

Error in rulings is no ground for reversal where the appealing party had no case.—Marionneaux's Case, Case No. 9,088.

Where the judgment on the whole record is right, it will not be disturbed, though errors were committed.—Johnson v. McLain, Case No. 7,395a; Anonymous, Id. 18,224.

A judgment will not be reversed for a refusal to admit evidence offered, unless it appears affirmatively that, if admitted, it would tend to prove a material fact in the cause.—Watt v. United States, Case No. 17,292.

The error in the admission or rejection of evidence on a question of fraud or deceit must not only be striking, but must necessarily have been calculated to mislead the jury, before the verdict will be interfered with.—Walker v. Hawxhurst, Case No. 17,071.

Where the instructions are not applicable to the facts proved in the case, and have no influence on the verdict, they are not ground of a reversal, however erroneous they may be.—United States v. Wright, Case No. 16,775.

Error in the admission of testimony of a custom is rendered harmless by a subsequent instruction construing the contract without regard thereto.—Lee v. New Haven, M. & W. R. Co., Case No. 8,197.

Judgment will not be reversed because papers recognized on the trial as in evidence were not formally read.—Andrews v. Graves, Case No. 376.

The incompetency of a witness as to the loss of goods shipped is immaterial, where the loss is otherwise sufficiently proved.—Brown v. The Elvira Harbeck, Case No. 2,005.

§ 36. Determination and disposition of cause—Decision in general.

Where there are two points actually decided in a case, and it does not appear that the court intended to rest its judgment upon one alone, the decision upon neither can be regarded as obiter.—Starr v. Stark, Case No. 13,317.

If the verdict below was given upon an immaterial issue, a repleader cannot be awarded, but judgment must be rendered against the party who committed the first fault.—United States v. Burnham, Case No. 14,690.

§ 37. —— Affirmance.

If a declaration is fatally defective, the court will affirm a judgment nonsuiting a plaintiff, without considering whether nonsuit was proper.—Earhart v. Campbell, Case No. 4,241a.

Where, by the pleadings, a complete bar is shown to the action, a judgment for defendant must be affirmed, though an error in his favor appear on the record.—United States v. Carlton, Case No. 14,725.

§ 38. —— Modification.

Where plaintiff is at least entitled to nominal damages, he should be permitted to avoid a new trial for erroneous instructions by remitting damages.—Cowing v. Rumsey, Case No. 3,296.

A judgment, broader and more advantageous than a party is entitled to, will be reversed or modified, although, upon the record, it appears to be technically correct.—Four Hundred and Twenty Min. Co. v. Bullion Min. Co., Case No. 4,989.

§ 39. —— Reversal.

The judgment will not be reversed for the small excess of $1.90.—Tunstall v. Robinson, Case No. 14,238a.

As to the question of title where property was sold on attachment and the judgment in the action was afterwards reversed, see—Biggs v. Blue, Case No. 1,403.

The title acquired by a stranger through a sale of lands regularly made under a judgment of a court of record, valid upon its face, cannot be defeated by a subsequent reversal of the judgment on appeal.—Galpin v. Page, Case No. 5,205.

Where a judgment has been enforced and subsequently reversed on appeal, the party is entitled to a right of action for a money equivalent of that which was lost by the erroneous judgment.—South Fork Canal Co. v. Gordon, Case No. 13,189.

On reversal of a judgment in an action brought by a writ of error from the district court, the circuit court may, if justice require, award a venire facias de novo, triable at the bar of the circuit court.—United States v. Sawyer, Case No. 16,227.

§ 40. —— Mandate and proceedings in lower court.

The effect of a remitter of the cause on reversal by the supreme court.—Harvey v. Richards, Case No. 6,182.

Unless modified or restrained by subsequent events, the mandate of the supreme court must be promptly and implicitly enforced by the court below.—South Fork Canal Co. v. Gordon, Case No. 13,189.

After a judgment against defendant in the supreme court on appeal on demurrer, he will not be allowed to amend.—Hodgson v. Marine Ins. Co., Case No. 6,566.

After reversal, on error to the supreme court, of an order sustaining demurrers to the plaintiff's petition, further demurrers cannot be filed.—Hitchcock v. Galveston, Case No. 6,533.

The court may allow the general issue to be pleaded after judgment upon demurrer has been awarded by the supreme court, and a mandate issued to enter the judgment and award a writ of inquiry.—Sheehy v. Mandeville, Case No. 12,740.

On certificate of division of opinion on a question of jurisdiction dismissed by the supreme court because of an equal division of opinion, the circuit court must enter a decree dismissing the bill.—Coleman v. Hudson River Bridge Co., Case No. 2,983.

In passing upon a collateral branch of a case which has been to the supreme court, the circuit court will not admit that the supreme court made a mistake in regard to any facts actually passed upon.—Kennicott v. Wayne County, Case No. 7,710.

An order for the performance of a decree affirmed on appeal, made in pursuance of a mandate, cannot be superseded under Act Md. 1791, c. 67.—White v. Clarke, Case No. 17,542.

A judgment on affirmance may be amended four years after rendition by adding the name of another person.—Coelle v. Lockhead, Case No. 2,943a.

§ 41. Liability on bonds and undertakings—Unauthorized appeal.

Where defendant takes an unauthorized appeal and gives a bond, plaintiff may maintain an action thereon.—Chase v. Smith, Case No. 2,629.

§ 42. —— Discharge of sureties.

Where a judgment is reversed, but it is ordered that the reversal be set aside, and an affirmance entered on the filing of a remittitur of a certain amount, which is accordingly done, the sureties on the supersedeas bond are released.—Seymour v. Gregory, Case No. 12,686.

An appeal bond is invalidated by interlining the name of a new obligor, and its execution by him without the consent of the other sureties.—Long v. Oneale, Case No. 8,481.

§ 43. —— Grounds and accrual of liability.

The condition of an appeal bond is broken unless the judgment be reversed in toto.—Butt v. Stinger, Case No. 2,246.

The sureties on an appeal bond are absolutely fixed without a ca. sa. or any step against the principal on his failure to prosecute the appeal with effect.—Dowlin v. Standifer, Case No. 4,041a.

§ 44. —— Extent of liability.

The appellant is not absolutely bound by the condition of a bond on appeal to the supreme court to pay the amount of the original judgment.—Bank of the Metropolis v. Swann, Case No. 902.

The sureties in the appeal bond are liable to the extent of its penalty, and have no right to compel the application of proceeds made under the original decree.—Sessions v. Pintard, Case No. 12,674.

§ 45. —— Summary remedy.

Summary judgment can be rendered against the sureties on an appeal bond where the decree in a circuit court is for a sum not sufficient to allow an appeal to the supreme court.—The Blanche Page, Case No. 1,525.

§ 46. —— Action.

Remedies on appeal bonds in Ohio.—Goshorn v. Alexander, Case No. 5,630.

The court in which the action was brought has jurisdiction of a suit on an appeal bond given therein.—Arnold v. Frost, Case No. 558.

Action on bond may be brought jointly by obligee claiming interest in the suit.—Arnold v. Frost, Case No. 558.

Debt is the proper action on an appeal bond or recognizance, but by the common-law rule the plaintiff must sue all, if living, or one, and not an intermediate number.—Dowlin v. Standifer, Case No. 4,041a.

In an action on an appeal bond given on appeal to the supreme court, plaintiff must aver damages sustained by defendant's not making his plea good.—Bank of the Metropolis v. Swann, Case No. 902.

In an action upon an appeal bond given upon a writ of error to the supreme court, the breach to be assigned must be a single breach, denying each alternative.—Tucker v. Lee, Case No. 14,221.

The plaintiff in error is bound only to indemnify the defendant in error for whatever losses he may have sustained by the judgment not being satisfied and paid after affirmance, which must be specially alleged in an action on the appeal bond.—Tucker v. Lee, Case No. 14,221.

APPEARANCE.

§ 1, Authority to enter appearance for another party. § 2, Time for appearance. § 3, Entry and record of appearance. § 4, Proceedings in cause constituting appearance. § 5, Operation and effect in general. § 6, Rights acquired by defendant. § 7, Jurisdiction acquired. § 8, Waiver of process or notice. § 9, Waiver of objection. § 10, Effect of appearance after judgment. § 11, Setting aside or striking out.

Bonds for appearance in admiralty, see "Admiralty," § 67.
By attorney general, see "Attorney General."
By corporation, see "Corporations," § 55.
Effect of, see "Admiralty," § 61; "Courts," § 63; "Removal of Causes," §§ 27, 36.
In admiralty, see "Admiralty," § 63.
In bankruptcy proceedings, see "Bankruptcy," § 568.

§ 1. Authority to enter appearance for another party.

General appearance by solicitors is a waiver of exemption from jurisdiction by a nonresident of the district.—Kerp v. Michigan L. S. R. Co., Case No. 7,727.

An appearance by attorney, and the filing of a plea to the jurisdiction by attorney, and not in person, is a submission to the jurisdiction.—Thayer v. Wales, Case No. 13,872.

After an appearance entered at a previous term, it is too late to call for the authority to appear.—Rogers v. Crommelin, Case No. 12,009.

§ 2. Time for appearance.

A party may appear in person or by counsel at any time in the course of the action.—Hightower v. Hawthorn, Case No. 6,478b.

Defendant has the whole of the return term to appear in, and, if plaintiff withdraws his action before the end of the term, he cannot maintain a suit on the bail bond.—Ringgold v. Renner, Case No. 11,849.

§ 3. Entry and record of appearance.

An appearance cannot be entered upon the docket, out of court.—French v. Venable, Case No. 5,105.

A special appearance, entered by the clerk upon the order book at the request of defendant's attorney, without leave of court, *held* an admission of jurisdiction.—Thayer v. Wales, Case No. 13,872.

§ 4. Proceedings in cause constituting appearance.

A demurrer on the ground that the petition does not set forth facts sufficient to constitute a cause of action is an appearance which cures defective service of process.—Dallmeyer v. Farmers', Merchants' & Manufacturers' Fire Ins. Co., Case No. 3,546.

The giving of a bond by a nonresident for the release of property seized under foreign attachment from a United States court is not a voluntary appearance.—Chittenden v. Darden, Case No. 2,688.

§ 5. Operation and effect in general.

An appearance by defendant, shown by the record, cannot be denied by plea or otherwise.—Thompson v. Emmert, Case No. 13,953.

§ 6. Rights acquired by defendant.

Where defendant in equity has appeared by a solicitor, notice of application for a decree, after an order pro confesso, must be given such solicitor.—Bennett v. Hoefner, Case No. 1,320.

§ 7. Jurisdiction acquired.

The voluntary appearance of defendant in a suit commenced by foreign attachment cures the defect of jurisdiction.—Chittenden v. Darden, Case No. 2,688.

A nonresident of the district waives his immunity from suit by voluntarily appearing and pleading jointly with other defendants.—McCloskey v. Cobb, Case No. 8,702.

§ 8. Waiver of process or notice.

A voluntary appearance after the revival of a suit is a waiver of process.—Carrington v. Brents, Case No. 2,446.

Appearance of counsel for defendants waives notice of injunction.—Bell v. Ohio Life & Trust Co., Case No. 1,260.

Want of 10 days' notice to an administrator of the presentation of a claim to the probate court is cured by the voluntary appearance of the administrator.—McCoy v. Lemons, Case No. 8,730a.

§ 9. Waiver of objection.

A defendant who appears in an action or proceeding waives his right to urge an objection to the process or notice, or the service thereof.—Brammer v. Jones, Case No. 1,806; Flanders v. Ætna Ins. Co., Id. 4,852; Gadsby v. Miller, Id. 5,167; In re Ulrich, Id. 14,327; Winans v. McKean R. & N. Co., Id. 17,862.

An appearance by persons whose names are alleged in the bill to be unknown, and who are designated by fictitious names in the bill, and subpœna served on them, does not cure these defects or make such persons parties on the record.—Kentucky Silver Min. Co. v. Day, Case No. 7,719.

§ 10. Effect of appearance after judgment.

An appearance, after decree rendered, for the mere purpose of moving to strike the case from the docket on the ground that no process had been served, will not validate the decree.—Dorr v. Gibboney, Case No. 4,006.

Appearance by attorney to set aside office judgment *held* not to waive irregularity of service.—Knox v. Summers, Case No. 7,913.

§ 11. Setting aside or striking out.

The court will not order defendant's appearance to be struck out, so as to charge the marshal.—Wood v. Dixon, Case No. 17,943.

APPLICATION.

Of assets and securities in general, see "Marshaling Assets and Securities."
—— of partnership, see "Partnership," §§ 32, 33.
Of payment, see "Payment," §§ 7–14.

APPOINTMENT.

Assignee for benefit of creditors, see "Assignments for Benefit of Creditors," § 8.
—— in bankruptcy, see "Bankruptcy," §§ 160–183.
—— in insolvency, see "Insolvency," § 6.
Executor or administrator, see "Executors and Administrators," §§ 4–8.
Guardian, see "Guardian and Ward," §§ 2, 3.
—— ad litem, see "Infants," § 4.
Master of vessel, see "Shipping," § 74.
Of officers, see "Army and Navy," § 8; "Customs Duties," § 17; "United States," § 7; "United States Marshals," §§ 1, 3.
Power of appointment, see "Powers"; "Wills," § 37.
Receiver, see "Railroads," § 60; "Receivers."
Register in bankruptcy, see "Bankruptcy," § 310.
Trustee, see "Trusts," §§ 12–15.

APPORTIONMENT.

Of salvage compensation, see "Salvage," §§ 51–56, 72.

APPRAISAL.

Of merchandise subject to duty, see "Customs Duties," §§ 28–54.

APPRENTICES.

§ 1, Persons who may bind. § 2, Indentures. § 3, Recovery of runaway. § 4, Compelling performance of covenants.

§ 1. Persons who may bind.

A mother cannot bind out her child.—Ballard v. Edmonston, Case No. 817.

Justices of the peace in the District of Columbia have no power to bind out an orphan not brought before them.—Smith v. Elwood, Case No. 13,042.

Justices of the peace have no authority to bind out an orphan child while the orphans' court is in session.—Gody v. Plant, Case No. 5,499; Lynch v. Ashton, Id. 8,636; May v. Bayne, Id. 9,331.

§ 2. Indentures.

Under Act Md. 1793, an indenture made by one justice of the peace under the seventh section of the act will be enforced, though there were many objections to the form of the indenture.—Charles v. Matlock, Case No. 2,615.

The father of an apprentice who binds himself is liable upon the indentures, by reason of his signature and seal, although there be no express words of covenant binding the father.—Woodrow v. Coleman, Case No. 17,982.

An indenture, signed and sealed by a minor 15 years old, bound out by his father, is binding on him, though he is not named therein, and there are no covenants on his part.—Studer v. Glenn, Case No. 13,558.

In the indentures of an apprentice bound out by the orphans' court, it is not necessary to state that the apprentice was present in court.—Smith v. Elliot, Case No. 13,040.

The master is concluded by the recitals in the indentures as to the age of his apprentice.—McCutchin v. Jamieson, Case No. 8,743.

An entry on the minutes of the orphans' court "that A. B. be bound apprentice to C. D." does not constitute a lawful binding.—Hines v. Hewitt, Case No. 6,520.

A stranger to the indenture of apprenticeship cannot take advantage of the omission to insert the age of the apprentice.—Heinecke v. Rawlings, Case No. 6,326.

The orphans' court of Alexandria county has power to bind out orphan children without indentures.—Bell v. English, Case No. 1,250.

Binding out of apprentice in Washington county, D. C., is of no effect, unless parents approve and indorse indentures within two months.—Barrett v. McPherson, Case No. 1,049.

The order of the orphans' court to bind out an apprentice does not of itself create the relation of master and servant.—Stewart v. Duffey, Case No. 13,425.

An infant cannot bind himself as an apprentice, nor can a master assign the indenture of his apprentice.—Handy v. Brown, Case No. 6,019.

An apprentice bound in Maryland, and brought into the District of Columbia, may be discharged by the court, who will order him to be bound again, by two justices of the peace, to a new master.—Gusty v. Diggs, Case No. 5,878.

§ 3. Recovery of runaway.

Where the indenture is void by the law of the state where made if the apprentice is carried out of the state, the master cannot hold him in another jurisdiction.—United States v. Scholfield, Case No. 16,231.

The statute and constitutional provisions for the rendition of persons held to labor include apprentices.—Boaler v. Cummines, Case No. 1,584.

A person binding himself as an apprentice, with the assent of his father living in another state, may be arrested and remanded as a fugitive from labor.—Boaler v. Cummines, Case No. 1,584.

§ 4. Compelling performance of covenants.

An apprentice will be compelled after the expiration of the term to serve the number of days lost by an absence without consent of the master.—Easby v. Fletcher, Case No. 4,250.

For failure to obey the order of the court, the apprentice may be punished as for a contempt.—Easby v. Fletcher, Case No. 4,250.

Assumpsit lies by apprentice against master for disobedience of order although no indentures are executed.—Adams v. Miller, Case No. 63.

APPROPRIATION.

Of water rights, see "Waters and Water Courses," §§ 1, 7.

APPURTENANCES.

Included in contract for sale of land, see "Vendor and Purchaser," § 12.

ARBITRATION AND AWARD.

§ 1, Submission. § 2, Arbitrators. § 3, Proceedings. § 4, Award. § 5, Action on awards.

See, also, "Reference"; "Submission of Controversy."

Submission by trustee, see "Trusts," § 24.

§ 1. Submission.

The reservation in a submission to referees of the right to move to set aside their report takes away its character of a submission to arbitration; and an agreement for a cognovit for the amount of the report will be deemed to refer to the amount as finally settled by the court.—Denny v. Brown, Case No. 3,805.

An agreement to submit a question to arbitration is revocable before the award is given.—Tobey v. County of Bristol, Case No. 14,065.

A revocation of the submission and notice thereof before the award is made and signed will invalidate the same.—Sangster v. Quantrill, Case No. 12,321.

When the terms of submission to arbitration are uncertain, parol evidence may be given of the controversies submitted.—Davy v. Faw, Case No. 3,663; Faw v. Davy, Id. 4,701.

If the submission be general, and the award be of a particular thing, it will be presumed that nothing else was in controversy unless the contrary appears.—Kleine v. Catara, Case No. 7,869.

Where a reference in a pending suit is made without order of court, it can only be enforced by separate action.—Banert v. Eckert, Case No. 837.

§ 2. Arbitrators.

Where one of the arbitrators has prejudged the cause, the award will be set aside.—Taber v. Jenny, Case No. 13,720.

After delivering their award, the arbitrators cannot again act upon the case without new authority.—Talbott v. Hartley, Case No. 13,732.

A submission to three referees does not authorize an award by two only.—The Nineveh, Case No. 10,276.

Where, after vain efforts to secure agreement, the third referee refused to sign the award, and declared it unnecessary to ask him to meet again, *held*, that the remaining referees might make the award.—Kingston v. Kincaid, Case No. 7,821.

§ 3. Proceedings.

An award will be set aside where the arbitrators have refused to give time to defendant to produce an absent witness to explain evidence in a case of surprise.—Torrance v. Amsden, Case No. 14,103.

Under a general submission, referees are not bound to award on principles of law only, but may decide according to equity and good conscience.—Kleine v. Catara, Case No. 7,869.

An umpire is not to be called in until the original arbitrators have differed, and is then only to decide the points on which they differ.—Traverse v. Beall, Case No. 14,153.

An umpire provided for in an order of reference may be appointed before the referees have heard the evidence and discovered that they could not agree.—Swann v. Alexandria Canal Co., Case No. 13,671.

An umpire must give notice to the parties and to the arbitrators of the time and place of his proceeding to act.—Thornton v. Chapman, Case No. 13,997.

An umpire must hear the parties.—Taber v. Jenny, Case No. 13,720.

§ 4. Award.

Where a third person was to be chosen in case the two arbitrators disagreed, it need not appear in the award that the two disagreed, or that the third was appointed in writing.—Frye v. Scott, Case No. 5,144.

Notice of an award need not be given unless specially provided in the submission.—Matthews v. Matthews, Case No. 9,288.

Objections to award because made without giving notice of time and place, because one party had revoked submission, and because notice of the award was served only on defendant's attorney, overruled.—Masterson v. Kidwell, Case No. 9,269.

An award not delivered within the time prescribed by the arbitration bond is invalid. The time cannot be extended by parol.—Goldsborough v. McWilliams, Case No. 5,518.

An award made upon part only of the subjects submitted will be set aside.—Faw v. Davy, Case No. 4,701.

An award is void which is not final and conclusive, and does not embrace all the matters submitted, and settle the dispute.—Talbott v. Hartley, Case No. 13,732.

The award must decide the whole matter submitted, and be certain, final, and conclusive thereon.—James v. Thurston, Case No. 7,186.

In Pennsylvania it is the rule that awards of referees must be so plainly expressed that the parties may know precisely what they are to do. An objection otherwise fatal may be cured by averment of something dehors the award which renders it certain.—Kingston v. Kincaid, Case No. 7,821.

A mistake by the referees in a point of law need not appear on the face of the award, to induce the court to set it aside.—Hurst v. Hurst, Case No. 6,930.

An award is conclusive upon all matters of fact, and a mistake of fact is no ground for setting aside the award; but when apparent on the face thereof, or when the arbitrators certify that they have made a mistake, and wish to correct it, the award will be recommitted for that purpose.—Kleine v. Catara, Case No. 7,869.

If referees refer a point of law to the court by spreading it on the award, the award will be set aside if they have mistaken the law; but if they admit the law, and decide contrary thereto, upon equity and good conscience, the award must stand.—Kleine v. Catara, Case No. 7,869.

An arbitration award is conclusive as to the parties thereto, and can only be avoided or vacated for fraud or gross misconduct.—Denny v. Brown, Case No. 3,805.

An award will be set aside for misconduct of arbitrators, or where they have decided contrary to law.—Torrance v. Amsden, Case No. 14,103.

An award may be good in part and void in part.—Wise v. Geiger, Case No. 17,908.

In the case of common awards, the arbitrators cannot be called upon to disclose the grounds upon which the award was made.—Kingston v. Kincaid, Case No. 7,821.

In an action to set aside an award, where it is contended that the referees have made a mistake in a point of law, new evidence cannot be admitted.—Hurst v. Hurst, Case No. 6,930.

Plain mistakes in facts appearing on the face of the award, or from the evidence submitted, are no ground for relief in equity from the judgment entered upon the award.—Hurst v. Hurst, Case No. 6,932.

A general award cannot be impeached collaterally.—Kleine v. Catara, Case No. 7,869.

An award upon a submission of a question whether the parties had a right of set-off is conclusive.—Greene v. Darling, Case No. 5,765.

Mistakes of law by arbitrators, or errors of judgment by them on the evidence, cannot be reviewed or rectified.—Denny v. Brown, Case No. 3,805.

§ 5. Action on awards.

Averment that an award was duly published is an averment that the notice of the award required by the submission was given.—Matthews v. Matthews, Case No. 9,288.

Where four counts declare on an alleged submission and award, a plea purporting to answer the whole action, but alleging revocation of one submission only, without showing which one of the four, is bad on general demurrer.—Matthews v. Matthews, Case No. 9,288.

In debt on an award, a plea that the referees never made any such award as is averred is bad, as amounting to the general issue.—Matthews v. Matthews, Case No. 9,288.

A count on an award which requires a release by plaintiff on payment of a sum by defendant is bad on general demurrer if it failed to aver plaintiff's readiness to give the release.—Matthews v. Matthews, Case No. 9,288.

ARGUMENT OF COUNSEL.

In civil actions, see "Trial," § 11.
In criminal prosecutions, see "Criminal Law," § 91.

ARMY AND NAVY.

§ 1, In general. § 2, Officers—Pay and allowances. § 3, —— Authorities and duties. § 4, Enlistment—In general. § 5, —— Minors. § 6, Compulsory service. § 7, Enlisted men. § 8, Paymasters, pursers, distributing officers, and agents—Appointment. § 9, —— Liabilities. § 10, —— Pay and allowances. § 11, —— Liabilities of sureties on disbursing officer's bonds. § 12, Civilian employés and contractors. § 13, Civil status and liabilities of persons in military or naval service. § 14, Offenses by persons in military or naval service. § 15, Offenses by persons not in military or naval service. § 16, Courts of inquiry. § 17, Courts-martial—Jurisdiction. § 18, —— Proceedings. § 19, —— Sentence and punishment.

See, also, "Militia"; "Pensions."
Conflicts between civil and military authorities, see "Habeas Corpus," § 13.
Discharge of enlisted persons, see "Habeas Corpus," § 13.
Effect of acquittal before court-martial, see "Criminal Law," § 33.
Jurisdiction of offenses committed in navy yard, see "Criminal Law," § 12.
Prize of war, see "War," §§ 26–78.
Trial and punishment of persons, see "Indictment and Information," § 1.

§ 1. In general.

The power of congress to provide for the government of the land and naval forces "in peace and war" is not affected by amendments to the constitution.—In re Bogart, Case No. 1,596.

§ 2. Officers—Pay and allowances.

See, also, post, § 8.

A captain in the marine corps, acting as brevet lieutenant colonel, while in command of a separate post designated by the navy department as entitled to extra rations, is entitled to double rations.—United States v. Freeman, Case No. 15,163.

Where a captain of the marine corps acts as brevet lieutenant colonel, and is paid as such, he cannot, during the same period, receive the pay either of captain or the allowance which he would be entitled to as such for the charge of the clothing of the company.—United States v. Freeman, Case No. 15,163.

Under Act April 16, 1818, c. 64 (3 Stat. 427), additional brevet pay is not to be allowed, unless there be at least two organized companies of men, with suitable officers, though the whole number of men present may average enough for two companies.—United States v. Freeman, Case No. 15,163.

An officer detailed from his regiment, and commissioned, as captain of volunteers, to command a company of Indians in the Florida war, *held* entitled to the regular pay of his rank,

in addition to his special pay as such captain.—United States v. Lee, Case No. 15,587.

Money received by a naval officer for a special purpose, accompanied by instructions from the secretary of the navy, is not covered by the specified allowances mentioned in Act March 3, 1835, § 2.—United States v. Jones, Case No. 15,493a.

The marine station at the Washington navy yard *held* "a permanent or fixed post garrisoned by troops." within Act Aug. 23, 1842, § 6, allowing double rations.—Tyler v. Walker, Case No. 14,311a.

Where a brevet commission is conferred, to take rank from a prior date, the pay and emoluments of the rank conferred follow as an incident from such date whenever the officer has rendered services according to such rank.—United States v. Vinton, Case No. 16,624.

§ 3. —— Authorities and duties.

Duties, rights, and emoluments of pursers in relation to the stores to be provided, and the price therefor, and the effect of usage.—United States v. Buchanan, Case No. 14,678.

An army officer in command of a military district under Act March 2, 1867, cannot order a sheriff to place a person in possession of property at the time in possession of another person.—Whalen v. Sheridan, Case No. 17,476.

A bond by a battalion quartermaster, conditioned "to expend faithfully all public moneys, and to account for all public property," requires an accounting, not with the quartermaster general, but the treasury department; and the obligation extends to moneys as well as property, and to expenditures made by the obligor while acting as a deputy of the quartermaster general.—United States v. Lent, Case No. 15,593.

A quartermaster who furnishes other articles than such as are allowed by law and usage cannot charge the United States with them.—United States v. Webster, Case No. 16,658.

Under Act May 28, 1836, c. 82, the quartermaster may adjust and settle claims against the United States arising during the Florida war for proper supplies taken by impressment.—United States v. Webster, Case No. 16,658.

Where a provost marshal has good reason to believe, and does believe, that a person is threatening him for the purpose of interfering with him in the execution of his official duties, he is justified in arresting and detaining such person.—Walker v. Crane, Case No. 17,067.

A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offense against a law of the United States, except in aid of the judicial authority.—Ex parte Merryman, Case No. 9,487.

After the accounts of an officer of the navy have been once stated and settled by the treasury department, the auditor has no power to open or resettle them of his own mere authority.—Ex parte Randolph, Case No. 11,558.

§ 4. Enlistment—In general.

See, also, post, § 7.

Sufficiency of the oath of enlistment under the acts of 1812, 1858, and 1861.—In re Ferrens, Case No. 4,746.

Where oath was taken before military officer, it will be presumed that services of a civil magistrate could not be obtained.—In re Cline, Case No. 2,896.

A person will be discharged on habeas corpus, whose enlistment into the military service was procured by fraudulent representations on the part of the recruiting officer, or by mistake of fact of one ignorant of the English language.—Schmeider v. Barney, Case No. 12,462.

Persons who have been accepted as volunteers (Act Feb. 6, 1812) are not entitled to be discharged as alien enemies.—Wilson v. Izard, Case No. 17,810.

A married man who enlists in the military service upon his statement that he is a single man is not entitled to his discharge, though the army regulations require special authority for the enlistment of married men.—Ex parte Schmeid, Case No. 12,461.

The fact that an enlisted man has a wife and child *held* not to invalidate the enlistment.—In re Ferrens, Case No. 4,746.

Acts of congress relating to the enlistment of marines, listed.—Ex parte Brown, Case No. 1,972, note.

§ 5. —— Minors.

The enlistment of a minor without the oath of enlistment is illegal.—In re McDonald, Case No. 8,752.

A minor under 18 years of age cannot be mustered into the army.—In re Riley, Case No. 11,834.

The enlistment of a minor in the army is illegal unless made with the consent of his parents or guardian.—In re McDonald, Case No. 8,752; Ex parte Burke, Id. 2,156a; United States v. Wright, Id. 16,778; Id., 16,777.

"Parent," as used in the statute forbidding the enlistment of any minor in the army without the consent of his "parent, guardian, or master," includes the mother when the father is dead and there is no guardian or master.—Shorner's Case, Case No. 12,808.

Congress has a constitutional power to enlist minors in the army or navy without the consent of their parents.—United States v. Bainbridge, Case No. 14,497.

A minor, 17 years of age, who has enlisted in the army without his parents' consent, is entitled to discharge on habeas corpus.—Ex parte Burke, Case No. 2,156a.

A contract of enlistment by a minor over 18 years of age, without the consent of his parents, may be avoided by the minor himself.—In re McNulty, Case No. 8,917.

A prisoner of war, paroled by the enemy, although a minor illegally enlisted, is not entitled to his discharge until after his exchange.—United States v. Wright, Case No. 16,777.

Minor enlisting without consent of parent will be discharged on request of parent.—In re Andrews, Case No. 369; United States v. Anderson, Id. 14,449; In re Keeler, Id. 7,637; In re McLave, Id. 8,876.

Quære, whether a person enlisting as a minor is not entitled to his discharge at the age of 21, regardless of the term of his enlistment.—Ex parte Brown, Case No. 1,972.

An enlisted minor, who has not been mustered into the service, nor received any rations or clothing, cannot be held in custody as a volunteer, either under the United States or Massachusetts statutes.—Bamfield v. Abbot, Case No. 832.

The whole power of discharging minors from the army is given to the secretary of war, and cognizance of such matters is taken from the courts.—In re Riley, Case No. 11,834; In re Neill, Id. 10,089. CONTRA, see In re McDonald, Case No. 8,752; Seavey v. Seymour, Id. 12,596.

The oath of a recruit as to his age is conclusive (Act Feb. 13, 1862).—In re Cline, Case No. 2,896; In re Conley, Id. 3,102; United States v. Taylor, Id. 16,439; In re Riley, Id. 11,834.

The oath of enlistment is not conclusive upon the courts, but is a protection to the enlisting officer.—United States v. Wright, Case No. 16,778.

A contract of enlistment irregularly made *held* to have been ratified by the receipt of rations and clothing, and the performance of duties as a recruit for 20 days.—In re Ferrens, Case No. 4,746.

Under the navy acts of 1798, 1806, 1807, 1809, 1813, the consent of the father is not necessary to the valid enlistment of minors.—United States v. Bainbridge, Case No. 14,497.

A minor of the age of 18 can enlist in the navy without the consent of his parents or guardian.—United States v. Watson, Case No. 16,650a; Same v. Stewart, Id. 16,400. CONTRA, see In re McLave, Case No. 8,876; In re Hayes, Id. 6,261a.

Minors may be enlisted in the marine corps, as musicians, with the assent of their fathers; and may be bound as apprentices to the drum major, in behalf of the government.—Ex parte Brown, Case No. 1,972.

A contract of enlistment in the marine corps by a minor over 18 years of age without the consent of his parents may be avoided by the minor himself, or by his parents, or by the United States.—In re McNulty, Case No. 8,917.

§ 6. Compulsory service.

The board of enrollment has no power, after publication of its decision declaring a person exempt on the election of his widowed mother, to revise the same.—In re Irons, Case No. 7,066.

Under Act March 3, 1863, § 3, if a married man over 35 years of age be enrolled and drafted in the first class, he may be discharged by a federal court on habeas corpus.—Stingle's Case, Case No. 13,458.

Militiamen of a state cannot be lawfully drafted into the service of the United States unless their names have previously been accurately enrolled. A person misnamed is not liable to the draft.—McCall's Case, Case No. 8,669.

A militiaman of a state duly called into the service of the United States under Act July 17, 1862, and who has disobeyed an order to attend a rendezvous, may be compelled by military force.—McCall's Case, Case No. 8,669.

A person drafted under Act March 3, 1863, is in the custody of the provost marshal from the time he regularly reports for duty.—In re Irons, Case No. 7,066.

A notary public is an officer authorized to administer oaths in such cases.—United States v. Sonachall, Case No. 16,352.

§ 7. Enlisted men.

Where a soldier who has served out his term is refused his discharge, he is nevertheless, while remaining in the barracks, subject to the rules of the establishment.—United States v. Travers, Case No. 16,537.

The place of service of volunteers may be changed notwithstanding the insertion in their enrollment of the officer's name under whom they were to serve.—Wilson v. Izard, Case No. 17,810.

A United States soldier, when acting as a part of the posse of a United States marshal or revenue officer, is as much bound to obey the laws of the United States as any other citizen.—Georgia v. O'Grady, Case No. 5,352.

An officer of the marine corps, to whom an advance of money is made, is liable therefor as a debtor, and not merely as a bailee.—United States v. Freeman, Case No. 15,163.

§ 8. Paymasters, pursers, distributing officers, and agents—Appointment.

See, also, post, §§ 17–19.

Appointments to office can be made by heads of departments only in those cases which congress has authorized by law, and consequently the appointment of an agent of fortifications, by the secretary of war, is irregular.—United States v. Maurice, Case No. 15,747.

An agent of fortifications is an officer whose office is established by law. (Act April 24, 1816, § 9; Act March 2, 1821, § 13.)—United States v. Maurice, Case No. 15,747.

§ 9. —— Liabilities.

Presumptions arising from the showings of the books of the treasury department in account with a navy paymaster, considered, together with what evidence is necessary to rebut the same.—United States v. Kuhn, Case No. 15,545.

Where an officer of the marine corps to whom money is advanced to be applied to the expenses of the corps deposits it in a bank, which afterwards fails, whether the bank was or was not a public depository, it does not exonerate him as debtor without a special act of congress to that effect.—United States v. Carr, Case No. 14,732.

§ 10. —— Pay and allowances.

A navy agent stationed abroad, who has been removed, or whose office has been vacated, cannot charge the government with his return home, nor with his traveling expenses in going to the seat of government to settle his accounts.—Armstrong v. United States, Case No. 548.

The secretary of the navy has authority to order the fourth auditor to allow a credit to a naval paymaster for extra official service; and an allowance so made is equivalent to an allowance by the secretary himself.—United States v. Kuhn, Case No. 15,545.

An army officer superintending works on fortifications, *held* entitled to credits for extra services of 2½ per cent. of the amount disbursed by him.—United States v. Eliason, Case No. 15,040.

Compensation of acting purser of navy, under Act April 18, 1814.—Goldsborough v. United States, Case No. 5,519.

Rate of pay of a paymaster in the marine corps between 1821 and 1830 considered.—United States v. Kuhn, Case No. 15,545.

Act May 15, 1820, in relation to the settlement of accounts of military and naval officers charged with the disbursement of public moneys, does not apply to a mere acting purser in the navy.—Ex parte Randolph, Case No. 11,558.

A purser in the navy, who disburses money for the United States which it is not his duty, as purser, to disburse, is, in equity, entitled to a reasonable compensation therefor.—United States v. Fitzgerald, Case No. 15,107.

The words "pay of the army," in charging moneys advanced to a militia paymaster, *held* evidence merely of the appropriation out of which the advances were made, and not as to their disbursement.—United States v. Willard, Case No. 16,698.

Pursers are bound by the naval regulations of 1817 as to commissions on disbursements, in the absence of a different, authorized agreement.—United States v. Fitzgerald, Case No. 15,107.

Paymasters of the army *held* entitled to receive the pay and emoluments of majors of infantry, and not majors of cavalry.—United States v. Gwynne, Case No. 15,272.

Time of service and the amount disbursed by a navy agent furnish the data for computing the amount of his compensation for any fractional part of a year.—United States v. Wendell, Case No. 16,666.

The maximum compensation of navy agents is fixed at $3,000 per annum (Act March 3, 1855), and the excess of commissions in one year can-

not aid the deficiency of another.—United States v. Wendell, Case No. 16,666.

A navy agent is not entitled to extra compensation for services rendered out of his district, which appertain to the duties of another officer.—United States v. White, Case No. 16,684.

A navy agent appointed acting purser for the naval school, *held* entitled to the salary allowed by law to pursers.—United States v. White, Case No. 16,684.

A navy agent is entitled to office rent and clerk hire, and to engage them by the quarter, and, if dismissed from office, he will be allowed for the whole quarter.—United States v. White, Case No. 16,684.

A navy agent disbursing navy and privateer pensions is not allowed extra pay or emolument therefor.—Browne v. United States, Case No. 2,036.

The government is bound to indemnify a navy agent removed before the end of his term for office rent and clerk hire for which he, in good faith, became liable before removal.—United States v. Jarvis, Case No. 15,468.

§ 11. —— Liabilities of sureties on disbursing officer's bonds.

The surety on a paymaster's bond is liable for the penalty named therein, and for interest thereon from the commencement of the suit to the entry of judgment.—United States v. Meeker, Case No. 15,757.

The debt of a paymaster to the United States is created by the advances made to him, and not at the time of striking a balance of accounts against him on the treasury books; and his surety becomes a debtor as soon as the paymaster fails to account according to law.—United States v. Clark, Case No. 14,807.

The sureties on the official bond of a regimental paymaster are not liable for his failure to account for funds placed in his hands after six months' neglect to account for funds previously placed in his hands.—United States v. Vanzandt, Case No. 16,611.

The secretary of the navy may require navy agents to pay navy pensions, and their sureties are responsible for the faithful performance of such service.—United States v. Cutter, Case No. 14,911.

The surety of a navy agent is liable for misappropriation of public moneys by his principal, though they were advanced to him contrary to law.—United States v. Cutter, Case No. 14,911.

A new bond of a navy agent, given when a defalcation was known, *held* to cover past defalcations as well as the future.—United States v. Brodhead, Case No. 14,654.

Certified copy of regimental paymaster's account and of his bond *held* competent evidence in action against sureties.—United States v. Vanzandt, Case No. 16,611.

§ 12. Civilian employés and contractors.

Army contractors and their subordinates are liable to arrest by the military commander for frauds against the government under their contracts, but must be brought to trial with reasonable diligence.—Holmes v. Sheridan, Case No. 6,644.

Where a person in an Indian country induces Indians to steal cattle for him, with which to fulfill a government contract for army supplies, the major general commanding in that country may order his arrest and the seizure of the cattle.—Holmes v. Sheridan, Case No. 6,644.

See, also, post, §§ 17–19.

§ 13. Civil status and liabilities of persons in military or naval service.

A commanding officer of a militia cannot lawfully impress the horse of a citizen even in time of war.—Jacobs v. Levering, Case No. 7,162.

A military officer acting under the law martial is justified by an order from a superior officer, apparently within the scope of his authority.—Despan v. Olney, Case No. 3,822; McCall v. McDowell, Id. 8,673.

If the superior has secretly abused his power, he, and not the inferior who executes the order, is answerable.—Despan v. Olney, Case No. 3,822.

An officer cannot justify an unlawful seizure by showing the orders of his superior officer.—Harmony v. Mitchell, Case No. 6,082.

Lawful and public orders from the president and from the secretary of the navy are a good defense to a suit against a naval officer for the destruction of property by a bombardment of a foreign town.—Durand v. Hollins, Case No. 4,186.

The military officers are liable for an arrest and imprisonment ordered by them in states where the civil courts were not disturbed even though ratified and approved by the executive.—Milligan v. Hovey, Case No. 9,605.

The limitation imposed by Act March 3, 1863, is valid and binding on state tribunals, and the statute begins to run against a continuing imprisonment.—Milligan v. Hovey, Case No. 9,605.

The damages in such cases should be compensatory, and not exemplary.—Milligan v. Hovey, Case No. 9,605.

Members of a raiding party connected with the Confederate army are individually liable for property taken, whether present at the taking or not.—Shirley v. Triplett, Case No. 12,797.

An action for assault and battery and false imprisonment will lie against a provost marshal for acts outside of his official duty while in the performance of his official duty.—Walker v. Crane, Case No. 17,067.

A provost marshal has the right to order a person to leave the premises occupied officially by him, and, if such person refuses to go, to use as much force as is necessary to remove him.—Walker v. Crane, Case No. 17,067.

The seizure by military authorities of drafts, where the drawer and drawee are citizens of different states in rebellion, does not give such authorities the right to take physical possession of the moneys of the drawees, and a person seizing the same is liable therefor, although he was acting as a military commander.—Britton v. Butler, Case No. 1,903.

Nor is the seizure of such moneys under such circumstances validated by Act March 2, 1867.—Britton v. Butler, Case No. 1,903.

The circuit court of the United States has no jurisdiction in trover for the seizure and conversion by a military officer of the United States, while in an insurgent state, of property belonging to a citizen of that state. The right, if any, is against the government.—Coolidge v. Guthrie, Case No. 3,185.

In an action for damages against the commander of a military district, who had ordered the sheriff to place a person in possession of property then in possession of another person, defendant may justify under such order if the person put in possession was the true owner, and entitled to possession.—Whalen v. Sheridan, Case No. 17,476.

§ 14. Offenses by persons in military or naval service.

There can be no criminal desertion where the enlistment was illegal.—United States v. Wright, Case No. 16,778.

See, also, post, §§ 17–19.

§ 15. Offenses by persons not in military or naval service.

A conviction for having procured or enticed a person to desert (Act 1812, c. 14, § 17) is sustained by evidence of the making of representations as to the means and facilities for deserting to induce a person to enlist, with the belief that they were likely to cause him to desert, if they had such effect.—United States v. Clark, Case No. 14,808.

A seaman who has passed the examination at the naval rendezvous merely, and has not been examined and passed on the receiving ship, is not enlisted, within Act 1855, c. 136, § 11, punishing the enticing to desert of an enlisted seaman.—United States v. Thompson, Case No. 16,491.

Act Feb. 24, 1864, fixes a definite period of imprisonment for fraudulently procuring the exemption of a drafted person, leaving the court no discretion.—United States v. McCarty, Case No. 15,658.

The period of imprisonment fixed is the same as that for which the person was drafted to serve, which, under Act March 3, 1863, § 11, may be three years, or less than three if the Rebellion end sooner.—United States v. McCarty, Case No. 15,658.

An indictment will not lie under Act March 3, 1863, for obstructing, hindering, and delaying an enrolling officer.—United States v. Will, Case No. 16,697.

An assault causing the death of an officer is an offense under Act Feb. 24, 1864, § 12, where it was committed while the officer was engaged in a matter relating to the proper discharge of his official duties, though the offender did not intend to obstruct the execution of the law.—United States v. Gleason, Case No. 15,215; Id., 15,216.

If a person assault parties charged with the service, prescribed by the statute when they are not engaged therein, he is not amenable to the federal laws, however malicious the deed may be, and even though it result in death.—United States v. Gleason, Case No. 15,216.

Persons employed by proper officers to arrest deserters, when, having come into a vicinage on such service, they are returning therefrom to another place to obtain assistance, are employed in arresting deserters, within Act Feb. 24, 1864, § 12.—United States v. Gleason, Case No. 15,216.

The protection of the act continues so long as the person is employed in a service necessary and proper to the discharge of his duty in that behalf.—United States v. Gleason, Case No. 15,216.

The protection which the law affords to persons executing it does not depend upon the legal guilt of the persons charged as deserters.—United States v. Gleason, Case No. 15,216.

An indictment for purchasing of a soldier "his arms" can only be sustained by showing that the soldier was in lawful possession of the arms, or had a special bailment of them.—United States v. Brown, Case No. 14,669.

§ 16. Courts of inquiry.

The district court will not issue a warrant of arrest for parties charged with murder on the high seas, on board a naval vessel, while the matter is under investigation by a court of inquiry instituted by the secretary of the navy.—United States v. MacKenzie, Case No. 15,690.

§ 17. Courts-martial—Jurisdiction.

The fact that manslaughter is not named in the naval code as an offense punishable by court-martial is no ground for holding that the civil courts of the United States have jurisdiction thereof. In the absence of any statute conferring jurisdiction upon these courts, it is sufficient in any case, to exclude such jurisdiction, that the accused is charged with the offense, in taking the life of a seaman belonging to a naval ship, in the exercise of what was claimed to be his rightful authority as an officer in command.—United States v. Mackenzie, Case No. 18,313.

Congress has constitutional power to provide that crimes, even of a capital character, committed on board a naval vessel, by persons who formed part of the naval forces of the United States, shall be tried exclusively by courts-martial.—United States v. Mackenzie, Case No. 18,313.

Under article of war 88, a soldier may be arrested and tried, after the expiration of his term of service, for a military offense committed during such term.—In re Bird, Case No. 1,428.

A soldier, if arrested before the expiration of his term of enlistment, may be held for trial thereafter by military authority.—In re Bird, Case No. 1,428.

A court-martial is a lawful tribunal existing under the constitution and acts of congress, and is supreme while acting within the sphere of its exclusive jurisdiction.—In re Bogart, Case No. 1,596.

Congress has power under the constitution to provide for punishment by naval court-martial without indictment or the intervention of a jury.—In re Bogart, Case No. 1,596.

A paymaster's clerk may be tried by court-martial for an offense committed while on duty in the navy, upon proceedings commenced after his dismissal.—In re Bogart, Case No. 1,596.

A mere contractor to furnish supplies to the government for the use of the military service cannot be punished by court-martial under Act March 2, 1863.—Ex parte Henderson, Case No. 6,349.

Act July 17, 1862, § 16, is unconstitutional in so far as it operates to subject a contractor to trial by court-martial.—Ex parte Henderson, Case No. 6,349.

If not unconstitutional, such act only makes contractors subject to trial by court-martial for fraud or willful neglect of duty in connection with their contracts, and not for offenses unconnected therewith.—Ex parte Henderson, Case No. 6,349.

A clerk in the employ of a paymaster of the United States army is in the military service, and subject to trial by court-martial for forging vouchers in the disbursement of a reconstruction fund.—In re Thomas, Case No. 13,888.

A paymaster's clerk in the navy is a person "in the naval forces," and in case of embezzlement is liable for the amount embezzled, under Act March 2, 1863, § 1, and not to the penalty under section 3.—In re Bogart, Case No. 1,596; In re Reed, Id. 11,636; United States v. Bogart, Id. 14,616.

§ 18. —— Proceedings.

The clause in the fifth amendment "when in actual service in time of war" has no reference to the regular army or the navy, but refers only to the militia.—In re Bogart, Case No. 1,596.

Article 70 of the articles of war, limiting the term of confinement of officers and soldiers, applies solely to confinement preliminary to trial.—In re Corbett, Case No. 3,219.

A charge that defendant was engaged in furnishing supplies "for the military service" is indefinite, in failing to show that the supplies were furnished for the regular army and navy.—Ex parte Henderson, Case No. 6,349.

In a trial by court-martial the charges cannot be so amended after arraignment as to

entirely obliterate the original specifications, and insert new ones, describing wholly different offenses.—Ex parte Henderson, Case No. 6,349.

The convening officer of a naval court-martial has authority to send back to the court the record of its proceedings, with the finding and sentence, for the reconsideration of such court as to revision of the sentence.—In re Reed, Case No. 11,636.

Where the revision is made by the court composed of the same members that took part in the trial, the sentence is not rendered illegal by the fact that its membership was changed during the intermission.—In re Reed, Case No. 11,636.

Such revision of sentence can be made after an intermission in which the court had been occupied with other trials.—In re Reed, Case No. 11,636.

The circuit court of the District of Columbia has no power, by habeas corpus or otherwise, to revise or correct the error of a court-martial. The appeal must be to the president.—In re Biddle, Case No. 18,236.

§ 19. —— Sentence and punishment.

Sentence rendered by a court-martial against an individual without notice is void.—Meade v. Deputy Marshal, Case No. 9,372.

The status of a soldier is not affected by a sentence of court-martial discharging him from service, subsequently set aside.—In re Bird, Case No 1,428.

ARRAIGNMENT.

See "Criminal Law," §§ 44–50.

ARREST.

§ 1, Statutory provisions. § 2, Actions in which arrest is authorized. § 3, Persons liable. § 4, Grounds. § 5, Jurisdiction and authority to grant. § 6, Affidavits for arrest. § 7, Undertaking. § 8, Place and time of arrest. § 9, Quashing or vacating. § 10, Discharge of prisoner. § 11, Arrest on criminal charges.

See, also, "Bail"; "Ne Exeat"; "Prisons."
As ground of proceeding in bankruptcy, see "Bankruptcy," § 61.
Illegal arrest, see "False Imprisonment."
Malicious arrest, see "Malicious Prosecutions," § 1.
Of bankrupt, see "Bankruptcy," §§ 42, 142.
Of insolvent, see "Insolvency," § 12.
Of person in admiralty, see "Admiralty," § 57.
Of vessel in admiralty, see "Admiralty," §§ 37–49.
On execution, see "Execution," §§ 24–26.
Power of army officers to arrest persons, see "Army and Navy," § 3.
Powers and duties of marshal, see "United States Marshals," § 18.
Privilege from arrest of bankrupt, see "Bankruptcy," § 500.
—— of foreign minister, see "Ambassadors and Consuls," § 3.
Proceedings on arrest, see "Criminal Law," §§ 38–43.

§ 1. Statutory provisions.

In an action of debt in a federal court in New York against a foreign consul for money received in a fiduciary capacity, defendant is subject to arrest under Code Proc. N. Y. § 179, made applicable by Acts Feb. 28, 1839, and Jan. 14, 1841.—McKay v. Garcia, Case No. 8,844.

§ 2. Actions in which arrest is authorized.

An agent is not liable to arrest in New York in an action for money collected by him under an agreement to account for and pay over the proceeds monthly to his principal.—Grover & Baker Sewing Mach. Co. v. Clinton, Case No. 5,845.

An action for the value of goods illegally imported *held* not one to recover damages for a fraud or for a penalty, so as to make defendant liable to arrest, under Code N. Y. § 549.—United States v. Moller, Case No. 15,793.

A manufacturer of matches, who sells them unstamped, in an action to recover a penalty for such violation, may be arrested as in an action for a debt incurred by fraud.—United States v. Walsh, Case No. 16,635.

§ 3. Persons liable.

A party to a cause depending for trial is privileged from arrest during the continuance of the court at which the trial will take place.—Ex parte Hurst, Case No. 6,924; McFerran v. Wherry, Id. 8,792.

Such privilege will prevent his arrest when coming to and returning from court, and while at his lodgings.—Ex parte Hurst, Case No. 6,924.

The witness is privileged from arrest during a reasonable time in going to court and returning to his home.—Smythe v. Banks, Case No. 13,134.

A recommitment of debtor upon ca. sa. is not a breach of the debtor's privilege as a witness and party bound to attend court.—Ex parte Bill, Case No. 1,405.

The protection from arrest given to suitors extends to petitioners under the bankrupt law. (Act 1842.)—Ex parte Mifflin, Case No. 9,537.

A bankrupt on his way to the register's office, for the purpose of being examined under an order previously served on him, is entitled to be considered a witness, and, as such, to be protected from arrest at the hands of a state court.—In re Kimball, Case No. 7,767.

A person arrested in a civil suit, and going to another state in virtual custody of his bail, may there be arrested in another civil suit, if his bail voluntarily relinquish all claim to his detention.—Sun Mut. Ins. Co. v. McDougal, Case No. 13,618.

See, also, post, § 11.

§ 4. Grounds.

Fraud in an importer in inducing the acceptance of less than the whole sum due for duties does not make the balance of the debt fraudulently contracted, so as to subject the importer to arrest in a civil suit.—United States v. Wood, Case No. 16,755a.

A debtor who is about to remove from the state without the consent of his creditors, and without an intention to return, is prima facie an absconding debtor. (Code Or. § 106.)—Norman v. Manciette, Case No. 10,300.

The legislature has power to authorize the arrest and imprisonment of such a debtor so as to enable his creditors to enforce the establishment and collection of their debts by legal proceedings in the tribunals of this state.—Norman v. Manciette, Case No. 10,300.

§ 5. Jurisdiction and authority to grant.

Nonresident party defendant cannot be arrested (in North Carolina) on mere affidavit in action for injury to person or character.—In re Bergen, Case No. 1,338.

No process can be issued to arrest a defendant in a civil suit except under the state law.—Cooper v. Dungler, Case No. 3,192.

§ 6. Affidavits for arrest.

Where the cause of action and arrest are identical, a verified complaint is a sufficient affidavit upon which to allow an order of arrest.—United States v. Walsh, Case No. 16,635.

The verified complaint in an action to recover a penalty and damages for making a false claim against the United States (Rev. St. §§ 3490–3493) is a sufficient affidavit for the arrest of de-

fendant.—United States v. Griswold, Case No. 15,266.

A commissioner of the United States may, as an officer under the state law, take the verification of all necessary papers in order to procure the arrest of defendant.—Fulton v. Gilmore, Case No. 5,154.

§ 7. Undertaking.

Defendant may be arrested and held to bail without an undertaking by plaintiff, as provided in Civ. Code Or. § 107.—United States v. Griswold, Case No. 15,266.

§ 8. Place and time of arrest.

An inhabitant of Alexandria county, D. C., may be arrested in Washington county without a non est in Alexandria county.—Thompson v. Lacy, Case No. 13,965.

A creditor who has caused the provisional arrest of an absconding debtor under Code Or. § 106, has until the time allowed for a return of an execution against property to charge the body of such debtor in execution.—Norman v. Manciette, Case No. 10,300.

§ 9. Quashing or vacating.

The arrest can only be set aside by direct proceedings where the affidavit states sufficient facts to make out a case, though the proof is slight and not entirely satisfactory.—Nelson v. Cutter, Case No. 10,104.

The mode of redress for a person privileged from arrest, when arrested, is by motion to the court from which the process issued.—Lyell v. Goodwin, Case No. 8,616.

On the arrest of defendant in an action of debt under Code Proc. N. Y. § 179, plaintiff may oppose defendant's affidavits by affidavits in addition to those on which the arrest was granted.—McKay v. Garcia, Case No. 8,844.

§ 10. Discharge of prisoner.

One arrested after the adoption of the supreme court rule abolishing imprisonment for debt, but before its publication, is entitled to be discharged.—Bell v. Nelson, Case No. 1,257.

§ 11. Arrest on criminal charges.

A congressman is not privileged from arrest on a warrant charging that he is about to commit a breach of the peace by fighting a duel.—United States v. Wise, Case No. 16,746a.

An officer may hold a person upon a warrant without informing him that he is arrested upon it.—United States v. Omeara, Case No. 15,919.

An officer effects an arrest of a person by laying his hands on him for the purpose of arresting him, though he may not succeed in stopping and holding him.—United States v. Benner, Case No. 14,568.

A marshal who receives a warrant to be served upon a circuit court commissioner is bound to make return of his doings thereunder.—United States v. Scroggins, Case No. 16,244.

A constable having a warrant to arrest a man for assault and battery may break open the door of his dwelling house to arrest him.—United States v. Faw, Case No. 15,079.

Where the presentment of the grand jury is equivalent to the finding of "Not found," or "Not a true bill," the prisoner will be discharged.—United States v. Elliott, Case No. 15,045.

ARREST OF JUDGMENT.

In civil actions, see "Judgment," § 17; "Penalties," § 12.
In criminal prosecutions, see "Criminal Law," § 103.

ASSAULT AND BATTERY.

§ 1, What constitutes criminal assault. § 2, Persons liable. § 3, Indictment. § 4, Evidence. § 5, Trial. § 6, Civil liability.

See, also, "Mayhem."
Assault by seamen, see "Seamen," § 157.
—— on seamen, see "Seamen," § 179.
—— with intent to kill, see "Homicide," § 3.

§ 1. What constitutes criminal assault.

It is an assault to double the fist and run it at another, saying, "If you say so again, I will knock you down."—United States v. Myers, Case No. 15,845.

The mere taking hold of another's coat, if done in anger, or a rude and insolent manner, or with a view to hostility, constitutes an assault and battery.—United States v. Ortega, Case No. 15,971.

Striking at a person, though no blow be inflicted, or raising the arm to strike, or holding up one's fist, if done in anger or a menacing manner, constitutes an assault.—United States v. Ortega, Case No. 15,971.

A person is guilty of the offense if he could have reached the person intended by extending his arm, so as to inflict a blow, although no blow was actually given.—United States v. Salisbury. Case No. 16,214.

It is an assault to threaten to strike a woman with an uplifted club if she open her mouth.—United States v. Richardson, Case No. 16,155.

An indictment will not lie under the penitentiary act for an assault with intent to kill. There must be a battery also.—United States v. Turley, Case No. 16,546.

It is a misdemeanor at common law to persuade, instigate, and incite another to commit an assault and battery.—United States v. Lyles, Case No. 15,646.

If a man be present, and encourage an assault and battery, he is a principal.—United States v. Ricketts, Case No. 16,158.

A person who flourishes or points a deadly weapon at another, intending personal harm, is guilty of an assault, within Act March 3, 1825, § 22, although no battery has been committed.—United States v. Salisbury, Case No. 16,214; Same v. Kierman, Id. 15,529.

Malice is not an ingredient of the offense of an assault with a dangerous weapon, under the federal statute.—United States v. Lunt, Case No. 15,643.

A man cannot lawfully push another off from his land without first requesting him to leave.—Thompson v. Berry, Case No. 13,943.

The builders of a house have a right to remove, without unnecessary violence, all persons who come into the building without authority, and refuse to depart upon request.—United States v. Bartle, Case No. 14,531.

§ 2. Persons liable.

An indictment at common law in the county of Alexandria will lie against a free negro or mulatto for assault and battery upon a white man.—United States v. Carter, Case No. 14,741.

§ 3. Indictment.

To make those liable who are only present aiding and abetting, it is not necessary that they be indicted jointly or with a simul cum.—United States v. Hunter, Case No. 15,425.

In an indictment for assault and battery with intent to kill, it is not necessary to state the manner and extent of the assault and battery, nor the particular weapon used, nor to charge the assault to be felonious or malicious, or with malice prepense, nor to show that, if death had

ensued, it would have been murder.—United States v. Herbert, Case No. 15,354.

An indictment for assault and battery with intent to kill need not show that the crime would have been murder if death had ensued.—United States v. Tharp, Case No. 16,458.

An indictment under the penitentiary act for assault and battery with intent to kill need not aver malice aforethought, or any other evil intent than the intent to kill.—United States v. Lloyd, Case No. 15,619.

An assault with a dangerous weapon under Act March 3, 1825, § 22, is a misdemeanor; and the indictment need not charge that it was committed feloniously, or with intent to perpetrate a felony.—United States v. Gallagher, Case No. 15,185.

In an indictment for an assault with a dangerous weapon, an allegation of criminal intent is implied in the word "assault."—United States v. Lunt, Case No. 15,643; Same v. McClare, Id. 15,659.

§ 4. Evidence.

On an indictment for assault and battery against a constable serving a warrant, parol evidence of the contents of the warrant cannot be given, unless it be lost or destroyed.—United States v. Long, Case No. 15,625.

In an indictment against one of several who made a joint assault, the acts of the others may be given in evidence.—United States v. Johnston, Case No. 15,490.

On a plea of not guilty, evidence may be given in mitigation of the fine to be assessed by the jury.—United States v. Bartle, Case No. 14,531.

§ 5. Trial.

An indictment for assault and battery and an indictment under the statute for the same assault and battery with intent to kill may be pending and tried at the same time, but there cannot be a judgment of conviction upon both.—United States v. Herbert, Case No. 15,354.

Whether an assault was with a dangerous weapon or not may depend upon matter of fact, as upon the manner of the assault; and the court cannot declare, as a matter of law, that an assault, if committed with a belaying pin, was with a dangerous weapon.—United States v. Small, Case No. 16,314.

On an indictment for assault and battery on H. with intent to kill him, a verdict, "Guilty of an assault by shooting H. with intent to kill," is substantially a general verdict of guilty.—United States v. Lloyd, Case No. 15,619.

§ 6. Civil liability.

No words of provocation will justify an assault, although they may constitute a ground for the reduction of damages.—Cushman v. Ryan, Case No. 3,515.

Under the plea of not guilty plaintiff need not prove that defendant assaulted him first. Contra on the plea of son assault demesne.—Stevens v. Lloyd, Case No. 13,402.

Evidence of defendant's state of mind, caused by recent excitement or provocation, is admissible in mitigation under the general issue.—Cushman v. Waddell, Case No. 3,516.

Provocation will only excuse the payment of exemplary damages and such damages cannot be recovered where the assault was committed in the heat of passion caused by the appearance and statement of defendant's son punished by plaintiff, and without previous malice.—Cushman v. Waddell, Case No. 3,516.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," §§ 5–11.
Of damages, see "Damages," § 12.
Of expenses of public improvements, see "Municipal Corporations," § 18.
Of loss on insured, see "Insurance," §§ 33, 34, 197.
Of taxes, see "Internal Revenue," §§ 7–20; "Taxation," § 9.
On subscription to corporate stock, see "Corporations," § 20.

ASSETS.

Marshaling, see "Marshaling Assets and Securities."
Of bankrupt, see "Bankruptcy."
Of estate of decedents, see "Executors and Administrators," § 9.
Of partnership and individual members, see "Bankruptcy," §§ 196, 447–456; "Partnership," §§ 32, 33.

ASSIGNMENTS.

§ 1, Requisites and validity. § 2, Operation and effect. § 3, Rights and liabilities of parties. § 4, Actions.

Effect of to discharge lien, see "Maritime Liens," § 41.
—— of check, draft, or order as assignment, see "Bills and Notes," § 22.
For benefit of creditors, see "Assignments for Benefit of Creditors."
For purpose of conferring jurisdiction, see "Courts," § 52.
Fraud as to creditors, see "Fraudulent Conveyances."
In insolvency, see "Bankruptcy," §§ 184–213; "Insolvency," § 7.
Jurisdiction of actions by or against assignees as dependent upon citizenship or residence, see "Courts," §§ 48, 49.
Proof of assigned claim in bankruptcy, see "Bankruptcy," § 378.
Right of assignee to sue in admiralty, see "Admiralty," § 52.
—— of set-off of assigned claims, see "Set-Off and Counterclaim," § 6.
Transfer of cause of action ground for abatement, see "Abatement and Revival," § 4.

Transfers of particular species of property, rights, or instruments.

See "Bills and Notes," §§ 29, 45–49; "Bonds," §§ 12–14; "Chattel Mortgages," § 19; "Copyrights," § 20; "Covenants," § 7; "Dower," § 4; "Insurance," §§ 35–38; "Judgment," §§ 67–69; "Mortgages," § 14; "Patents," §§ 139, 142–149, 157; "Trade-Marks" and Trade-Names," § 13.
Bill of lading, see "Carriers," § 3.
Corporate shares, see "Corporations," § 24.
Charter party, see "Shipping," § 72.
Claim against United States, see "United States," § 24.
Ferry license, see "Ferries," § 2.
Inventions, see "Patents," § 63.
Title bond, see "Vendor and Purchaser," § 4.
Vendor's lien, see "Vendor and Purchaser," § 34.
Wages, see "Pilots," § 11.

§ 1. Requisites and validity.

A right of action for a tort is not assignable, and an action for damages resulting from a tort can only be sustained by the person directly injured thereby.—Ware v. Brown, Case No. 17,170.

To render an assignment valid at law, the subject of the assignment must have an existence, actual or potential, at the time of the assignment. A mere possibility is not assignable. Otherwise in equity.—Mitchell v. Winslow, Case No. 9,673.

A bona fide assignment of goods at sea and their proceeds will pass the legal title to both,

without an indorsement of bill of lading.—De Wolf v. Harris, Case No. 4,221.

An assignment may, in point of law, be good, of goods and their proceeds, though given by way of mortgage or as security for future advances.—De Wolf v. Harris, Case No. 4,221.

§ 2. Operation and effect.

An assignment of "all the assignor's estate and effects in possession, or which may accrue or become due and owing to him," will not transfer a mere possibility of a legacy.—Cook v. Conway, Case No. 3,154.

An assignment of a debt carries with it all the accessory obligations by which the debt is secured.—The Hull of a New Ship, Case No. 6,859.

One taking an assignment of a demand after fraud committed on the assignor is entitled to all rights of the latter.—Aiken v. Edrington, Case No. 111.

Where an assignee of a claim takes no steps to enforce the same, he will lose his right as against a subsequent assignee in good faith.—Judson v. Corcoran, Case No. 18,304.

The execution of an assignment by a corporation and by S., president, *held* to be a good execution by S. for his individual interest.—Campbell v. James, Case No. 2,361.

See, also, post, §§ 3, 4.

§ 3. Rights and liabilities of parties.

A creditor who believes his debtor to be insolvent can assign his demand to a debtor of the insolvent whose debt is not yet payable so as to enable the latter to set it off.—In re City Bank of Savings, Loan & Discount, Case No. 2,742.

A debt due on a single contract or obligation cannot be split up by assignment so as to give a right of action by each assignee.—The Hull of a New Ship, Case No. 6,859.

In an action between the original parties to a contract, the defense of illegality cannot be defeated by an assignment to a third person.—Fales v. Mayberry, Case No. 4,622.

An assignment, with notice, of a negotiable chose in action, founded in illegality, will not protect the parties thereto.—Fales v. Mayberry, Case No. 4,622.

The assignment of a nonnegotiable chose in action without notice of fraud or illegality in its origin will not preclude a defense to an action thereon.—Fales v. Mayberry, Case No. 4,622.

§ 4. Actions.

The transfer of a bankrupt's effects in England, being an assignment merely by operation of law, will not enable the assignees to maintain an action in their own name in the courts of this country.—Blane v. Drummond, Case No. 1,531; Perry v. Barry, Case No. 11,000.

An assignee of a nonnegotiable contract cannot sue upon it in his own name in the circuit court for the Southern district of New York, as the state procedure is not adopted by such court.—Suydam v. Ewing, Case No. 13,655.

A person who sues as assignee is bound to allege an assignment to show title in himself.—Earhart v. Campbell, Case No. 4,241a.

Payments made to the original creditor, after notice of the assignment of the debt, cannot be given in evidence in a suit brought by the assignee in the name of the original creditor.—Gardner v. Tennison, Case No. 5,238.

The legal plaintiff has a right to dismiss a suit brought in his name by order of a person who claims to be his assignee of the right of action, and the court will not interfere to protect the assignee unless the evidence of the assignment is clear.—Welch v. Mandeville, Case No. 17,370.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

§ 1, Requisites and validity—Nature and essentials of trust for creditors. § 2, —— Form and requisites of intrument. § 3, —— Reservations. § 4, —— Preferences. § 5, —— Fraud. § 6, Construction and operation in general—Property conveyed. § 7, —— Foreign assignments. § 8, Appointment and qualification of assignee. § 9, Rights and powers of assignee. § 10, Actions by assignee. § 11, Rights and remedies of creditors—Presentation, proof, and payment of claims. § 12, —— Claims and liens prior or superior to assignment. § 13, Accounting by and compensation of, assignee.

See, also, "Bankruptcy."

As act of bankruptcy, see "Bankruptcy," § 73.
Ground of opposition to discharge in bankruptcy, see "Bankruptcy," § 599.
When fraudulent, see "Bankruptcy," §§ 249, 250.

§ 1. Requisites and validity—Nature and essentials of trust for creditors.

An assignment by a person while laboring under the immediate effects of intoxication will not be favored in a court of equity.—Bowen v. Clark, Case No. 1,721.

Quære, whether one partner can, without the assent of the others, make a general assignment for creditors.—Pearpoint v. Graham, Case No. 10,877.

An assignment is void as to the firm property, as well as to the individual estate of the nonsigning members of the firm.—In re Bear, Case No. 1,177.

An assignment of property to creditors, or to others for their benefit, is founded upon a good consideration.—Lawrence v. Davis, Case No. 8,137.

An instrument whose effect is to transfer property beyond the reach of an execution in trust for assenting creditors is within the Pennsylvania statutes regulating voluntary assignments for creditors.—Corn Exch. Nat. Bank v. Philadelphia Trust, Safe-Deposit & Insurance Co., Case No. 3,244.

The execution of a deed of assignment and the transfer of the property, under the New Jersey assignment act, constitutes the assignee a trustee in possession for the equal benefit of all creditors.—In re Kimball, Case No. 7,771.

A trust for creditors (Act Ohio March 14, 1853) will not be implied from a transfer by an insolvent, to indemnify a surety, of property sufficient only for that purpose.—Coolidge v. Curtis, Case No. 3,184.

An assignment to creditors is not valid without their assent.—Lawrence v. Davis, Case No. 8,137.

The assent of creditors to an assignment, not stipulating for a release, may be presumed; aliter if release stipulated for.—Halsey v. Fairbanks, Case No. 5,964.

Agreement by part of creditors to take assignment of debtor's property to apply on account of debts of all creditors is valid as against a creditor not present at the meeting.—Adams v. Blodgett, Case No. 46.

§ 2. —— Form and requisites of instruments.

One partner may sign and seal an assignment for the firm, and it will bind the partnership, as a release of the debt.—Halsey v. Fairbanks, Case No. 5,964.

Delivery of schedules is not necessary to the validity of the assignment.—In re Kimball, Case No. 7,770.

Sufficiency of inventory and schedule by assignors for benefit of creditors, under Laws N. Y. 1877, c. 466, and Laws 1878, c. 318.—In re Bear, Case No. 1,177.

§ 3. —— Reservations.

On the general validity of assignments made by a failing debtor for the benefit of creditors, with various stipulations and conditions.—Halsey v. Fairbanks, Case No. 5,964.

A provisional stipulation that the creditors shall delay their suits against the debtors, or else forfeit their claims upon the fund assigned, is fraudulent.—Marsh v. Bennett, Case No. 9,110.

It seems that an assignment for the benefit of such creditors as should release their claims within 60 days is valid.—Pearpoint v. Graham, Case No. 10,877.

Quære, whether, in Rhode Island, an insolvent assigning only a part of his property for the benefit of all his creditors may stipulate for a release.—Stewart v. Spenser, Case No. 13,437.

Quære, whether an assignment stipulating for a release of the debtor is fraudulent.—Halsey v. Fairbanks, Case No. 5,964.

A stipulation for a release, and that the dividends of creditors refusing to become parties shall be paid to the assignor, does not render the assignment fraudulent and void on its face, by the law of Rhode Island.—Heydock v. Stanhope, Case No. 6,445.

If the terms of release are general, its operation will be restrained to a release of debts.—Halsey v. Fairbanks, Case No. 5,964.

If the terms of a covenant by creditors to indemnify the debtor against claims under them are general, it will be construed a several covenant by each creditor, and not a joint one by all.—Halsey v. Fairbanks, Case No. 5,964.

The preference of certain creditors upon condition that they accept a distributive share, and release the balance of their debts, does not invalidate a general assignment for creditors under the Virginia laws.—Wickham v. Dillon, Case No. 17,612.

A general assignment in trust for such creditors as should become parties thereto and release their claims, the surplus to be paid the assignor, is void as against dissenting creditors.—The Watchman, Case No. 17,251.

§ 4. —— Preferences.

An insolvent debtor may lawfully prefer one creditor to another.—Pearpoint v. Graham, Case No. 10,877.

Preferences to creditors, if not made for fraudulent purposes, are valid in Ohio.—Coolidge v. Curtis, Case No. 3,184.

Preferences are valid in Illinois, not being prohibited by statute.—Lawrence v. Davis, Case No. 8,137.

It is not a fraud upon any attaching creditor to provide for the payment of all the creditors in preference to one who means to attach by process the property conveyed.—Halsey v. Fairbanks, Case No. 5,964.

A state law as to the effect of an assignment by a debtor in failing circumstances is inapplicable to an assignment made in another state of an instrument executed in the former state.—Dundas v. Bowler, Case No. 4,141.

Construction and effects of Ohio acts of 1824, and 1842, in relation to assignments made by banks.—Dundas v. Bowler, Case No. 4,141.

An assignment with preferences, made by two members of a firm, in the absence and without the knowledge or consent of the third, who had previously refused to give preference, is not valid as to him.—Bowen v. Clark, Case No. 1,721.

§ 5. —— Fraud.

An assignment is not void because made to the clerk of the assignor without requiring bond, and permitting a sale on 30 days' credit if the assignee deem best.—In re Walker, Case No. 17,063.

Concealment of a large sum in cash at the time of making an assignment renders the instrument of assignment fraudulent and void.—Gilkerson v. Hamilton, Case No. 5,424a.

A general assignment for creditors *held* fraudulent, where, from the course of business, the assignor must have had ample assets, but the same were not revealed.—Fuller v. Ives, Case No. 5,150.

An assignment for benefit of creditors by a debtor absconding with a large sum of money is fraudulent as to creditors where it stipulates for a release as a condition of obtaining a preference under the assignment.—Stewart v. Spenser, Case No. 13,437.

A general assignment for the benefit of creditors is not invalidated by subsequent fraudulent acts of the assignor.—In re Walker, Case No. 17,063.

Delivery of assets to the assignee before he has qualified himself to take possession by filing the inventory and bond is a fraudulent conveyance.—Gilkerson v. Hamilton, Case No. 5,424a.

The omission of schedules and inventory by an insolvent merchant making an assignment is a badge of fraud.—Gilkerson v. Hamilton, Case No. 5,424a.

Payment by an insolvent of a just debt to his assignee at the time of making the assignment is a quasi bribe, and a badge of fraud.—Gilkerson v. Hamilton, Case No. 5,424a.

An assignment, fraudulent as to creditors, does not in law oppose any obstacle to the enforcement of their legal rights.—In re Beisenthal, Case No. 1,236.

§ 6. Construction and operation in general—Property conveyed.

An assignment of all the property mentioned in a schedule referred to, which merely enumerates specific property, affords no presumption of a general assignment.—United States v. Langton, Case No. 15,560.

A general assignment is valid for future liabilities, as well as for debts due, if the parties so intend.—Halsey v. Fairbanks, Case No. 5,964.

An assignment of "all the goods, wares, merchandises, and personal property of every kind" belonging to the assignor, does not pass an interest under a contract.—Kendall v. Almy, Case No. 7,690.

One of the trusts of an assignment was to pay "$8,400 in customhouse bonds, on which M. is surety." M. was surety on bonds for a less amount, but the assignor in fact owed such bonds amounting to $8,257. *Held*, that only the bonds on which M. was surety were included.—United States v. Langton, Case No. 15,560.

A claim for damages for collision of a craft passes to the assignee under a deed of general assignment for benefit of creditors under the Ohio statute.—Murdock v. The Emma Graham, Case No. 9,940.

§ 7. —— Foreign assignments.

An assignment valid by the law of the state where it is made, though void if made in another state, conveys property in such other state.—Caskie v. Webster, Case No. 2,500.

A general assignment for the benefit of creditors by an insolvent residing in another state will not protect property at such time in Maine from attachment of a creditor resident therein. —The Watchman, Case No. 17,251.

An assignment valid in the state of the assignor's domicile, where it is made, will transfer goods then in another state, under whose law such assignment, if made there, would have been invalid.—Wickham v. Dillon, Case No. 17,612.

§ 8. Appointment and qualification of assignee.

Member of firm of attorneys, absent when assignment was made to the firm, will be presumed to have assented thereto, where he did not refuse to act after notice.—Gordon v. Coolidge, Case No. 5,606.

An assignment made to two persons, and accepted by one, becomes operative as to him.—Gordon v. Coolidge, Case No. 5,606.

Acceptance of the trust by the trustee, who was also a creditor, will not entitle him to the benefit of the trust, if he has failed to execute the release in time. — Pearpoint v. Graham, Case No. 10,877.

§ 9. Rights and powers of assignee.

An assignee in insolvency has no right to retain goods which were in the hands of his assignor for sale on commission, on which the latter had a lien as security on accommodation acceptances given to the owner after a tender of such acceptances and a demand of the goods. —Terry v. Bamberger, Case No. 13,837.

The assignee may avoid a transaction of the debtor for fraud or collusion when the debtor could not do so because a party to it.—Whetmore v. Murdock, Case No. 17,509.

§ 10. Actions by assignee.

Quære, whether the assignee of an insolvent can sue, in his own name, in a foreign jurisdiction.—Bradford v. Jenks, Case No. 1,769.

§ 11. Rights and remedies of creditors—Presentation, proof, and payment of claims.

One to whom partners have become individually liable may, on an assignment of their individual and firm assets, prove the claim against their separate estates and the surplus against their joint estate after payment of their joint debts.—Drake v. Taylor, Case No. 4,067.

Where an assignment is made for the benefit of such creditors as should release their debts within 60 days, a mere offer to release is unavailing.—Pearpoint v. Graham, Case No. 10,877.

§ 12. —— Claims and liens prior or superior to assignment.

A creditor who purchases property from a trustee in ignorance of the fraud is not precluded from impeaching the assignment.—Johnson v. Rogers, Case No. 7,408.

Unlawfully preferred creditors have no priority as against a mortgagee equally preferred, but not enforcing his mortgage to their prejudice.—Bowen v. Clark, Case No. 1,721.

An assignment for the benefit of all creditors is good against subsequent attachments, although all the creditors are not parties to the deed before the attachments.—Halsey v. Fairbanks, Case No. 5,964.

An assignment for the benefit of creditors is good against a subsequent attachment, as to creditors, who, though not parties, assented thereto before the attachment.—Brown v. Minturn, Case No. 2,021.

An assignment for the benefit of creditors *held* to take priority as against subsequent attachment of goods held by another on consignment.—Bholen v. Cleveland, Case No. 1,381.

Creditors levying after, but not those levying before, expiration of time to file inventory and schedule, under the New York insolvent law (Act N. Y. June 16, 1877, § 3) acquire a lien where the inventory, etc., is not filed within the time.—In re Bear, Case No. 1,177; In re Croughwell, Id. 3,440.

Recovery of judgment, and levy thereunder prior to the filing of an inventory and bond, but after the execution of the assignment, and after the assignee has taken possession, create no lien under the New Jersey assignment act. —In re Kimball, Case No. 7,771.

A party who purchases a judgment has no higher right to impeach a fraudulent assignment than his assignor had.—Johnson v. Rogers, Case No. 7,408.

§ 13. Accounting by, and compensation of, assignee.

An assignor may, by bill in equity against the assignee and the only unpaid creditor, compel an accounting of the assignee.—Carpenter v. Robinson, Case No. 2,431.

All the creditors must be made parties to a bill for an account to fix the amount of a trust fund for creditors. Without them, the court cannot distribute parts of the fund to those who are entitled to them in severalty.—Greene v. Sisson, Case No. 5,768.

The assignee who is put upon inquiry as to facts rendering the assignment voidable by creditors has no lien, as against attaching creditors, upon the proceeds of the property for services or counsel fees.—Hastings v. Spenser, Case No. 6,201.

ASSISTANCE, WRIT OF.

§ 1. Nature and grounds.

A writ of assistance will be granted where defendant refuses to surrender under a decree. —Pratt v. Burr, Case No. 11,372.

ASSOCIATIONS.

§ 1, Rights of members in property of association. § 2, Mutual dealings of members. § 3, Liability of members for debts of association. § 4, Actions.

See, also, "Building and Loan Associations"; "Joint Stock Companies."

Mutual benefit assurance associations, see "Insurance," §§ 196–199.

§ 1. Rights of members in property of association.

On the wrongful expulsion of a member of an association having an absolute community of property with right of survivorship, *held*, that he should have a decree for his numerical proportion of the whole capital stock.—Nachtrieb v. The Harmony Settlement, Case No. 10,003.

§ 2. Mutual dealings of members.

A written agreement between the members of an unincorporated association to relinquish all individual interest in the proceeds of their joint labor for the common benefit is valid and binding.—Goesele v. Bimeler, Case No. 5,503.

§ 3. Liability of members for debts of association.

A stockholder of an unincorporated association is liable in equity for the debts of the association, irrespective of the provisions of the by-laws limiting his liability.—Riggs v. Swann, Case No. 11,831.

§ 4. Actions.

Where an unincorporated association of persons sued in the association name waive process, and appear and answer without objecting, they cannot afterwards raise the objection that

it was improperly sued.—Deems v. Albany & Canal Line, Case No. 3,736.

ASSUMPSIT, ACTION OF.

§ 1, Grounds. § 2, Defenses. § 3, Persons liable. § 4, Pleading. § 5, Issues and proof. § 6, Evidence.

See, also, "Account Stated"; "Money Received"; "Use and Occupation"; "Work and Labor."

§ 1. Grounds.

There can be no recovery in assumpsit if a special agreement be proved.—Krouse v. Deblois, Case No. 7,937; Rambler v. Choat, Id. 11,542.

Assumpsit will lie for money due upon a special contract.—Hyde v. Liverse, Case No. 6,972.

Assumpsit will lie for money due under an executed contract.—Maupin v. Pic, Case No. 9,309.

Assumpsit will not lie at common law on a parol demise.—Wise v. Decker, Case No. 17,906.

Assumpsit will lie for articles or services commonly charged on book account.—Edwards v. Nichols, Case No. 4,296.

Assumpsit lies upon the judgment of a justice of the peace.—Green v. Fry, Case No. 5,758.

Assumpsit is the proper form of action at common law to recover money paid as usury.—Whitaker v. Pope, Case No. 17,528.

Assumpsit will lie on the indorsement of a writing obligatory, the undertaking of the defendant not being under seal.—Campbell v. Jordan, Case No. 2,362.

Plaintiff may recover on a general indebitatus assumpsit for work and labor done under a special agreement.—Pipsico v. Bontz, Case No. 11,183.

Assumpsit will not lie for work and labor done under a sealed agreement unless the whole work has been done according to the contract.—Fresh v. Gilson, Case No. 5,112.

Assumpsit will lie for work done under a contract under seal which had been rescinded for failure to comply with its terms, where the work was accepted by the other party.—Lee v. New Haven, M. & W. R. Co., Case No. 8,197.

Assumpsit will not lie for work and labor done in the lifetime of defendant's intestate under a special contract for payment by the conveyance of land, without showing fraud in the making of such contract.—Powling v. Varnum, Case No. 11,364.

Assumpsit will lie for the value of work done under an agreement under seal, where plaintiff has been prevented by defendant from finishing the job.—Preston v. Young, Case No. 11,399.

A balance remaining due from the due increase and sale of property received as security for a debt, and to be accounted for, may be recovered in an action at law under a count for money had and received.—Jewett v. Cunard, Case No. 7,310.

Assumpsit will lie on interest coupons, not under seal, attached to railway aid bonds under seal, where each coupon contains an express promise to pay to bearer, and is signed by the proper officer.—First Nat. Bank v. Bennington, Case No. 4,807.

Interest coupons attached to a municipal bond, and made payable to bearer according to the condition of the bond, are not negotiable instruments, but are mere evidences of interest due on the bond, and assumpsit cannot be maintained thereon.—Clarke v. Janesville, Case No. 2,854.

Where defendant contracted to pay a certain sum for each patented article sold, the amount received may be recovered on the general count for money had and received.—Stanley v. Whipple, Case No. 13,286.

Where proceeds of an execution in a sheriff's hands were claimed by the plaintiff in the execution and by the United States, and were paid to the former, on his agreement to pay them to the latter if "the said court" decided they were entitled thereto, *held*, that assumpsit would lie in a federal court in behalf of the United States.—United States v. Mechanics' Bank, Case No. 15,756.

Assumpsit lies for work done under a sealed contract, without previous demand for stock agreed to be received in payment.—Hallihan v. Washington, Case No. 5,962.

Assumpsit will not lie for the costs of appeal against the person for whose use the appeal was prosecuted.—Williams v. Hopkins, Case No. 17,722.

A promise to account for the proceeds of a bill of exchange "as soon as the fate of the bill is decided" *held* a promise to pay, conditional upon the bill being paid.—Hutz v. Karthause, Case No. 6,963.

A promise to pay a claim out of the proceeds of a bill of exchange is not enforceable where the bill is protested for nonpayment.—Hutz v. Karthause, Case No. 6,963.

§ 2. Defenses.

An agreement to release a debtor upon his executing a deed is a good defense in assumpsit, the deed being executed.—Bartleman v. Douglass, Case No. 1,073.

A credit of six months in a note expired before suit will not defeat a recovery on the general counts.—Brown v. Noyes, Case No. 2,023.

§ 3. Persons liable.

An action for money had and received will lie by the holder against the acceptor of a bill who received a fund out of which it was payable.—Grammer v. Carroll, Case No. 5,681.

§ 4. Pleading.

Proper form of declaration in assumpsit.—Myers v. Davis, Case No. 9,986.

In assumpsit for board and lodging and articles furnished, the day stated in the declaration is not material if the articles were delivered and to be paid for before the action was brought.—McLaughlin v. Turner, Case No. 8,875.

One who has fully performed a special agreement may recover upon a general count.—Brockett v. Hammond, Case No. 1,916.

A declaration in assumpsit may be amended (in Connecticut) by adding a special count in covenant.—Lee v. New Haven, M. & W. R. Co., Case No. 8,197.

The declaration on a promissory note in a suit in the federal court in New York, drawn under the Code of Procedure, *held* bad on general demurrer, as a claim of damages is necessary in assumpsit.—Brownson v. Wallace, Case No. 2,042.

§ 5. Issues and proof.

A partnership debt may be given in evidence to support a several assumpsit by one of the partners.—Edmondson v. Barrell, Case No. 4,284.

A promissory note is good evidence, under the money counts, in a suit by an indorsee as well as by the payee.—Brown v. Noyes, Case No. 2,023.

A special agreement to do the work at certain prices cannot be given in evidence on a general indebitatus assumpsit.—Farrell v. Knapp, Case No. 4,684.

Although the contract offered in evidence vary from that stated in the special count, the re-

ceipt for the purchase money at the bottom of the contract is evidence on the money counts.—Jamieson v. Alexander, Case No. 7,203.

The statute of gaming may be given in evidence, upon nonassumpsit, without notice.—Watson v. Bayley, Case No. 17,276.

Payment may be given in evidence under non assumpsit without notice.—Jeffrey v. Schlasinger, Case No. 7,253a.

Defendant need not plead a former recovery to give the same in evidence in an action of assumpsit or on the case.—Lonsdale v. Brown, Case No. 8,493; Ridgway v. Ghequier, Id. 11,816; Stone v. Stone, Id. 13,488.

A declaration in general indebitatus assumpsit for property sold and delivered is not supported by evidence of a sale and delivery under a special contract for a price named.—Talbot v. Selby, Case No. 13,729.

Upon a count for a certain sum for work and labor, plaintiff must prove an express assumpsit for a certain sum.—Farrell v. Knapp, Case No. 4,684.

§ 6. Evidence.

Indebitatus assumpsit will lie against a corporation aggregate upon an account stated by their treasurer, without examining him as a witness.—Davis v. Georgetown Bridge Co., Case No. 3,637.

ASSUMPTION.

Of obligation of old firm, see "Partnership," § 43.
Of risk by employé, see "Master and Servant," § 6.

ATTACHMENT.

§ 1, Nature and grounds—Nature of attachment, causes of action, and parties. § 2, —— Grounds. § 3, Property subject to. § 4, Proceedings to procure—Jurisdiction and venue. § 5, —— Affidavits. § 6, —— Security. § 7, Writ or warrant. § 8, Levy. § 9, Lien. § 10, Priorities. § 11, Custody and care of property in general. § 12, Delivery of property on forthcoming or delivery bond. § 13, Proceedings to support or enforce. § 14, Quashing, vacating, dissolution, or abandonment. § 15, Claims by third persons. § 16, Return. § 17, Liabilities on bonds and undertakings. § 18, Wrongful attachment.

See, also, "Execution"; "Garnishment."

Adoption of state practice by federal courts, see "Courts," § 68.
Effect of proceedings in insolvency, see "Insolvency," § 8.
—— of removal of cause, see "Removal of Causes," § 47.
Exemptions, see "Exemptions"; "Homestead."
For contempt, see "Contempt," § 4; "Injunction," § 39.
For costs, see "Costs," § 27.
For failure to return writ of habeas corpus, see "Habeas Corpus," § 7.
In admiralty, see "Admiralty," §§ 58–61, 69.
Liability of officer, see "Sheriffs and Constables," § 3; "United States Marshals," § 16.
Liens in bankruptcy, see "Bankruptcy," §§ 260, 261, 285.
Malicious attachment, see "Malicious Prosecutions," § 1.
Of partnership property, see "Partnership," § 35.
Power to issue, see "United States Commissioners," § 1.
Restraining enforcement of attachment lien, see "Bankruptcy," § 285.
Security for dissolution in admiralty, see "Admiralty," § 69.
To compel appearance, see "Admiralty," §§ 58–61; "Corporations," § 85; "Courts," §§ 58, 59.
—— attendance of witness, see "Witnesses," § 4.

§ 1. Nature and grounds—Nature of attachment, causes of action, and parties.

A foreign attachment is a remedy, and may be defeated by any act that bars or takes away the remedy or right to judgment under it.—Ex parte Foster, Case No. 4,960.

A proceeding by attachment is a proceeding in rem, and only binds the defendant to the extent of the property levied on.—Westerwelt v. Lewis, Case No. 17,446.

An attachment under Act Md. 1795, c. 56, will not lie for a debt under $20.—Dix v. Nicholls, Case No. 3,926.

Under the Georgia law no attachment lies for the recovery of unliquidated damages consequent upon the breach of a contract.—Zerega v. McDonald, Case No. 18,212.

The remedy by a foreign attachment in Pennsylvania cannot be pursued except for a demand arising under contract, and where the measure of damages can be averred.—Fisher v. Consequa, Case No. 4,816.

The remedy by foreign attachment in Pennsylvania may be pursued in an action for breach of a contract, made in a foreign country by persons who had never resided in the state, to deliver a quantity of tea of a particular quality.—Fisher v. Consequa, Case No. 4,816.

A foreign attachment for breach of stipulation in a charter party cannot be sustained where the amount of plaintiff's damages cannot, with propriety, be averred or sworn to.—Clark v. Wilson, Case No. 2,841.

The proceedings upon attachment, upon an assigned cause of action, must be in the name of the legal plaintiff; and all the requisites of the statute must be complied with.—Davis v. Wyer, Case No. 3,660.

§ 2. —— Grounds.

Attachment lies against absconding debtor under the Virginia law.—Allen v. Greenwood, Case No. 222.

A man who leaves a place to avoid service of process, requesting false information to be given of his movements, "conceals himself so that process cannot be served upon him," within the meaning of the attachment law of Illinois.—North v. McDonald, Case No. 10,312.

It is not necessary that process be first issued, or that an attempt should first be made by the officer to find him; nor is it material that he is in another county.—North v. McDonald, Case No. 10,312.

Antedating a note substituted in place of an unexpired credit *held* a fraud upon grantees, and the note no ground of attachment against the land conveyed.—Briggs v. French, Case No. 1,871.

The intent to delay or defraud one creditor alone in the disposal of goods by the debtor is sufficient ground of attachment. — Correy v. Lake, Case No. 3,253.

§ 3. Property subject to.

The wages of a seaman are not subject to attachment.—The John E. Holbrook, Case No. 7,339.

Lands are subject to a foreign attachment in Pennsylvania.—Graighle v. Notnagle, Case No. 5,679.

Property in the hands of a lienor is not attachable in a suit against the owner, unless the lien is waived.—Meeker v. Wilson, Case No. 9,392.

A lien is not attachable as personal property or as a chose in action of the person entitled to it.—Meany v. Head, Case No. 9,379.

A chancery attachment will not lie against the effects of a deceased person.—Henderson v. Her-

derson, Case No. 6,353; Patterson v. McLaughlin, Id. 10,828; Redfern v. Rumney, Id. 11,627.

An order for the attachment "of the property of" a defendant named, issued as a provisional remedy, prior to judgment, under the provisions of Code Prac. Ky. § 223, gives the sheriff no authority to seize property which has been conveyed to another, on the ground that such conveyance was in fraud of creditors; and such a seizure, if made, does not carry the property into the custody of the court.—Manier v. Trumbo, Case No. 18,309.

A foreign attachment may be laid on property in the hands of the plaintiff in the attachment, and in such case no special process is necessary.—Graighle v. Notnagle, Case No. 5,679.

Goods in the officer's hands under a distress for rent are liable to attachment, at the suit of the same landlord, for the rent not yet due.—Herbert v. Ward, Case No. 6,398.

Money awarded under a rule of court cannot be attached.—In re Bridgman, Case No. 1,867.

A judgment rendered in the federal circuit court cannot be attached by process issued out of a state court against the plaintiff in the judgment.—Thomas v. Wooldridge, Case No. 13,918.

If the indorser of a promissory note accept an order from the indorsee for the amount of the note in favor of a third person, a subsequent attachment of the money in the hands of the indorser by a creditor of the indorsee will not avail him.—Whetcroft v. White, Case No. 17,507.

§ 4. Proceedings to procure — Jurisdiction and venue.

Under Act 1789, c. 20, § 11, a foreign attachment cannot be maintained against the principal defendant unless he is an inhabitant of the district where the suit is brought, or is found within it, at the time of service of the process.—Richmond v. Dreyfous, Case No. 11,799.

It is no objection to a foreign attachment that plaintiff has sued out an attachment in another state on the same cause of action.—Clark v. Wilson, Case No. 2,841.

Quære, whether a foreign attachment can be sustained where plaintiff has sued out an attachment in another state for the same cause, and defendant has given bail therein.—Clark v. Wilson, Case No. 2,841.

Proceedings and practice under the foreign attachment law of Pennsylvania.—Graighle v. Notnagle, Case No. 5,679.

An attachment under Act Md. 1795, c. 56, will lie against lands and tenements in Alexandria county, D. C.—Hough v. Smoot, Case No. 6,723.

§ 5. —— Affidavits.

Sufficiency of instrument and affidavit produced to the magistrate to warrant attachment under Act Md. 1795, c. 56.—Hard v. Stone, Case No. 6,046.

To obtain attachment (Act Md. 1795, c. 56), it is not necessary that all plaintiffs should make affidavit, nor that they appear to be citizens.—Birch v. Butler, Case No. 1,425.

An affidavit to obtain attachment under Act Md. 1795, may be made by one of the co-partners, and need not state that he is the acting partner, nor that the other partners were absent.—Drake v. Cleveland, Case No. 4,059.

An affidavit made before a judge in another state is not good without a certificate of authority to administer the oath.—Bolton v. White, Case No. 1,616.

The affidavit, in the territory of Arkansas, may be made before the clerks of the circuit court.—James v. Jenkins, Case No. 7,181a.

In an affidavit to obtain an attachment under Act Md. 1795, it is not necessary to state the plaintiff to be a citizen of the county of Washington, D. C.—Decatur v. Young, Case No. 3,722; Kurtz v. Jones, Id. 7,954.

In order to obtain an attachment under Act Md. 1795, c. 56, the affidavit must be positive as to the amount of the debt.—Munroe v. Cocke, Case No. 9,928.

Affidavit *held* insufficient where the debt arose in part upon a note, and the note was not produced.—Mills v. Wilson, Case No. 9,616.

A positive averment, in the words of the statute, that "plaintiff's debt was fraudulently contracted," is sufficient, under Laws Minn. 1867, c. 66, § 1.—Cheshire Provident Inst. v. Johnston, Case No. 2,659.

It is not necessary that the deponent, in an affidavit upon which an attachment is applied for, should swear positively to the fraudulent intent of the defendant; facts going to show the intent must be stated, and facts reasonably authorizing a belief of such intent are sufficient.—Ely v. Hanks, Case No. 4,430.

Proof of a general intent to dispose of property to prevent a particular creditor from collecting his demand by legal proceedings is sufficient proof, in an action by such creditor, that be is about to do so.—Correy v. Lake, Case No. 3,253.

§ 6. —— Security.

Plaintiff in attachment in a federal court must furnish security in the same manner and amount, and with sureties of the same qualifications, as if he were proceeding in a state court.—Singer Mfg. Co. v. Mason, Case No. 12,903.

In a chancery attachment in Virginia, the court may order the attached debt to be paid over to the plaintiff, on his giving security to refund, etc., although the plaintiff's right may be doubtful.—Wilson v. Dandridge, Case No. 17,801.

Money deposited in court under a stipulation to abide the issue in attachment cannot be withdrawn, and a bond substituted therefor.—United States v. Hutton, Case No. 15,435.

§ 7. Writ or warrant.

An attachment against partners, where the writ failed to show their given names, but was amended in this particular before the return day, *held* valid.—Harrington v. Fire Ass'n, Case No. 6,106.

The writ and capias may be amended by inserting given names of plaintiffs.—Birch v. Butler, Case No. 1,425.

§ 8. Levy.

To constitute attachment of personalty as against assignee in bankruptcy, officer must take actual possession.—In re Ashley, Case No. 581.

A levy under an attachment satisfies the debt if the property be of sufficient amount, though it be wasted by the negligence of the officer.—Starr v. Moore, Case No. 13,315; Same v. Taylor, Id. 13,319.

An attachment cannot be served in court.—Davis v. Sherron, Case No. 3,652.

§ 9. Lien.

An attachment, on mesne process, is not a lien in the sense of the common law.—In re Bellows, Case No. 1,278; In re Cheney, Id. 2,636.

An attachment on mesne process is only a contingent and conditional charge, until the judgment and levy.—Ex parte Foster, Case No. 4,960.

An attachment levied on land fixes the lien from the time of the levy, and a sale under a judgment on the attachment relates back to such time.—Tyrell's Heirs v. Rountree, Case No. 14,313.

§ 10. Priorities.

The attachment first served is entitled to priority of payment.—Johnson v. Griffith, Case No. 7,386; Grigsby v. Love, Id. 5,827.

Questions as to priority of attachment and unrecorded conveyances.—Briggs v. French, Case No. 1,871.

The rule applicable to a purchaser claiming land, with notice of a prior unrecorded attachment, does not govern where two creditors are proceeding by suit in invitum with knowledge of the attachments of each other; and each is entitled to any priority which he can lawfully obtain.—Kent v. Roberts, Case No. 7,715.

§ 11. Custody and care of property in general.

The nature and kind of possession which the officer is bound to keep of personal property to save the attachment.—Lewis v. The Orpheus, Case No. 8,330.

Where attached property is lost without the neglect of the officer or plaintiff, the loss must be sustained by defendant; and a plea that property was attached and lost is defective in not showing how the loss occurred.—Starr v. Moore, Case No. 13,315; Same v. Taylor, Id. 13,319.

§ 12. Delivery of property on forthcoming or delivery bond.

Effect of redelivery to defendant of property taken on attachment under Civ. Code Or. §§ 178, 179.—Correy v. Lake, Case No. 3,253.

A sheriff, who delivers up to defendant the attached property before the action is actually dismissed, though ordered to do so by plaintiff, may be required to account to subsequent attaching creditors for the value thereof.—Rice v. Baldwin, Case No. 11,750a.

The giving of a bond for possession does not prevent defendant from making as full a defense as if the bond had not been given.—Lehman v. Berdin, Case No. 8,215.

A bond to prevent the removal of property in litigation beyond the jurisdiction of the court creates a personal obligation only against the obligor.—Lenox v. Notrebe, Case No. 8,246b.

Upon attachment of the effects of both and each of two joint debtors, bail must be given for both, to release the joint and separate effects.—Magee v. Callan, Case No. 8,942.

Bail will not be received of one only to discharge his separate goods.—Magee v. Callan, Case No. 8,942.

The court will not, upon affidavit, decide whether the effects attached are the joint or several property of the defendants.—Magee v. Callan, Case No. 8,942.

See, also, post, § 17.

§ 13. Proceedings to support or enforce.

A valid attachment of property within the jurisdiction gives a state court power to render judgment that an absent defendant, not otherwise served, is indebted to plaintiff, and to enforce payment by the sale of the property.—Mickey v. Stratton, Case No. 9,530.

A sale of land of an absent defendant, under an attachment, is void where the return shows that copy of process was posted on the premises, but does not show that there was no occupant with whom it could have been left.—Mickey v. Stratton, Case No. 9,530.

A personal judgment cannot be rendered against defendant on a foreign attachment under the Indiana statute of 1838, where defendant was not personally served with process, and did not appear; and the judgment in such cases should be for a sale of the property attached. A sale on fieri facias issued on such judgment is void.—Wyman v. Russell, Case No. 18,115.

Defendants in attachment may appear and plead without entering special bail to the action, and then the property attached is considered as a substitute for bail.—Gibson v. Scull, Case No. 5,400a.

A judgment in a proceeding by attachment is erroneous where the service of the writ does not conform to the statute.—James v. Jenkins, Case No. 7,181a.

A judgment in attachment is not to be treated as a nullity because the affidavit does not appear in the record.—Biggs v. Blue, Case No. 1,403.

The bill cannot be taken for confessed for nonappearance in a chancery attachment if the subpœna be served on the principal without an affidavit and publication.—Dean v. Legg, Case No. 3,709.

The plaintiff must prove his debt before he can obtain judgment of condemnation. (Act Md. 1795, c. 56.)—Stephenson v. Giberson, Case No. 13,372.

In a judgment upon an attachment, interest cannot be added.—Power v. Semmes, Case No. 11,360.

§ 14. Quashing, vacating, dissolution, or abandonment.

An attachment, issued upon a return of non est, before the appearance day, will be quashed.—Camilloz v. Johns, Case No. 2,343.

An attachment will be dissolved where defendant is arrested before its return.—Cox v. Watkins, Case No. 3,307.

It is no ground for dismissing a foreign attachment, instituted in the federal court, that plaintiff had sued out another attachment against the defendant in a state court, and afterwards discontinued it.—Fisher v. Consequa, Case No. 4,816.

The second attaching creditors are entitled to the relief against fraud given by Act Mass. Feb. 21, 1824, though their writ be not returnable to the same term of court as the first attachment.—Lodge v. Lodge, Case No. 8,460.

An attachment under Act Md. 1795, against the property of a corporation aggregate is dissolved by its appearance without bail.—Nicholl v. Savannah S. S. Co., Case No. 10,225.

An attachment by way of execution is discontinued if there is no appearance at the return term.—Bank of Washington v. Brent, Case No. 948.

An attachment under Act Md. 1795, c. 56, is dissolved by the death of the principal defendant and the appearance of his administrator.—Pancost v. Washington, Case No. 10,706.

§ 15. Claims by third persons.

Rights under an attachment depend on the state of the property when the attachment was levied.—Clarke v. Chase, Case No. 2,845.

Trustees in an attachment suit, who unsuccessfully contest a transfer of bank stock on the books of the bank on the ground that the sale by the debtor was fraudulent as to the attachment creditor, are liable for costs.—Hubbard v. Bank of United States, Case No. 6,815.

§ 16. Return.

When a marshal has several writs of attachment put into his hands, he must return all the property, as attached on each of them.—Violette v. Tyler, Case No. 16,955.

The state court has discretionary power to allow a sheriff to amend his return on attachment by reducing the stated value of the goods to the actual value, and its decision is not subject to review by the federal circuit court.—Pierce v. Strickland, Case No. 11,147.

§ 17. Liabilities on bonds and undertakings.

A judgment against a surety on a delivery bond given in attachment proceedings under the Tennessee laws is valid, although entered without notice, and while the surety was a nonresident of the state.—Kuhn v. McMillan, Case No. 7,945.

If the attachment be not sustained, plaintiff, though he recovered judgment for his debt, cannot resort to the bond given for possession.—Lehman v. Berdin, Case No. 8,215.

§ 18. Wrongful attachment.

An officer in Massachusetts seizing property of a firm on a writ against one partner who has no equitable interest in such property is a trespasser.—Cropper v. Coburn, Case No. 3,416.

Reputed ownership by a debtor of goods in his possession, in fact belonging to another, will not justify a creditor in attaching them.—Merrill v. Rinker, Case No. 9,471.

The attaching creditor, by giving bond and directing the sheriff to sell, ratifies the act of his attorney in directing the attachment.—Murray v. Lovejoy, Case No. 9,963.

Judgment against a sheriff for property wrongfully attached, without full satisfaction, is no bar to an action of trespass against the attaching creditor. Partial satisfaction of such judgment goes to reduction of damages.—Murray v. Lovejoy, Case No. 9,963.

The measure of damages for seizure under attachment of the goods of a third person is their value at the time of seizure, with such further damages as may be found to have been actually sustained by reason of seizure.—Comly v. Fisher, Case No. 3,053.

ATTORNEY AND CLIENT.

§ 1, Office of attorney—Suspension and disbarment. § 2, Retainer. § 3, Authority of attorney. § 4, Duties and liabilities of attorney to client. § 5, Compensation. § 6, Liens. § 7, Offenses by attorney.

Arguments of counsel, see "Criminal Law," § 91; "Trial," § 11.
Attorneys as public officers, see "Attorney General"; "District and Prosecuting Attorneys."
—— in fact, see "Principal and Agent."
Competency of attorney as witness, see "Witnesses," § 35.
Disclosure of communications, see "Witnesses," § 54.
Employment of new counsel as ground of continuance, see "Continuance," § 7.
Fees of attorney, in general, see "Costs," § 16.
—— in admiralty, see "Admiralty," § 144.
—— in bankruptcy, see "Bankruptcy," § 665.
Liability of attorney for negligence, see "Abstracts of Title."
Misconduct of counsel as grounds for new trial, see "New Trial," § 3.
Representation by attorneys in bankruptcy, see "Bankruptcy," §§ 20, 330.
Right of attorney to make affidavit in admiralty, see "Admiralty," §§ 92, 138.
—— to waive question of jurisdiction, see "Appearance," § 1.

§ 1. Office of attorney—Suspension and disbarment.

The circuit court of the District of Columbia, may inquire in a summary manner into alleged malpractices, and suspend or expel an attorney. —Ex parte Burr, Case No. 2,186.

The court will strike an attorney from the roll for malpractice, though it be not indictable. —United States v. Porter, Case No. 16,072.

A proposition by a lawyer to his client that he will visit, with his family, the family of the judge, and at such time seek to commit the judge in favor of his client, is ground of disbarment.—Ex parte Cole, Case No. 2,973.

Name of proctor stricken from the rolls for contempt in filing a notice of motion to set aside a decree on the ground that the same was rendered without any consideration or deliberation, and was the result "of either prejudice or corruption," and in "willful violation of a known duty."—In re Hastings, Case No. 6,199.

The effort of an attorney to secure from certain persons, as condition to his consent to their appointment as receivers of a railroad, a secret promise to appoint certain persons as chief officers thereof, is not alone ground of disbarment.—Ex parte Cole, Case No. 2,973.

Fidelity to the client does not justify an attempt to evade the fair operation of the law, or to impede the administration of justice.—Ex parte Giberson, Case No. 5,388.

Inciting and encouraging clients, parties to a pending litigation, to influence, improperly, judicial action by newspaper publications and printed circulars disparaging the court, with intent to intimidate the judges, is ground of disbarment, though the attorney's suggestion is not acted upon.—Ex parte Cole, Case No. 2,973.

An information charging such conduct need not state the precise mode by which the attorney conveyed such suggestions to the client. —Ex parte Cole, Case No. 2,973.

Nor is it demurrable on the ground that the suggestion to the client is a privileged communication.—Ex parte Cole, Case No. 2,973.

The discretion to remove or suspend an attorney should be exercised with great caution.— Bradley v. Tochman, Case No. 1,788.

§ 2. Retainer.

An attorney employed by the lender to examine the title of property offered as security for a loan, though compensated by the borrower, is responsible to the lender for the correctness of his opinion.—Page v. Trutch, Case No. 10,668.

An attorney may recover for services in a litigation ordered to be prosecuted by a city, and conducted in its behalf, with notice of his employment, where it accepts the benefits thereof, though without express contract.—Blake v. Elizabeth, Case No. 1,495.

A party cannot, without the consent of the court, substitute a new solicitor for one who has had charge of the cause.—Sloo v. Law, Case No. 12,958.

Where a solicitor, who has faithfully discharged his duties, is notified that he is discharged, and that no fee will be paid him, the fact that he sues out an attachment against his client for his fees is no ground for ordering his discharge from the cause, without payment of his fees.—Sloo v. Law, Case No. 12,958.

§ 3. Authority of attorney.

The appearance of an attorney in a cause is received as evidence of his authority, and no additional evidence is required. — Baldwin v. Wylie, Case No. 18,228.

Warrant of attorney to appear is not necessary.—Bank of the United States v. Roberts, Case No. 934.

An affidavit on information and belief, without stating the grounds of the belief, that an attorney had no authority, is not a sufficient foundation for a rule against the attorney to show his authority.—Standefer v. Dowlin, Case No. 13,284a.

If defendant insists upon it, plaintiff's attorney must file his warrant of attorney as evidence of authority to bring the suit.—King of Spain v. Oliver, Case No. 7,814.

Attorneys at law, having confided to them by creditors a discretionary power to collect a debt, may, in the exercise of their discretion, bind

their clients by assent to an assignment for the benefit of creditors.—Gordon v. Coolidge, Case No. 5,606.

The court will not, on the motion of one attorney, order the names of other attorneys, whose appearance has been entered, to be stricken off the docket.—Eriko v. Bomford, Case No. 4,517.

The court will not enforce the private agreements of counsel.—Moore v. Dulany, Case No. 9,758.

The submission of a controversy to arbitration by an attorney binds the client.—Denny v. Brown, Case No. 3,805.

A party will not be held responsible for the conduct of his counsel in acting without probable cause, if not directed by him, nor for his counsel's malice, unless he attempts unjustly to take advantage of his act.—Burnap v. Albert, Case No. 2,170.

An attorney employed, not to attend to all his client's legal business, but to collect a particular debt, is a special, as opposed to a general, agent; and those dealing with him are bound to ascertain the extent of his authority. —Williamson v. Richardson, Case No. 17,754.

The counsel in a case has power to enter into a stipulation for the entry of a decree against his client.—Farmers' Trust & Canal Bank v. Ketchum, Case No. 4,670.

An attorney has exclusive control of the conduct of his client's suit, and neither the client nor his attorney in fact can sign a stipulation for a continuance.—Nightingale v. Oregon Cent. Ry. Co., Case No. 10,264.

An attorney employed to collect a claim, after entry of judgment, satisfied the same on receiving a less amount, which he failed to pay over. *Held*, that the satisfaction would be set aside on condition of the indorsement on the judgment of the amount paid. — Pierce v. Brown, Case No. 11,143.

A proctor in admiralty cannot release or compromise his client's debt without special authority, but an insufficient amount paid in settlement is a discharge pro tanto.—Bates v. Seabury, Case No. 1,104.

An attorney may confess judgment for his client in an action on contract. — Denny v. Brown, Case No. 3,805.

A ratification of the proceedings of an attorney in a suit is not valid to bind the client unless it is made with a full knowledge of all the material facts.—Williams v. Reed, Case No. 17,733.

§ 4. Duties and liabilities of attorney to client.

An attorney is justified in acting according to a decision of a state supreme court, though it is afterwards reversed by the United States supreme court.—Marsh v. Whitmore, Case No. 9,122.

It is not gross negligence in an attorney to unite in one suit debts secured and debts unsecured, for the moneys made on execution will be applied first to the unsecured debts.—Williams v. Reed, Case No. 17,733.

An attorney at law is not liable to a suit for moneys collected or for interest until demand, directions to remit, or some equivalent act.—Sneed v. Hanly, Case No. 13,136.

An attorney is bound to disclose to his client if he has any adverse retainer which may affect his own judgment or his client's interest; but the concealment of the fact is not a necessary presumption of fraud.—Williams v. Reed, Case No. 17,733.

An attorney chargeable with negligence is liable only to the extent of the injury his client has received.—Suydam v. Vance, Case No. 13,657.

An attorney at law cannot avail himself of the statute as to moneys collected for his client, until demand, directions to remit, or some equivalent act.—Sneed v. Hanly, Case No. 13,136.

Attorneys, in the exercise of their proper functions as such, are not liable for their acts when performed in good faith to protect clients' interest.—Campbell v. Brown, Case No. 2,355.

An attorney, who enters an appearance, without authority, is answerable in damages, for the injury he may thereby have occasioned the parties.—Field v. Gibbs, Case No. 4,766.

See, also, ante, § 2.

§ 5. Compensation.

A contract for a contingent compensation of 7½ per cent. for collecting and distributing an estate of $800,000, *held* not unconscionable.—Ex parte Plitt, Case No. 11,228.

Amount of attorney's charges where there were 11 suits, involving the same questions, with identical pleadings.—Ferrett v. Atwill, Case No. 4,747.

Where several attorneys appear for defendants, the attorney's fee in the bill of costs will be equally divided among them.—Hurst v. Durnell, Case No. 6,928.

Attorneys are entitled, in the absence of contract, to recover a quantum meruit for professional services.—Newman v. Keffer, Case No. 10,177.

A proctor may maintain a suit in admiralty for his costs or fees.—McDonald v. The Cabot, Case No. 8,759.

An action at law will not lie by a counselor of the circuit court of the District of Columbia, for his fees as such, even under an express promise; otherwise as to an attorney.—Law v. Ewell, Case No. 8,127.

Counsel fees, as such, are not recoverable without express agreement, but otherwise as to reasonable fees and expenses.—Blake v. Elizabeth, Case No. 1,495.

See, also, ante, § 2.

§ 6. Liens.

An attorney cannot acquire a lien for his compensation upon a judgment obtained by him, unless he has a special agreement as to the amount thereof. Civ. Code Or. § 1012.—In re Scoggin, Case No. 12,511.

A mere debt due by the adverse party to the client of the attorney is not money in the hands of such party, within Civ. Code Or. § 1012, subd. 3, upon which the attorney can acquire a lien.—In re Scoggin, Case No. 12,511.

Attorney *held* entitled to a lien upon notes of the client in his hands for counsel and solicitor's fees in suit not relating thereto.—In re Brown, Case No. 1,984.

The court will uphold the proctor's right to costs awarded against acts of the principal to his prejudice.—Collins v. Hathaway, Case No. 3,014.

A proctor for libelant in admiralty may proceed for costs after a clandestine settlement between the parties without his consent, after suit commenced.—Angell v. Bennett, Case No. 387; Collins v. Nickerson, Id. 3,016; The Planet, Id. 11,204; The Sarah Jane, Id. 12,348; The Victory, Id. 16,937; Trask v. The Dido, Id. 14,142; Johnson v. A Raft of Spars, Id. 7,370a.

A proctor who in such case intends to continue the suit to recover costs must give distinct notice to claimant or respondent.—The Sarah Jane, Case No. 12,348.

The proctor of a seaman may proceed with his suit for wages where the master of the vessel

secretly settles with the seaman after summons sued out, with knowledge thereof, and of the fact of an assignment to the proctor.—Eldridge v. The Ashley, Case No. 4,333.

Where the master on whom a libel has been served for seamen's wages pays the wages over at once on garnishment from a state court, at the request of the seamen, without any notice to their proctor in admiralty to enable him to secure his costs and fees, he renders himself liable therefor.—McDonald v. The Cabot, Case No. 8,759.

In a suit in admiralty for a personal tort, a compromise between the parties before decree will bar a further suit by libelant's proctor to obtain the costs.—Peterson v. Watson, Case No. 11,037; Purcell v. Lincoln, Id. 11,471.

A notice by the proctor to respondent that, in case of a compromise, he will be held liable for the costs, is ineffectual.—Peterson v. Watson, Case No. 11,037.

Where payment of a claim to an assignee thereof by officers of the government will defeat an attorney's lien upon the fund, the court will enjoin the assignee from demanding payment without the attorney's consent.—Key v. Bank of United States, Case No. 7,746.

A client can change his solicitor whenever he pleases, subject to the solicitor's lien. But the lien does not extend so far as to enable the solicitor to stay or delay the proceedings in the suit.—Isaacs v. Abraham, Case No. 7,094.

Where a proctor, in conducting a suit in rem for wages, to recover his costs, after a settlement without his knowledge with the libelant, makes unnecessary litigation, the cost thereof may be set off against his claim.—The Victory, Case No. 16,937.

§ 7. Offenses by attorney.

Upon an indictment for barratry, no evidence can be given of specific acts without notice given before the trial.—United States v. Porter, Case No. 16,072.

ATTORNEY GENERAL.

§ 1. Authority.

Comp. Laws Nev. § 2778, does not authorize the attorney general to appear for state generally in actions against officers in individual capacities, so as to bind state.—Adams v. Bradley, Case No. 48.

A direction given by the attorney general to a district attorney in respect to his official action in regard to an indictment cannot control the court.—United States v. Davis, Case No. 14,923.

AUCTIONS AND AUCTIONEERS.

§ 1, License and bond of auctioneer. § 2, Liability of auctioneer. § 3, Conduct and validity of sale.

Requirements of statute of frauds, see "Frauds, Statute of," § 3.

§ 1. License and bond of auctioneer.

An auctioneer's bond given to the corporation of Georgetown, D. C., by its corporate name, *held* void.—Georgetown v. Baker, Case No. 5,342.

The license must be under the corporate seal.—Georgetown v. Baker, Case No. 5,342.

In debt on an auctioneer's bond for failure to pay over money, it may be pleaded that the auctioneer's liability has not been established by judgment.—Alexandria v. Moore, Case No. 185.

§ 2. Liability of auctioneer.

An auctioneer limited as to price is liable if he sell at a less price.—Williams v. Poor, Case No. 17,732.

§ 3. Conduct and validity of sale.

Where the last bid before the purchaser's on a sale at auction is a real bid, and the judgment of the real bidders and the purchaser has not been blinded by previous sham bids, the fact that the seller employed sham bidders will not render the sale invalid.—Veazie v. Williams, Case No. 16,907.

An association of individuals may purchase at an auction sale of public lands.—Piatt v. Oliver, Case No. 11,114; Id. 11,115.

A party who is not himself injured thereby cannot defeat the title of the purchaser at a sale by auction of public land, by showing a combination to prevent competition in bidding.—Root v. Shields, Case No. 12,038.

After the lapse of five years, where the property has greatly depreciated in value, a bill cannot be maintained to set aside a sale by auction by defendant's agent on the ground of fraudulent by-bidding which enhanced the price, but which was without defendant's knowledge or connivance.—Veazie v. Williams, Case No. 16,907.

AUDITA QUERELA.

§ 1. Judgments subject to review.

The proper remedy for persons aggrieved by proceedings under a judgment obtained against a testator is an audita querela, or by obtaining a rule of court to stay proceedings.—Wilson v. Watson, Case No. 17,847.

AUTHORITY.

Of agent in general, see "Principal and Agent," §§ 4–7, 17–31.
——. of corporation, see "Corporations," § 35.
Of attorney, see "Attorney and Client," § 3.
Of corporate officers or agents, see "Corporations," § 35.
Of justice of the peace, see "Justices of the Peace," §§ 3–7.
Of masters of vessels, see "Shipping," §§ 75–77.

AUTREFOIS ACQUIT AND CONVICT.

Plea of, see "Criminal Law," § 49.

AVERAGE.

General average, see "Shipping," §§ 223–243.
Jurisdiction of admiralty, see "Admiralty," § 11.

AVOIDANCE.

Pleading matter in avoidance, see "Pleading," § 34.

AWARD.

See "Arbitration and Award," §§ 4, 5.

B

BAGGAGE.

Of passenger, see "Carriers," §§ 49–51; "Shipping," § 204.

BAIL.

I. IN CIVIL ACTIONS.

§ 1, When bail will be required. § 2, Waiver of bail. § 3, Proceedings in giving and taking bail. § 4, Affidavit or certificate to hold to bail. § 5, Motion to appear without bail or for discharge on common bail. § 6, Amount of bail and motions to reduce. § 7, Sufficiency of sureties. § 8, Justification of sureties. § 9, Rights and liabilities of sureties. § 10, Discharge or exoneration of sureties. § 11, Surrender of principal. § 12, Motion to quash bail bond. § 13, Proceedings to enforce bonds or recognizances.

II. IN CRIMINAL PROSECUTIONS.

§ 14, Right to release on bail. § 15, Amount of bail. § 16, Jurisdiction and authority to admit to bail. § 17, Bond, undertaking, or recognizance. § 18, Breach of bond or recognizance. § 19, Relief from forfeiture and motions to remit. § 20, Discharge of bond or recognizance. § 21, Discharge or exoneration of sureties. § 22, Actions on bonds or recognizances.

Excessive bail, see "Malicious Prosecution," § 1.
In admiralty, see "Admiralty," § 67.
In bankruptcy, see "Bankruptcy," § 142.
Powers and duties of marshal, see "United States Marshals," § 19.
Taxation of expenses for procuring, see "Costs," § 22.

I. IN CIVIL ACTIONS.

§ 1. When bail will be required.

Special bail may be required in cases of tort as well as in cases of contract, and without affidavit as to the true amount of the debt or damage.—Parkhurst v. Kinsman, Case No. 10,761.

Bail cannot be required of a feme covert in a civil action.—Henry v. Cornelius, Case No. 6,380.

Special bail will be required in an action of covenant for rent, upon a proper affidavit.—Wager v. Lear, Case No. 17,034.

Bail required in trespass for cutting up a scow.—Voss v. Tuel, Case No. 17,015.

Bail not required in debt on bond with collateral condition.—Barbour v. Russell, Case No. 971.

Special bail refused to be ordered in debt on a replevin bond, although there had been judgment for a return, etc.—Jenkins v. Porter, Case No. 7,274.

A defendant discharged under a state insolvent law may appear in the District of Columbia, and discharge an attachment, without giving special bail. — Davis v. Marshall, Case No. 3,641.

Defendant cannot appear to a chancery attachment in Virginia without giving bail.—Mayor and Commonalty v. Cooke, Case No. 9,358.

In a common-law attachment, under Act Va. Dec. 26, 1782, § 6, the court may, in its discretion, suffer the principal defendant to appear without bail at the first term after the return of the attachment, to plead to the jurisdiction, without discharging the attached effects.—Locke v. Cannon, Case No. 8,440.

In ordinary cases of libel, special bail is not required without some special reason other than the publication of the libel itself.—Withers v. Thornton, Case No. 17,918.

A resident of Alexandria may be held to special bail in Washington in an action of debt founded upon a judgment in an action of debt in Virginia in which bail was given, although no previous writ had been issued against the defendant in Alexandria county.—Gordon v. Lindo, Case No. 5,616.

Bail will not be required to be given by the defendant in an action by his immediate indorsee while another action is pending against him by a more remote indorsee, and it appears that the name of the plaintiff has been stricken from the note by the subsequent indorsee.—Johnson v. Harris, Case No. 7,387.

In an action upon a bond, where defendant offered to appear without bail, *held*, that he could not appear without bail until he should be committed for want of bail, when he might appear and plead in custody. — Aldridge v. Drummond, Case No. 156.

If bail has not been required upon the cap. ad resp., it will not be required upon setting aside the office judgment without affidavit.—Gordon v. Riddle, Case No. 5,619; Shean v. Towers, Id. 12,731.

Defendant will be held on bail, notwithstanding the discontinuance of an action for the same cause in the state court in which he was discharged on common bail, where the proceedings do not appear to be vexatious.—Parassel v. Gautier, Case No. 10,709.

Where defendant has been discharged under the state insolvent law from a debt contracted in the state, he will be discharged on common bail.—Read v. Chapman, Case No. 11,605.

Probable cause, on oath, must be set forth, to justify the court in holding defendant to special bail, under Act Feb. 26, 1795.—Leonard v. Caskin, Case No. 8,257.

Where there is no declaration, special bail will not be required unless plaintiff appears at the return of the writ.—Thompson v. Carenough, Case No. 13,947.

If defendant offers to appear on the calling of the appearance docket, time will not be given to procure an affidavit to hold him to special bail.—Meade v. Roberts, Case No. 9,374.

Defendant is entitled to the whole of the return term to give special bail.—Rhodes v. Brooke, Case No. 11,747.

In Virginia, special bail in an action of debt upon judgment rendered in one or the other states cannot be required by the indorsement of an attorney.—Wray v. Riley, Case No. 18,060.

§ 2. Waiver of bail.

By the Pennsylvania practice, filing the declaration before the return of the writ is not a waiver of bail.—Bobyshall v. Oppenheimer, Case No. 1,589.

§ 3. Proceedings in giving and taking bail.

If the affidavit to hold to bail is sufficient, the court will not, on a motion to appear without bail, inquire into the merits.—Laverty v. Snelling, Case No. 8,124; Lee v. Gamble, Id. 8,189; Parassel v. Gautier, Id. 10,709.

But a positive affidavit of debt does not preclude the court from inquiring into the cause of action.—Oliver v. Parish, Case No. 10,500.

To hold the defendant to bail in debt on a bond, the bond need not be produced until oyer demanded, if there be a sufficient affidavit of debt.—Day v. Hackley, Case No. 3,679.

§ 4. Affidavit or certificate to hold to bail.

An affidavit to hold to bail must be positive as to the indebtment. The opinion or belief of the affiant is insufficient.—Jolly v. Rankin, Case No. 7,440; Nelson v. Cutter, Id. 10,104; Smith v. Watson, Id. 13,124; Wright v. Cogswell, Id. 18,074.

But where there is such positive averment, the source of the knowledge need not be stated. —Postley v. Higgens, Case No. 11,304.

An affidavit to hold to bail in Ohio need not state that the affiant is a citizen of any other state.—Cooper v. Dungler, Case No. 3,192.

An affidavit in the form required by Act Md. 1729 *held* sufficient to hold defendant to bail in District of Columbia.—Graham v. Konkapot, Case No. 5,670.

The affidavit to hold to bail must show that the debt was due at the time of issuing the capias.—Hill v. Myers, Case No. 6,496.

An affidavit to hold to bail for assault and battery must state a specific injury and the amount of damages.—Mecklin v. Caldwell, Cases Nos. 9,388, 9,387.

Where, in slander, the affidavit is positive as to the damages sustained, it is not a valid objection thereto that the speaking of the words is averred on information and belief.—Stettinius v. Orme, Case No. 13,386.

Bail, in an action for slander, will be required where the words were maliciously uttered, and it appears that the defendant is a transitory person, and about to leave the district, although the plaintiff does not swear positively as to the damages.—Doyne v. Barker, Case No. 4,055.

In slander, appearance bail is not required if the affidavit does not state the words spoken, and that defendant is about to leave the district.—Lanstraaz v. Powers, Case No. 8,078.

In a suit upon protested bills of exchange, the court will not require an affidavit of the amount due upon the bills to hold defendant to special bail.—Robbins v. Upton, Case No. 11,886.

Where the plaintiff filed, as his cause of action, a promissory note of A., and an affidavit by an indifferent witness that B. acknowledged to him that he was a partner with A. in the transaction and equally liable for the debt, B. was held to bail.—Miller v. Wheaton, Case No. 9,595.

Affidavit that account "is just and true as stated, and no part thereof has been paid," is sufficient to hold defendant to bail.—Clarke v. Druet, Case No. 2,850.

An affidavit that defendant is justly indebted to plaintiff in a sum certain for goods sold and delivered to a third person upon defendant's written guaranty is sufficient to hold to bail.—Laverty v. Snelling, Case No. 8,124.

Where an account is headed, "A. to B., dr., for articles furnished by his direction, and he is to be answerable for the payment thereof," and an affidavit of the plaintiff is indorsed on the account "that the within account is just and true as stated," such account and affidavit are not a sufficient affidavit to hold to bail.—Travers v. Hight, Case No. 14,151.

In an action by an administrator, his affidavit "that the above account is truly extracted from the books of the deceased, and that he believes the same to be a just and true account, and that since the death of the intestate he has received no part thereof," is sufficient to hold to bail.—McLaughlin v. Johns, Case No. 8,871.

In an action upon the case for selling negroes out of the neighborhood contrary to agreement, the defendant will not be held to special bail upon an affidavit stating the breach of the agreement and the belief of the plaintiff that he has sustained damage to a certain amount.—Young v. Palmer, Case No. 18,170.

In an action for money lent, an affidavit to an account "that the above account, as stated, is just and true, and that the plaintiff has not received any part, parcel, or satisfaction for the same," but does not state that the plaintiff has received no security, is sufficient to hold to bail.—Young v. Moriaty, Case No. 18,167.

The affidavit to hold to bail must be strictly construed, and must state the indebtedness positively, and specify the exact amount due, leaving nothing to inference.—Robinson v. Holt, Case No. 11,955.

An affidavit charging defendant as follows: "1809, Oct. 5. To goods per bill, $19.89,"—is insufficient.—Bartleman v. Smarr, Case No. 1,074.

A certificate in the usual form, by the treasury officials, that a certain balance is due by the defendant to the United States, is not sufficient cause for bail.—United States v. Smith, Case No. 16,331.

§ 5. Motion to appear without bail or for discharge on common bail.

The court will not decide upon the merits, on a motion to appear without bail.—Day v. Hackley, Case No. 3,679.

A motion, made before the appearance day, to appear without bail, will not be heard if the defendant be not in actual custody.—Olive v. Mandeville, Case No. 10,488.

On motion to discharge on common bail, the court will not decide doubtful questions of citizenship, or the effect of a discharge in insolvency upon debts contracted in another state.—Knox v. Greenleaf, Case No. 7,909.

§ 6. Amount of bail and motions to reduce.

In an action upon the case for a libel, where the damages were laid at $20,000, and the plaintiff in his affidavit averred damages to the same amount, the court required the bail to justify to the amount of $500.—Mayo v. Smith, Case No. 9,355.

The ad damnum in the writ and the sum demanded in the declaration are guides to the sheriff; but the amount may be reduced on motion on affidavit showing it to be unreasonable.—Parkhurst v. Kinsman, Case No. 10,761.

If another suit is pending elsewhere for the same cause of action, special bail will be reduced to a nominal sum, or only common bail allowed.—Parkhurst v. Kinsman, Case No. 10,761.

In actions on the case for uncertain damages, the court will mitigate the bail according to circumstances.—Sanderson v. Serat, Case No. 12,300.

A set-off cannot be shown, to mitigate the amount of bail.—Robbins v. Upton, Case No. 11,886.

When a bond for the payment of money is filed, an affidavit to hold to bail is not necessary, and the court will not mitigate the bail upon affidavit that the whole is not due, nor receive as bail persons not resident in the district.—Lee v. Welch, Case No. 8,204.

On motion to reduce special bail the court will not decide the question of jurisdiction.—Parkhurst v. Kinsman, Case No. 10,761.

§ 7. Sufficiency of sureties.

The administrator of appearance bail cannot be allowed to appear as appearance bail and plead for the principal.—Finley v. McCarthy, Case No. 4,794.

Bail residing in Alexandria county cannot be received in an action in Washington county.—Conningham v. Lacey, Case No. 3,116.

A recognizance of bail taken out of court is only de bene esse, and plaintiff may object to the sufficiency of the bail on return of the writ and recognizance.—Poe v. Mounger, Case No. 11,240.

If special bail be taken out of court by two justices of the peace by recognizance, there must be two sureties.—Thomas v. Elliot, Case No. 13,896.

§ 8. Justification of sureties.

No justification of bail is necessary where it is entered for the purpose of making a surrender.—Stockton v. Throgmorton, Case No. 13,463.

Marshal may justify appearance bail at second term after exception taken at the rules.—Brent v. Brashears, Case No. 1,836.

§ 9. Rights and liabilities of sureties.

Special bail for the stay of execution before a justice of the peace become liable to pay the debt in case it is not paid by the principal, or made out of his property, on the issuing of execution at the expiration of the stay; and nothing can discharge the bail except payment of the judgment.—Wilson v. Eads, Case No. 17,801a.

The engagements of special bail and appearance bail are of a different nature. Because the former may deliver up the principal before the second sci. fa., it does not follow the latter may do so.—Bobyshall v. Oppenheimer, Case No. 1,590.

The undertaking of the appearance bail can be fulfilled only by defendant's giving special bail, if so ruled, and that bail justifying, if excepted to.—Bobyshall v. Oppenheimer, Case No. 1,589.

Bail may follow their principal into another jurisdiction, and take him out of the custody of another person who has subsequently become bail in the latter jurisdiction.—Sharpless v. Knowles, Case No. 12,712.

See, also, post, § 11.

§ 10. Discharge or exoneration of sureties.

When bail become fixed, they cannot be discharged from liability, either by the surrender, bankruptcy, or arrest of the principal on a ca. sa.—Dowlin v. Standifer, Case No. 4,041a.

The discharge of the principal under the insolvent law discharges the bail.—Burns v. Sim, Case No. 2,184; Byrne v. Carpenter, Id. 2,271; Claggett v. Ward, Id. 2,780; King v. Simm, Id. 7,805.

Discharge of the principal under a commission of bankruptcy issued after return of sci. fa. against bail is no discharge of bail.—Bennet v. Alexander, Case No. 1,310.

Bail will not be exonerated upon scire facias, by the discharge of the principal under the insolvent act (2 Stat. 237), unless the discharge was before the appearance day of the first scire facias returned executed, or of the second returned nihil.—Munroe v. Towers, Case No. 9,930.

A discharge of the principal under an insolvent law is ineffectual to release the bail when not produced until the third term after the return of a sci. fa. against the bail.—Boyer v. The Wisconsin and The Hector, Case No. 1,756.

A note given by the bail, on being taken on execution, where the principal was discharged in insolvency before the bail was fixed, will be ordered to be canceled.—Bussard v. Warner, Case No. 2,229.

Where defendants are not liable to be imprisoned on the judgment, the special bail is not bound to surrender them in his discharge.—Beers v. Haughton, Case No. 1,230.

Bail is not discharged by a discontinuance of the suit at the rules, if it be reinstated.—Gadsby v. Miller, Case No. 5,167.

Bail are discharged by an amendment adding a cause of action which could not be given in evidence upon the original declaration, or which is not contained in the affidavit to hold to bail.—Hyer v. Smith, Case No. 6,979.

An amendment conforming the declaration to the cause of action upon which the bail was given will not authorize the discharge of the bail.—Carrington v. Ford, Case No. 2,449.

After scire facias returned, the bail will be exonerated if the principal be confined in the penitentiary of one of the states before any execution returned against him, and so continue to be confined until the return of the scire facias.—Wormsley v. Beedle, Case No. 18,049.

An exoneretur on the bail piece, on the ground that the defendant was confined in the hospital as a lunatic, refused.—Bowerbank v. Payne, Case No. 1,727.

The court will not receive, upon motion to exonerate bail, evidence of fraud in contracting the debt.—Burns v. Sim, Case No. 2,184.

A discharge of the appearance bail, arrested upon a joint ca. sa. against him and his principal, does not release the principal.—Watson v. Summers, Case No. 17,289.

§ 11. Surrender of principal.

Bail cannot surrender their principal before a judge at chambers.—Baxter v. Biays, Case No. 1,123.

On surrendering his principal, the bail must give notice to the creditor.—Maynadier v. Wroe, Case No. 9,351.

A surrender of the principal will not be received after the return term of the sci. fa. against the bail.—Boyer v. Herty, Case No. 1,753.

The court will not relieve the appearance bail, upon his delivering the principal in court, unless he put in and perfect special bail.—Bobyshall v. Oppenheimer, Case No. 1,590.

If the special bail surrender the principal, who has been discharged under an insolvent law, the court will discharge the principal from custody.—Richardson v. McIntyre, Case No. 11,789.

Where, in such case, he has given special bail, the court will order an exoneretur to be entered on the bail piece.—Richardson v. McIntyre, Case No. 11,789.

Upon surrender of the debtor upon a ca. sa., the court will not, without motion, order him to be committed in execution.—Peter v. Suter, Case No. 11,021.

Where two become bail jointly and severally, and two writs of sci. fa. are issued, and one of the bail surrenders the principal, he must pay the costs upon both writs.—Pennington v. Thornton, Case No. 10,939a.

Where the marshal had refused to permit the bail to seize his principal in court, *held*, that the court would not interfere to authorize such seizure.—Smith v. Catlett, Case No. 13,021.

§ 12. Motion to quash bail bond.

A motion to quash the bail bond, under the statute of Illinois, may be made at any time during the return term, as well after as before judgment.—Postley v. Higgens, Case No. 11,304.

§ 13. Proceedings to enforce bonds or recognizances.

It is not necessary in a suit on a bail bond to state defendants to be citizens of a different state from that of plaintiff.—Bobyshall v. Oppenheimer, Case No. 1,592.

To a suit by the assignees on the bail bond, defendant may plead that the principal was not a citizen of another state, as laid in the original declaration. — Bobyshall v. Oppenheimer, Case No. 1,592.

Proper conclusions to a replication of nul tiel record.—Bobyshall v. Oppenheimer, Case No. 1,591.

A replication nul tiel record to a plea comperuit ad diem in an action by the assignee of a bail bond presents an issue.—Bobyshall v. Oppenheimer, Case No. 1,591.

The plea of comperuit ad diem affirms a legal appearance. — Bobyshall v. Oppenheimer, Case No. 1,591.

That no ca. sa. was issued against the principal *held* a good plea in bar in sci. fa. against bail.—Bernard v. McKenna, Case No. 1,348.

In an action on the recognizance, the bail may plead discharge of principals under state insolvent laws.—Beers v. Haughton, Case No. 1,230.

In sci. fa. against bail, interest not allowed on judgment rendered against principal.—Anonymous, Case No. 433.

Material variance between record of recognizance and recital of it in sci. fa. is fatal.—Barnes v. Lee, Case No. 1,017.

The writ in the original suit cannot be set aside after judgment on motion in an action on the bail bond.—Hall v. Singer, Case No. 5,946.

II. IN CRIMINAL PROSECUTIONS.

§ 14. Right to release on bail.

Every person not committed for treason or felony is entitled to the benefit of the prison bounds upon giving security.—United States v. Wise, Case No. 16,746.

Flight while under bail during trial on indictment for one of a series of crimes *held* to forfeit the privilege of liberation on recommitment to answer other charges.—Lee's Case, Case No. 8,180.

Notwithstanding such flight, where it appears that the punishment could be but nominal, and the imprisonment pending trial would be unreasonable, *held*, that the prisoner should be admitted to bail.—Lee's Case, Case No. 8,180.

A person accused should be retained in custody, or required to give security for his appearance, while his examination is pending, but only on evidence sufficient to furnish probable cause.—United States v. Burr, Case No. 14,693.

The announcement of readiness to proceed to trial at the close of the term before adjournment will not entitle the prisoner to be released on bail, where he had previously obtained a postponement on the ground of absence of witnesses. —United States v. Stewart, Case No. 16,401.

On testimony given in court on the return of habeas corpus, bail will be allowed if it is clear that a conviction of murder should not take place.—United States v. Marshal of the District of Columbia, Case No. 15,726a.

Security by a recognizance may be taken for fine and costs in Washington county, D. C.— United States v. Hilliard, Case No. 15,367.

Act July 17, 1862, giving the courts authority, in their discretion, to impose fines and imprisonment, instead of death, as punishment for treason, makes the offense bailable.—Case of Davis, Case No. 3,621a.

Prisoners, even when charged with piracy, will be admitted to bail if suffering under a disease which may be ultimately dangerous from continued confinement. — United States v. Jones, Case No. 15,495.

Pending the hearing of a motion for new trial on conviction as a common scold, defendant was required to give bail for appearance and for good behavior.—United States v. Royall, Case No. 16,202.

§ 15. Amount of bail.

Where the indictment does not describe an indictable offense, the magistrate has a discretion as to the amount of bail, and is not criminally liable for taking insufficient bail.—United States v. Smith, Case No. 16,330.

A bond to secure the appearance of a person charged with two distinct offenses, taken for the aggregate amount, is invalid.—United States v. Goldstein's Sureties, Case No. 15,226.

To require larger bail than the prisoner can give is, in effect, to refuse bail.—United States v. Lawrence, Case No. 15,577.

§ 16. Jurisdiction and authority to admit to bail.

On preliminary examination, prima facie evidence of guilt is sufficient to hold to bail until the offense may be examined by a grand jury.— United States v. Cobb, Case No. 14,820.

Where, after conviction, time is granted to prepare a case and move in arrest of judgment, the court has no authority to take bail in the meantime.—United States v. Devlin, Case No. 14,955.

Where an indictment has been found the court will not examine the evidence, for the purpose of taking bail.—United States v. Jones, Case No. 15,495.

The magistrate's discretion in taking bail in a criminal case is to be guided by a consideration of the ability of the prisoner to give bail, and the atrocity of the offense.—United States v. Lawrence, Case No. 15,577.

A United States commissioner, as respects the taking of bail, has the same power as the state magistrate, and no greater.—United States v. Horton, Case No. 15,393.

A United States commissioner has power to let to bail one brought before him on a criminal complaint, pending the proceeding, in those states where justices of the peace have a similar power.—United States v. Rundlett, Case No. 16,208.

A commissioner in New York has no authority to take bail for the appearance of a party accused, for examination before himself at a future day.—United States v. Case, Case No. 14,742.

Where a United States commissioner adjourns the examination of a prisoner for a longer time than that allowed by the local law, a recognizance taken for his appearance is invalid, and the prisoner and his sureties are not estopped from setting up the want of jurisdiction.—United States v. Horton, Case No. 15,393.

On arresting one for misdemeanor, the marshal is not required to take the bail bond himself, but may take the prisoner to a justice, to give bail.—United States v. Milburn, Case No. 15,765.

Where a prisoner is in the custody of the military power in a region subject to martial law, the judge of a civil court cannot hear an application to admit the prisoner to bail until the legality of the military custody has been inquired into, by means of an application for a writ of habeas corpus.—Case of Davis, Case No. 3,621a.

§ 17. Bond, undertaking, or recognizance.

The recognizance need not state the particular charge on which the party is under arrest and to which he is to appear.—United States v. Atwill,

Case No. 14,475; Same v. De Grieff, Id. 14,935a; Same v. George, Id. 15,199.

A condition that defendant should appear "to answer to the charge of stealing from the mail of the U. S., contrary to the statute of the U. S. in such case made and provided," *held* sufficient.—United States v. Dennis, Case No. 14,949.

A recognizance is sufficiently certain if it sets out an act punishable by the statute, without any of the particulars.—United States v. Dennis, Case No. 14,949.

The material parts of the obligation and the condition in a recognizance should be set forth in the body, so as to admit of extension, consistently with its terms.—Dillingham v. United States, Case No. 3,913.

An acknowledgment without the signatures of the parties certified by a justice of the peace is all that is required to make a recognizance valid and obligatory.—United States v. Pickett, Case No. 16,043.

A recognizance of bail is not objectionable because embracing the amounts required upon two separate indictments.—United States v. Reese, Case No. 16,138.

Where the accused is admitted to bail pending consideration of objections to the indictment, the recognizance is a binding obligation, though the indictment be eventually adjudged void.—United States v. Reese, Case No. 16,138.

A bond signed by a third person, whose name did not appear in the body thereof after its execution by defendant and another, does not import a joint liability, and a joint action cannot be sustained thereon.—United States v. Pickett, Case No. 16,043.

A recognizance of bail taken out of court is only de bene esse, and does not discharge the marshal.—Bennett v. Pendleton, Case No. 1,322.

§ 18. Breach of bond or recognizance.

A person under recognizance to appear at a certain place at a certain hour is not in default before the expiration of that hour, and he is not bound to appear elsewhere.—United States v. Rundlett, Case No. 16,208.

Upon a recognizance for the appearance of defendant in a case of misdemeanor, he is bound to appear on the first day of the term.—United States v. Hodgkin, Case No. 15,375.

The cognizor must be called at the time and place when and where he was bound to answer, and an entry made of his default on the minutes of the commissioner, which he returns to the court, to show a breach of the condition of the recognizance.—United States v. Rundlett, Case No. 16,208.

Money voluntarily paid to a marshal in satisfaction of forfeited recognizances is not within the custody or summary jurisdiction of the court.—In re Corlies, Case No. 3,232.

§ 19. Relief from forfeiture and motions to remit.

Where a recognizance to appear for trial is forfeited, but the accused appears at a subsequent term, the court may suspend the recognizance, for good cause shown by the accused why he did not comply with its condition.—United States v. Feely, Case No. 15,082.

A motion to remit the forfeiture of a recognizance on the ground that the party, when called, was in the custody of a state officer, under warrant issued out of the state court, will be denied on the ground that the question can be best determined on the trial of the action on the forfeited recognizance.—United States v. Stricker, Case No. 16,410.

A motion to set aside a forfeiture of a recognizance given for appearance to answer an indictment, on the ground of irregularities, will be denied, where defendant is a fugitive from justice.—United States v. Stien, Case No. 16,403.

Where defendant absconded, and the trial proceeded in his absence, and he was acquitted, *held*, that the estreat would be set aside on application of the bail.—United States v. Santos, Case No. 16,222.

Where the recognizance of one indicted for smuggling was forfeited, but afterwards defendant appeared and was tried, and the jury were discharged as unable to agree, *held*, that the forfeiture would not be remitted, the court deeming the defendant guilty and the punishment deserved.—United States v. Mercer, Case No. 15,758.

The court cannot remit the forfeiture of a recognizance in a criminal case after the term in which it was entered.—United States v. Cookendorfer, Case No. 14,856.

The federal courts have power, even after judgment on a recognizance, to relieve the surety, where he is without fault in the escape of the prisoner. (Act Feb. 28, 1838.)—United States v. Duncan, Case No. 15,004.

§ 20. Discharge of bond or recognizance.

A recognizance to appear to answer to a certain indictment, and not to depart without the leave of the court, is not discharged by the quashing of the indictment, and if a new indictment is found the bail remain liable for his principal's appearance to answer such new indictment.—United States v. White, Case No. 16,678.

§ 21. Discharge or exoneration of sureties.

Subsequent detention for additional security, and subsequent arrest to compel the prisoner to keep the securities good, will not release the sureties.—United States v. Atwill, Case No. 14,475.

The subsequent arrest, conviction, and imprisonment of the principal on process from a state court, out of the jurisdiction of the district, is no defense to sureties on a recognizance given to the United States.—United States v. Van Fossen, Case No. 16,607.

The death of the principal after default and forfeiture of his recognizance does not exonerate his sureties.—United States v. Van Fossen, Case No. 16,607.

§ 22. Actions on bonds or recognizances.

In a declaration on a recognizance, where the officer taking it has jurisdiction over cases of the general description named therein, it is not necessary to aver the existence of the particular facts showing the authority of the officer to take it.—United States v. George, Case No. 15,199.

A declaration on a recognizance should state that the recognizance was filed in court.—United States v. Atwill, Case No. 14,475.

A declaration upon a forfeited recognizance given in a criminal proceeding may be amended in the discretion of the court.—United States v. George, Case No. 15,199.

A material variance between the warrant and the recognizance set forth in the declaration and those given in evidence is fatal.—Dillingham v. United States, Case No. 3,913.

In an action on the recognizance, it must be clearly proved that the party was called and warned, and neglected to appear.—Dillingham v. United States, Case No. 3,913.

It is not sufficient to aver and prove aliunde that the cognizor had in fact absconded, and did not intend to appear, and could not have appeared if he had been called.—United States v. Rundlett, Case No. 16,208.

BAILMENT.

§ 1, Nature and elements. § 2, Title and rights to property. § 3, Care of property. § 4, Negligence of bailee. § 5, Conversion by bailee. § 6, Compensation of bailor. § 7, Redelivery to bailor. § 8, Actions.

See, also, "Banks and Banking," §§ 9, 11, 19; "Carriers," §§ 2–36; "Innkeepers"; "Pledges"; "Warehousemen."

Contracts of bailment or sale, see "Sales," § 3. Embezzlement or larceny by bailee, see "Embezzlement."

§ 1. Nature and elements.

A bank requested another bank to loan money for it, and to make a proper charge therefor. The latter made the loan, but did not intend to charge therefor. Such intention was not communicated, but no charge was made in the running account between the banks. *Held*, that the bank was not a gratuitous bailee as to securities deposited to secure the loan.—Second Nat. Bank v. Ocean Nat. Bank, Case No. 12,602.

§ 2. Title and rights to property.

A sale by the bailee will not pass title to the property.—Stump v. Roberts, Case No. 13,561.

The bailor of wool and yarn to be manufactured into cloth at a specified price has a right to the unfinished product on the bankruptcy of the bailee, on an offer to the assignee, to pay the charges, without actual tender.—Aborn v. Mason, Case No. 19.

The delivery of the manufactured cloth to the person furnishing the yarn passes title, though the manufacturer furnished the filling, and was to have a share in the product for his labor.—Buffum v. Merry, Case No. 2,112.

§ 3. Care of property.

One hiring a horse is bound to take such care of him as a prudent man would of his own.—Laub v. Lansdale, Case No. 8,118.

A direction to remit, by mail or some responsible person, the proceeds of notes sent for collection, is complied with by sending the money by a trustworthy youth 18 years old, who had transacted business for himself for two years, and the collector is not responsible where the youth's pocketbook containing such money is stolen.—Pelham v. Pace, Case No. 10,911a.

A person who hires a steamboat to tow another vessel is not liable for an injury thereto sustained in the course of the navigation and not caused by the negligence of those in charge.—Reeves v. The Constitution, Case No. 11,659.

§ 4. Negligence of bailee.

Gross negligence of bailee is to be considered with reference to the nature of the goods committed to his care.—Tracy v. Wood, Case No. 14,130.

A gratuitous bailee is guilty of gross negligence if he omits that reasonable care which persons in the like situation exercise or which he is accustomed to exercise in like cases.—Tracy v. Wood, Case No. 14,130.

An action against an attorney at law for negligence in failing to collect a promissory note must be brought in the name of the legal owner, though a receipt therefor was given to another.—Sevier v. Holliday, Case No. 12,680a.

The question of negligence of a bailee, as a general rule, is one of fact for the jury.—Tracy v. Wood, Case No. 14,130.

One who hires property of another is answerable only for such injuries thereto as are caused by the omission of that care which a man of common prudence would have taken in his own concerns.—Reeves v. The Constitution, Case No. 11,659.

Where defendant had sold complainant a bill of exchange, and kept it as security for its price, and the drawers became bankrupt, and defendant failed to recover the dividends on the draft, he was liable for any loss resulting.—Childs v. Corp, Case No. 2,677.

One to whom the note of a third person is loaned is liable where the amount is lost through his failure to use reasonable diligence to collect it.—Higbie v. Hopkins, Case No. 6,466.

§ 5. Conversion by bailee.

A person who hires a slave, and carries her out of the state without the consent of the owner, whereby she is lost, is liable for her value.—Semmes v. Sherburne, Case No. 12,656.

The recovery of a judgment for the hire of a slave to a period subsequent to the commencement of an action of trover to recover for her loss will bar the action of trover.—Semmes v. Sherburne, Case No. 12,656.

§ 6. Compensation of bailor.

The person who obtains possession of the slave of another is responsible for hire, although the slave ran away before expiration of the time, and the bailee be liable for his loss.—Janes v. Buzzard, Case No. 7,206a.

A person who hires a slave for a fixed term must pay the stipulated price, though he lose the service of the slave by his arrest and imprisonment for theft during the term.—Scott v. Bartleman, Case No. 12,524.

§ 7. Redelivery to bailor.

The acceptance on a redelivery on demand of property which has been placed with another for repairs or additions thereto does not admit that the services have been performed as agreed.—The Isaac Newton, Case No. 7,089.

§ 8. Actions.

Though a bailor does not own property bailed, yet, there being no privity of contract between the owner and bailee, and the bailor having, as between himself and the bailee, represented the interests of the owner, the bailor may sue the bailee for loss of the property.—White v. Commonwealth Nat. Bank, Case No. 17,544.

The bailor of goods to be manufactured can recover the proceeds of a sale by the assignee in bankruptcy of the bailee less the expenses of manufacture.—Aborn v. Mason, Case No. 19.

BANKRUPTCY.

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§ 681, Appellate and revisory jurisdiction. § 682, Nature and form of remedy. § 683, Decisions reviewable. § 684, Right of review. § 685, Presentation and reservation in lower court of grounds of review. § 686, Time of taking proceedings. § 687, Petition for review. § 688, Bond. § 689, Powers and proceedings in lower court on transfer of cause. § 690, Stay of proceedings. § 691, Record. § 692, Dismissal. § 693, Hearing. § 694, Review. § 695, Determination and disposition of cause.

See, also, "Assignments for Benefit of Creditors"; "Insolvency."

Effect of bankruptcy of tenant on lease, see "Landlord and Tenant," § 3.

—— to discharge lien in admiralty, see "Maritime Liens," § 39.

Malicious prosecution of proceedings, see "Malicious Prosecutions," § 1.

Taxation of bankrupt's property, see "Taxation," § 4.

Transfer of patent rights of bankrupt, see "Patents," § 149.

I. CONSTITUTIONALITY AND STATUTORY PROVISIONS.

See, also, post, § 515.

§ 1. The constitutional grant.

The power given by the constitution to congress to regulate bankruptcy comprehends both voluntary and involuntary bankruptcy. Case No. 7,866 reversed.—In re Klein, Case No. 7,865.

Congress has a complete constitutional authority to enact a bankrupt act, giving to the district and circuit courts full jurisdiction in law and equity.—Mitchell v. Great Works Mill. & Mfg. Co., Case No. 9,662.

The power of congress to establish uniform bankruptcy laws is not limited to acts similar in scope to those in force in England at the adoption of the constitution, but is plenary over the subject of bankruptcy.—Silverman's Case, Case No. 12,855.

Under the bankruptcy clause, any and all uniform legislation tending to promote the distribution of an insolvent's estate among his creditors, and his discharge from their demands, is within the power of congress.—Silverman's Case, Case No. 12,855.

Congress has no power to vest jurisdiction in the state tribunals to carry into effect the bankrupt law.—McLean v. Lafayette Bank, Case No. 8,885; Mitchell v. Great Works Mill. & Mfg. Co., Id. 9,662.

Congress is not prohibited by the constitution from passing laws violating the obligations of contracts, and hence Act 1841 (5 Stat. 440), which provides that a bankrupt may be discharged from his debts contracted before its passage, is constitutional. Case No. 7,866 reversed.—In re Klein, Case No. 7,865.

Congress has power to destroy any lien upon property of the bankrupt, whether created by contract, by statute, or by judgment.—In re Jordan, Case No. 7,514; Id. 7,515.

Act March 3, 1873 (17 Stat. 577), is constitutional as to all cases where petition in bankruptcy is filed after the passage of the act.—In re Everitt, Case No. 4,579.

The bankrupt law is not rendered unconstitutional by reason of the want of uniformity in the exemptions allowed in different states.—In re Jordan, Case No. 7,514.

Act June 22, 1874, § 17, providing for compositions, is constitutional and valid.—In re Reiman, Case No. 11,673; Id. 11,675, affirming Case No. 11,674.

The provisions of Act 1867 which apply to persons other than merchants and traders and apply to corporations are not unconstitutional.—In re California Pac. R. Co., Case No. 2,315.

Act 1867, § 44, punishing the fraudulent disposition of the goods of a debtor, obtained on credit, and remaining unpaid for within three months next before the commencement of proceedings in bankruptcy, is within the power of congress, as a law "necessary and proper" for carrying the bankrupt law into effect.—United States v. Pusey, Case No. 16,098.

States may pass bankrupt laws in absence of action by congress.—Adams v. Storey, Case No. 66. CONTRA, see Golden v. Prince, Case No. 5,509.

Act Pa. March 13, 1812, is unconstitutional, as impairing the obligation of a contract, and because congress have exclusively the power to pass a bankrupt law.—Golden v. Prince, Case No. 5,509.

§ 2. When bankruptcy acts take effect.

Act 1841 is inoperative as to transactions occurring before Feb. 1, 1842, the date when it went into effect.—In re Horton, Case No. 6,708.

The date of the passage of Act 1841, as referred to in section 4 thereof, means after the date of the approval thereof, August 19, 1841, and not after the day when it was to go fully into operation.—In re Tebbetts, Case No. 13,817.

The meaning of the word "future," in Act 1841, § 2, cl. 1, is future with reference to the passage of the act.—Hutchins v. Taylor, Case No. 6,953.

The meaning of the word "future," in Act 1841, § 2 [5 Stat. 442], is future with reference to the day on which the act was to take effect.—In re Chadwick, Case No. 2,569.

A general assignment with preferences, made after the passage of Act 1841, but before it was to go into operation, is an act of bankruptcy.—Hutchins v. Taylor, Case No. 6,953.

The clause in Act 1841, relative to assignments, etc., made by a debtor after the 1st day of January, 1841, gives retrospective effect only as to voluntary bankruptcy.—Hutchins v. Taylor, Case No. 6,953.

Act March 2, 1867, was operative from the date of its passage, though proceedings thereunder were necessarily postponed until the appointment of officers and the adoption of rules.—Perry v. Langley, Case No. 11,006.

A deed of trust recorded on March 2, 1867, the date of the approval of the bankrupt act, is not avoided thereby.—In re Wynne, Case No. 18,117.

The amendatory act of June 22, 1874, went into effect from the first hour of the day of its approval, and not from the time of the actual signing by the president.—In re Carrier, Case No. 2,443; In re Williams, Id. 17,700.

§ 3. Rules of construction.

American bankruptcy laws have differed from the English in that they apply to any debtor, while the English law is applicable only to fraudulent traders.—In re Klein, Case No. 7,865.

The bankrupt act is remedial, and should be construed with a view to effect its objects, and promote justice between a debtor and his creditors.—In re Muller, Case No. 9,912.

In construing the bankruptcy law, the federal courts are not bound by decisions of state courts upon a similar insolvent law.—In re Knight, Case No. 7,880.

Distinction between insolvent and bankrupt laws.—Adams v. Storey, Case No. 66.

§ 4. Amendments.

The act of June 22, 1874, must be considered as supplementary and amendatory to the provisions of the Revised Statutes on the subject of bankruptcy. Case No. 10,558 reversed.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561.

Congress did not intend by Act June 22, 1874, to validate contracts void under the original act, or to affect contracts theretofore made, or the substantial rights of parties acquired under the original law.—Hamlin v. Pettibone, Case No. 5,995.

The amendments of June 22, 1874, do not apply to involuntary proceedings commenced, but not determined, prior to December 1, 1873.—Singer v. Sloan, Case No. 12,899; Hamlin v. Pettibone, Id. 5,995.

Where a substantial averment in the petition is lacking to give jurisdiction, the proceedings will not be considered as commenced within the exception of the amendatory act of 1874.—In re Burch, Case No. 2,138.

The amendment of June 22, 1874, did not annul or disturb judgments rendered or adjudications made or in force at the time it took effect.—In re O'Bear, Case No. 10,395; In re Pickering, Id. 11,120.

An adjudication after the passage of the amendatory act of June 22, 1874, where the petition was filed before such amendment, must be in accordance therewith.—In re Taylor, Case No. 13,776.

A petition on which issue was taken and a jury had rendered a defective special verdict, without a general verdict, at the time the amended act of June 22, 1874, was enacted, should be considered as a pending case, to which the retroactive provisions of the amended act applied.—In re King, Case No. 7,782.

The validity of an act alleged to be preferential in its character and which took place prior to December, 1873, must be tried according to Act 1867. Act June 22, 1874, § 12.—Oxford Iron Co. v. Slafter, Case No. 10,637.

The amendment of June 22, 1874, is inapplicable to a suit in equity by the assignee to recover a fraudulent preference in compulsory proceedings commenced prior to December 1, 1873.—Thomas v. Woodbury, Case No. 13,916.

The rights of the assignee to sue to set aside conveyance by bankrupt are not affected by Act June 22, 1874, when the adjudication of bankruptcy was passed before the amendments were adopted.—Barnewall v. Jones, Case No. 1,027.

The amendatory act of June 22, 1874, in reference to the rights of assignees to recover property transferred in contravention of Act 1867, and in reference to the proof of debts by creditors who have taken a preference, does not apply to proceedings commenced before its passage.—In re Lee, Case No. 8,179.

The amendment of Act 1867, by Act June 22, 1874, controls cases in which conveyance was made before the passage of such amendatory act, provided there was no judicial passage on the conveyance previous to the amendment.—Bradbury v. Galloway, Case No. 1,764. But see Boothe v. Brooks, Case No. 1,650.

The amendment of June 22, 1874, respecting the number and amount of petitioners, does not apply to a case in which the adjudication was entered before the passage of the act, as the adjudication is a decree of the court and is beyond legislative control.—In re Angell, Case No. 386; Barnert v. Hightower, Id. 1,009; In re Comstock, Id. 3,077.

Act June 1874, § 10, as an amendment to Act 1867, changing the period from four to two months, is not retrospective in its operation, and does not affect transactions happening before the time fixed for it to take effect.—Bradbury v. Galloway, Case No. 1,764.

The amendment of June 22, 1874, reducing the time within which conveyances, preferences, etc., are to be invalidated, and giving section 10 of the amended act no force until after the expiration of the two and three months, respectively, does not interfere with past transactions so far as time was an element. Case No. 12,899, affirmed.—Singer v. Sloan, Case No. 12,898.

Act June, 1874, § 11, substituting "knowing" for "reasonable cause to believe," does not affect transactions happening before December 1, 1873, in cases where bankruptcy proceedings were begun before that date.—Bradbury v. Galloway, Case No. 1,764; Tinker v. Van Dyke, Id. 14,058, affirming Case No. 16,849; Brooke v. McCraken, Case No. 1,932.

Act of June 22, 1874, which amends Act 1867, § 35, by inserting "knowing," applies to cases brought after the amendment, though the instrument creating the alleged preference was executed before that time. Case No. 12,899 affirmed.—Singer v. Sloan, Case No. 12,898.

In an action by trustees under Act 1867, § 39, to recover money paid by the bankrupt as a preference, commenced prior to December 1, 1873, the amendment of June 22, 1874, requiring proof that the creditor knew that the payment was made to him in fraud of the act, is not applicable. Case No. 16,849, affirmed.—Tinker v. Van Dyke, Case No. 14,058.

The amendment of June 22, 1874, to Act 1867, § 39, was not retroactive as to cases which, though commenced since December 1, 1873, had passed to an adjudication prior to June 22, 1874. Case No. 8,235 affirmed.—In re Leland, Case No. 8,231.

Act July 27, 1868, is retroactive.—In re Billing, Case No. 1,408.

The amendments of July 22, 1868 (15 Stat. 227), and July 14, 1870 (16 Stat. 276), to Act 1867 (14 Stat. 517), extend the time as to the operation of the provisions of the second clause of section 33 as if the original act had in this respect been passed January 1, 1869.—In re Hershman, Case No. 6,430.

Act June 22, 1874, § 9, concerning the conditions upon which a discharge is to be granted, applies to cases pending when the act was passed.—In re Griffiths, Case No. 5,825; In re King, Id. 7,781; In re Francke, Id. 5,045, reversing Case No. 5,046; Singer v. Sloan, Case No. 12,898, affirming Case No. 12,899. CONTRA, see In re Perkins, Case No. 10,983.

Where the right to discharge was barred by limitation under Act 1867, § 29, prior to the amendatory act of June 22, 1874, section 9 of the latter act does not remove the bar. Case No. 8,576 affirmed.—In re Lowenstein, Case No. 8,573.

The amendatory act of June 8, 1872, is prospective, but it may be availed of in all pending cases where assets are undistributed and the exemption can be granted without prejudice to the interest already vested before the passage of the act.—In re Wyllie, Case No. 18,112.

The amendment of March 3, 1873, in relation to exemptions, is not unconstitutional as applied to existing liens.—In re Jordan, Case No. 7,514; Id. 7,515.

Act March 3, 1873, in relation to exemptions, is constitutional in cases where petition is filed after passage of such act, and in such cases wherein the petition is filed before its passage, where, after the passage, there re-

mains in the hands of the bankruptcy court an unappropriated fund.—In re Kean, Case No. 7,630.

The amendatory act of March 3, 1873, which provides that the exemptions allowed the bankrupt by Act June 8, 1872, shall be the amount allowed by constitution and laws of each state, respectively, as existing in the year 1871, and that "such exemptions shall be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same," etc., is constitutional.—In re Smith, Case No. 12,986.

A bankrupt filing a voluntary petition after the passage of Act March 3, 1873, is entitled to exemptions "as existing in the place of his domicile on the first day of January, 1871," even as against judgments rendered prior to the state act increasing the exemption.—In re Smith, Case No. 12,986.

§ 5. Repealing acts.

The repeal of the bankrupt law of 1800 by Act Dec. 19, 1803, bars a criminal prosecution thereunder.—Anonymous, Case No. 475; United States v. Passmore, Id. 16,005.

The statute repealing Act 1841 took effect the first moment of the day it was approved, which was March 3, 1843, and a petition presented and filed on that day is of no effect.—In re Howes, Case No. 6,788; In re Welman, Id. 17,407. CONTRA, see In re Ankrim, Case No. 395; In re Richardson, Id. 11,777.

The original act of 1867 and all the acts amendatory thereof, except June 22, 1874, were superseded by the title "Bankruptcy" of the Revised Statutes and repealed by section 5596. Case No. 10,558 reversed.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561.

Act June 22, 1874, did not repeal any part of Rev. St. § 5112, or any prior enactment embodied therein, except the provision requiring "fifty percentum of such assets."—In re Sheldon, Case No. 12,747.

Act June 22, 1874, § 17, in providing a remedy by composition, does not operate to repeal the general provisions of Act 1867.—In re Jacobs, Case No. 7,159.

The repealing clause in Act June 22, 1874, does not affect suits by assignees then pending. —Hamlin v. Pettibone, Case No. 5,995.

The repeal of the bankrupt act does not prevent the assignee from suing to reduce the property of the bankrupt to possession.—Carr v. Hilton, Case No. 2,436.

§ 6. Effect upon state insolvent laws and proceedings thereunder.

The bankrupt law of 1841, upon going into operation in February, 1842, ipso facto, suspended all action upon future cases arising under state insolvent laws, where the insolvent persons were within the purview of the bankrupt law. —Ex parte Eames, Case No. 4,237.

State insolvent laws, which merely protect the person from imprisonment, and do not affect the contract, are not suspended by the bankrupt act. (Act 1841.)—Sullivan v. Hieskill, Case No. 13,594.

Cases pending under state insolvent laws when Act 1841 came into operation are not affected thereby.—In re Holmes, Case No. 6,633.

State insolvent laws in force at the time of the passage of Act 1867 are suspended thereby in so far as the provisions of the latter cover the subject-matter of the former.—In re Reynolds, Case No. 11,723.

Act 1867 does not devest the state power to pass laws for winding up the estate of insolvent corporations. The jurisdiction conferred upon the bankruptcy court in this respect is superior to, but not exclusive of, that of the state laws. —Chandler v. Siddle, Case No. 2,594.

Act La. March 14, 1842, in relation to the liquidation of banks, *held* in effect a bankrupt law, and superseded by the bankruptcy act of 1867.—Thornhill v. Bank of Louisiana, Case No. 13,990; Id. 13,992.

The Louisiana laws relating to insolvency, insolvent debtors, etc., were superseded by the bankruptcy act of 1867.—Thornhill v. Bank of Louisiana, Case No. 13,990; Id. 13,992.

Act N. Y. April 3, 1811, is an insolvent and not a bankrupt law.—Adams v. Storey, Case No. 66.

II. PETITION, ADJUDICATION, AND WARRANT.

(A) JURISDICTION AND COURSE OF PROCEDURE IN GENERAL.

1. Jurisdiction.

Jurisdiction on appeal, see post, § 681.

§ 7. In general.

Courts of bankruptcy derive all their jurisdiction from the act creating them.—Jobbins v. Montague, Case No. 7,330.

Under the bankrupt act of 1841, c. 9 (5 Stat. 440), the circuit and district courts have full jurisdiction in equity, in respect to all cases arising in bankruptcy, to do all which is necessary and proper to accomplish the entire settlement and distribution of the bankrupt's estate, whether the proceedings be formal or summary. —Mitchell v. Great Works Mill. & Mfg. Co., Case No. 9,662.

Authority for the complete administration of the bankruptcy system exists in the district courts under the acts of 1841 and 1867.—Watson v. Lemar, Case No. 17,287; Goodall v. Tuttle, Id. 5,533.

The jurisdiction of federal courts in bankruptcy is exclusive in all matters arising under the bankrupt act of 1867.—In re Barrow, Case No. 1,057.

The jurisdiction of the federal courts in bankruptcy is exclusive, and the jurisdiction of the state courts over insolvent corporations is at an end when the corporation is adjudged a bankrupt.—Watson v. Citizens' Sav. Bank, Case No. 17,279.

The federal district courts, sitting in bankruptcy, have general equity jurisdiction, without previous notice to the adverse party.—Ex parte Carlton, Case No. 2,415.

Act 1867, § 2, relates exclusively to the jurisdiction of the circuit courts, and its provisions cannot be referred to to limit the jurisdiction of the district courts conferred by section 1 of such act.—Goodall v. Tuttle, Case No. 5,533.

The jurisdiction of the bankrupt court is not affected by the fact that an assignment for the benefit of creditors under the state law had been made prior to the adjudication.—Pool v. McDonald, Case No. 11,268.

The fact that the state is a creditor does not affect the jurisdiction of the bankruptcy court. —In re Greenville & C. R. Co., Case No. 5,787.

The circuit court has no jurisdiction of a bill in equity filed by creditors before the appointment of an assignee to restrain a chattel mortgagee in possession from disposing of the goods of an alleged bankrupt.—Johnson v. Price, Case No. 7,407.

Under Act 1867, the federal district courts have jurisdiction, both in law and equity.—In re Fendley, Case No. 4,728.

The district court, when sitting as a court of bankruptcy, should not decline jurisdiction of a

case within its jurisdiction, as such, on the ground that the claim might have been presented in the district or circuit court sitting in equity.—Norris' Case, Case No. 10,304.

The district courts have no power to make general rules under Act 1867, such power being vested in the United States supreme court by section 10 of such act.—In re Kennedy, Case No. 7,699.

Notice to all creditors is not necessary to give the bankruptcy court full and complete jurisdiction as to all debts of the bankrupt; such jurisdiction is acquired by petition, adjudication, and warrant.—In re Archenbrown, Case No. 504.

All the orders and proceedings must be by the judge to whom the application is made.—Connelly's Case, Case No. 3,111.

A district judge has no jurisdiction in bankruptcy, virtute officiorum, but only from the statutes.—In re Morris, Case No. 9,825.

A decree of bankruptcy, and an order for the discharge of the bankrupt, must be made in court and not at chambers. (Act 1841.)—In re Johnson, Case No. 7,368.

§ 8. As dependent upon character of parties—Alien and nonresidents.

An alien residing in the United States may be adjudged a bankrupt on his own petition, regardless of his length of residence.—In re Goodfellow, Case No. 5,536.

In order to give the bankruptcy court jurisdiction the debtor must reside within the jurisdiction of the United States when the petition is filed.—In re Burton, Case No. 2,214.

§ 9. —— Infants.

An infant is entitled to the benefit of the bankrupt act, and the proceedings may be had in his own name.—In re Book, Case No. 1,637.

The bankruptcy court has no jurisdiction to make an adjudication against one who was an infant at the time of filing the petition; and a petition by the bankrupt, after he comes of age, for a confirmation of the proceedings, cannot give jurisdiction. (Act 1867.)—In re Derby, Case No. 3,815.

§ 10. —— Married women.

The district court will consider the state statutes and decisions in applying the bankrupt law to married women.—In re Goodman, Case No. 5,540.

It seems that in a state where a feme covert may be sued upon her contracts she may be declared a bankrupt.—In re O'Brien, Case No. 10,397.

In Indiana a petition in bankruptcy will not lie against a married woman where it is not shown that she has a separate estate.—In re Goodman, Case No. 5,540.

A married woman living separate and apart in California may be adjudged a bankrupt, as, under the state laws, she is liable to suit for her indebtedness.—In re Lyons, Case No. 8,649.

In Illinois a married woman may be a voluntary as well as an involuntary bankrupt.—In re Collins, Case No. 3,006.

§ 11. —— Executors.

An executorship for the limited purpose of winding up testator's business, and to carry on the same for such purpose, cannot be administered under Act 1867.—Graves v. Winter, Case No. 5,710.

§ 12. —— Corporations.

Any corporation created for the purpose of carrying on any lawful business defined by its charter, and clothed with power to do so, for gain, is amenable to Act 1867.—Rankin v. Florida, A. & G. C. R. Co., Case No. 11,567.

A railroad company is a "moneyed, business, or commercial corporation," within Act 1867, § 37, providing that such corporations may be adjudged bankrupt.—Adams v. Boston, H. & E. R. Co., Case No. 47; Alabama & C. R. Co. v. Jones, Id. 126; Sweatt v. Boston, H. & E. R. Co., Id. 13,684; In re Greenville & C. R. Co., Id. 5,787; Winter v. Iowa, M. & N. P. Ry. Co., Id. 17,890; In re California Pac. R. Co., Id. 2,315; In re Southern Minnesota R. Co., Id. 13,188. CONTRA, see In re Opelousa & G. W. R. Co., Case No. 10,547.

An insurance company is a "business or commercial" corporation, within such act.—In re Merchants' Ins. Co., Case No. 9,441; In re Hercules Mut. Life Assur. Soc., Id. 6,402; In re Independent Ins. Co., Id. 7,017, affirming Case No. 7,018.

A national bank cannot be proceeded against in bankruptcy.—In re Manufacturers' Nat. Bank, Case No. 9,051.

§ 13. —— Traders.

A person engaged in a business requiring the purchase of articles to be sold again either in the same or an improved shape, is "using the trade of merchandise," within Act 1841.—Wakeman v. Hoyt, Case No. 17,051.

The owner of timber lands, who manufactures lumber therefrom as a means of deriving profit from the real estate, is not a merchant or trader (Act 1841), unless he carries on such business on a large scale substantially and independently as a trade.—Hall v. Cooley, Case No. 5,928.

A distiller engaged in the purchase and sale of grain and the sale of alcohol into which it is converted, and the purchase of domestic animals, and the sale of them or of their flesh after being fattened, is subject to the operation of Act 1841 upon the petition of a creditor.—In re Eeles, Case No. 4,302.

Livery stable keepers are not merchants or traders, under the act of 1841.—Hall v. Cooley, Case No. 5,928.

§ 14. Effect of appointment of receiver by state court.

A petition in bankruptcy will lie against an insolvent corporation, notwithstanding a decree of dissolution and the appointment of a receiver on proceedings in the state court by a state officer.—In re Washington Marine Ins. Co., Case No. 17,246; Thornhill v. Bank of Louisiana, Id. 13,992, affirming Id. 13,990; In re Merchants' Ins. Co., Case No. 9,441; In re Independent Ins. Co., Id. 7,017, affirming Case No. 7,018; In re Safe-Deposit & Savings Inst., Case No. 12,211; In re Green Pond R. Co., Id. 5,786.

The bankruptcy proceedings must be commenced within six months after the dissolution.—In re New Amsterdam Fire Ins. Co., Case No. 10,140.

Act Feb. 13, 1873, does not deprive the bankruptcy court of jurisdiction over a corporation of which a receiver has been appointed by a state court, but only saves acts done by the state court and the receiver prior to filing the petition.—In re National Life Ins. Co., Case No. 10,046.

§ 15. As dependent on locality—Residence or place of business.

Proceedings may be instituted in the district either of the debtor's residence or place of business (Act 1841, § 7).—Ex parte Hall, Case No. 5,919.

The residence or place of business of the debtor must be within the district to give the court jurisdiction and the objection cannot be waived by him.—Fogarty v. Gerrity, Case No. 4,895; In re Palmer, Id. 10,680.

Albemarle, Cape Fear, and Pamlico, as defined in Act April 29, 1802 (2 Stat. 156), are "districts," within Act 1841, § 7 (5 Stat. 446), providing that bankruptcy proceedings must be in the district where the bankrupt resides.—In re Johnson, Case No. 7,368.

A voluntary proceeding may be prosecuted in the district where the debtor has carried on business for the requisite time, irrespective of residence.—In re Alabama & C. R. Co., Case No. 124.

Under Act 1841 the proceedings can be had in a district other than that of the bankrupt's residence only when it appears that he has a fixed and notorious employment, denoting a place of business in such other district.—In re Kinsman, Case No. 7,832.

Where a debtor files a petition in the Southern district of New York, not averring any place of residence, and on his examination it appears that he resided in New Jersey four years previous, and for about six months before filing he has been keeping books for a firm in New York City, such court has no jurisdiction of the case.—In re Magie, Case No. 8,951.

Where a resident of Massachusetts becomes domiciled in California, and leaves the latter state without any intention of returning, and after staying without the limits of the United States several months returns to Massachusetts, and in less than two months thereafter files his petition, it is rightly filed in Massachusetts, as the act of leaving California with no intention of returning at once revived his domicile in the other state.—In re Walker, Case No. 17,061.

The word "residence" (Act 1867, § 11) is not synonymous with "domicile," and where a person, resident with his family in one place, buys a stock of goods in another, and goes there for business, leaving his family in the former place, the petition is properly filed in the place where he carries on such business.—In re Watson, Case No. 17,272.

The mere fact that a trader had desk room in an office in one district, where he was engaged in closing up the affairs of the business which he carried on in another district, in which he still resided, will not give the court of the former district jurisdiction (Act 167).—In re Little, Case No. 8,391.

Petition of merchant failing in business in New York City, who moved his family to New Jersey, but continued with his successors as clerk, is properly filed two years later in the Southern district of New York.—In re Belcher, Case No. 1,237.

A nonresident, who has for six months preceding petition carried on business as agent and attorney for another within a certain district, may file his petition in such district.—In re Baily, Case No. 753.

The business of a railroad corporation within the meaning of Act 1867 can only be carried on where its railroad is, or is to be, constructed, maintained, and operated. The fact that its officers and directors meet and act within a certain district does not give jurisdiction.—In re Alabama & C. R. Co., Case No. 124.

Involuntary proceedings cannot be prosecuted against an Alabama railroad corporation in a federal district court in New York where it has its general offices, but no railroad.—In re Alabama & C. R. Co., Case No. 124.

Where it appears in an involuntary proceeding that prior to the filing of the petition the debtor had resided less than two months within the district, prior to which he had resided for over six months in another district, the court has no jurisdiction, as the debtor has not resided in the district for the longest period during the six months preceding the filing of the petition.—In re Leighton, Case No. 8,221.

Where a bankrupt, during the six months previous to filing his petition, carried on business for two months in the Southern district of New York, and for the same two months in the district of Massachusetts, and carried on business nowhere else, during such six months, his petition is properly filed in the Southern district of New York.—In re Foster, Case No. 4,962.

§ 16. —— In case of partnerships.

The district court of the district in which the domicile and only place of business of the firm is located has jurisdiction of a petition in involuntary bankruptcy, although it is proved that one of the partners resided in another district.—Cameron v. Canieo, Case No. 2,340.

In case of partnerships, either partner may be declared a bankrupt in the district where he resides, or where the partnership is established. But the court first acquiring jurisdiction has exclusive jurisdiction over all the partners and all their property, joint and several.—Ex parte Hall, Case No. 5,919.

The bankruptcy court has jurisdiction of a petition by a resident partner of a firm doing business in another state, in which the other partners reside, to have the firm and each partner thereof adjudged a bankrupt, where it is alleged that they are unable to pay the partnership debts in full, and that the other partners had refused to join in the petition (Act 1867, § 36).—In re Penn, Case No. 10,927.

The court first acquiring jurisdiction on a petition of a partner has exclusive jurisdiction, and proceedings by the other partners in another court are void.—In re Greenfield, Case No. 5,772.

An adjudication of bankruptcy of a firm on the petition of one member is void as to members not consenting to the adjudication and living outside the district, and having no place of business therein.—In re Martin, Case No. 9,150.

Where an Ohio firm was dissolved in 1861, and in 1867 one of the partners filed a petition in bankruptcy in New York, praying for his individual discharge, and the other partners, who were then resident in Ohio, thereupon filed a petition setting forth the above facts, and stating that they had no debts except partnership debts, that all the debts of the first-mentioned partner were partnership debts, and praying that they might be allowed to file their petition in New York, Act 1867, § 36, does not apply, and the petition will not be granted.—In re Boylan, Case No. 1,757.

Where involuntary proceedings are commenced against two persons who are doing business in this country, but one of them is a resident of Canada, an adjudication may be granted against the resident alone.—In re Burton, Case No. 2,214.

§ 17. —— Conflict of jurisdiction.

Where petitions in bankruptcy against the same debtor are filed in two or more district courts, each having jurisdiction, the court in which the petition is first filed will be accorded exclusive jurisdiction over the case. Case No. 1,679, reversed.—In re Boston, H. & E. R. Co., Case No. 1,677.

Where a corporation is created under the laws of two states, the bankruptcy court which first exercises jurisdiction will be permitted to carry the proceedings to their final conclusion without the interference of the bankruptcy court in another state.—In re Boston, H. & E. R. Co., Case No. 1,677.

An adjudication in one state, made between the time of signing and filing an adjudication in another state, is prior. Case No. 1,679, reversed.—In re Boston, H. & E. R. Co., Case No. 1,678.

Where a bankrupt resided in New York, but did business in New Jersey, and a creditors'

petition was filed in New Jersey against him, upon which he was declared a bankrupt, and after the property had been in the custody of the New Jersey court for many months a creditors' petition was filed in New York, and an adjudication of bankruptcy against the same debtor was entered by consent, and it appeared that an abandonment of the proceedings in New Jersey would involve the parties in great loss, the provisions of general order No. 16 did not apply, and the adjudication in the New York case was set aside, and all proceedings stayed pending the New Jersey proceedings.—In re Brown, Case No. 1,982.

§ 18. Pleading and objections.

Where the want of jurisdiction appears on the petition, the consent of the parties cannot give jurisdiction, and the bankruptcy court, of its own motion, will take notice of the point.—Hopkins v. Carpenter, Case No. 6,686.

Where the allegation of residence within the district as the ground of jurisdiction is false as to one of the petitioning partners, the bankruptcy court is without jurisdiction as to any of them.—In re Beals, Case No. 1,165.

The question of jurisdiction depending upon averments in the petition in a voluntary proceeding cannot be raised on an application by creditors to set aside the adjudication of bankruptcy, but this question may be raised when an application for a discharge is made.—In re Penn, Case No. 10,926.

The proceedings will not be stopped, after adjudication, on a mere protest alleging want of jurisdiction in the court, under amended acts, before the court has full knowledge of their context.—In re Rosenthal, Case No. 12,062.

2. COURSE OF PROCEDURE IN GENERAL.

§ 19. Commencement of proceedings.

Filing a petition, unaccompanied by due proof to sustain it, is not the commencement of proceedings under Act 1867, § 38, although an order to show cause is improperly issued upon it, and although a proper petition is afterwards filed and prosecuted to adjudication.—In re Rogers, Case No. 12,003.

An order to show cause, issued without such proofs, is illegal and void, and does not constitute the commencement of proceedings.—In re Rogers, Case No. 12,003.

§ 20. Representation of parties by attorneys.

The appearance of a debtor not served on a petition against joint debtors may be by attorney.—In re Weyhausen, Case No. 17,474.

Where a person who is not an attorney at law desires to represent another before a register, he must show a formal power of attorney, but in such case the authority of one who is an attorney at law will not be questioned, and he will be accepted unless some one requires him to prove the same.—In re Scott, Case No. 12,519.

The authority of an attorney or counselor of the circuit or district court, who appears for the creditors in a proceeding in bankruptcy, cannot be questioned by the register.—In re Hill, Case No. 6,481.

An attorney at law cannot vote for his client without being duly constituted his attorney in fact.—In re Purvis, Case No. 11,476.

At a meeting held in a course of proceedings in bankruptcy, an attorney cannot act for a creditor unless he has authority to do so, evidenced by a letter of attorney acknowledged before a register or United States commissioner.—In re Christley, Case No. 2,702.

The mere fact of an attorney verifying proof of debt for a firm, and swearing that he was duly authorized thereto, does not show authority to appoint another to act for the firm at a creditors' meeting in bankruptcy proceedings.—In re Knoepfel, Case No. 7,891.

To authorize counsel to appear for a corporation and admit acts of bankruptcy charged, the corporators or shareholders should by vote authorize such action. Case No. 11,706, affirmed.—Leiter v. Republic Ins. Co., Case No. 8,227.

The counselor of the assignee may act as attorney for creditors in bankruptcy proceedings.—In re Levy, Case No. 8,299.

An attorney other than the duly-appointed attorney may appear as counsel for the assignee in a particular proceeding pending in court.—In re Comstock, Case No. 3,080.

An attorney who has no authority to appear in a proceeding instituted by the assignee cannot be heard to question the authority of the attorney who appears in such proceeding as counsel for such assignee.—In re Comstock, Case No. 3,080.

A power of attorney to appear for a creditor need not be acknowledged.—In re Powell, Case No. 11,354.

A power of attorney to prove debt need not be acknowledged.—In re Barnes, Case No. 1,012.

A notary public has authority to take acknowledgments of letters of attorney in bankruptcy proceedings.—In re Butterfield, Case No. 2,248; In re McDuffee, Id. 8,778.

In the absence of an express rule, the bankruptcy court will follow the rules of the circuit and district courts whereby agreements between counsel must be in writing or of record, provided no inequitable result would be caused thereby.—In re Amory and Leeds, Case No. 336a.

A power of attorney under form No. 26, which concludes with the words, "and with like powers to attend and vote at any other meeting of creditors or sitting of court holden * * * for the declaration of a dividend, or for any other purpose in my interest whatever," does not authorize the filing of an opposition to the bankrupt's discharge.—Creditors v. Williams, Case No. 3,379.

§ 21. Schedule—When required.

See, also, post, §§ 480, 563.

Where the acts of bankruptcy charged in a petition filed after December 1, 1873, are denied, and a jury trial demanded, the bankrupt, under Act 1867, § 39, as amended June 22, 1874, will be required to file a list of creditors and amount of their claims.—Warren Sav. Bank v. Palmer, Case No. 17,207.

In an involuntary proceeding a bankrupt will be required to make statement in writing under oath, where he is relied on to prove insufficient number of petitioning creditors as suggested by a creditor.—Clinton v. Mayo, Case No. 2,899.

A debtor will not be compelled to file a full list of creditors, when sworn statements of the petitioning creditors show that the requisite amount and number have not petitioned.—In re California Pac. R. Co., Case No. 2,315.

§ 22. —— Contents.

The bankrupt is only bound to set forth in his schedule such property as he has a right or interest in at the time of petitioning.—Ex parte Robertson, Case No. 11,921.

An interest in the net profits of a business as additional compensation for services of the bankrupt need not be scheduled by him.—In re Brown, Case No. 1,978.

Where claims against a bankrupt are purchased at a discount, they remain subsisting against him for their full value in the hands of the purchaser, whatever may be the latter's rights against other creditors, and the bankrupt may

properly state in his schedules that the purchaser of the claims is his creditor to their full amount.—In re Houghton, Case No. 6,728.

The bankrupt must state in his schedules whether or not any note has been given, or any judgment rendered, for every debt, and whether or not any person is liable with the debtor as a partner or joint contractor, and what is a sufficient statement of those facts is a matter of discretion with the register.—In re Orne, Case No. 10,582.

Purchases of bankrupt's property by members of his family at judicial sales, though a part of the property was left in the bankrupt's possession, but not remaining with him at the time of filing his petition, do not afford presumptive evidence of an ownership remaining in the bankrupt which will require him to account for the property in his schedules, under Act 1841.—In re Bailey, Case No. 726.

A claim of the bankrupt for damages on a contract for the sale of goods must be stated in his schedule.—In re Orne, Case No. 10,581.

The bankrupt must show, either in the schedule attached to his petition, or in a separate affidavit, the efforts made by him to find the present residence of creditors, which is not given. —In re Pulver, Case No. 11,466.

A creditor objecting that the petitioner does not set forth a list of his creditors, with their residences and the amounts due, must point out the omission.—In re Plimpton, Case No. 11,227.

A person named in a bankrupt's schedule as a creditor, who does not appear either in person or by duly-constituted attorney, and has not proved any debt, cannot file a protest against being named as a creditor.—In re Altenheim, Case No. 268.

§ 23. —— Form and sufficiency.

The use of dots or contractions in the schedules to indicate a repetition of words previously used is forbidden by rule 14 of the general orders in bankruptcy.—In re Orne, Case No. 10,582.

A schedule of a voluntary petitioner's real estate which states the county and town in which the property is situated, together with the name of the grantor, is sufficiently accurate.—In re Dodge, Case No. 3,946a.

The description of property by a bankrupt in his schedule as "an interest in half a lot in Buffalo" is not sufficient.—In re Frisbee, Case No. 5,130.

A bankrupt's schedule of assets should set forth the separate items of household furniture and wearing apparel, but such defect may be remedied by amendment.—In re Hill, Case No. 6,481.

Every article of family stores and wearing apparel, generally described, need not be set out in the schedule.—In re Malcom, Case No. 8,986.

The statement in the schedule of a bankrupt of the amount due to each creditor is sufficient, when the sum and date of the debt or judgment is given.—In re Hill, Case No. 6,481.

Where the petitioner in bankruptcy has no property except what he claims as exempt, and his creditors are all of one class, he is required in making up his schedule to use such forms as are appropriate to and descriptive of the debts and property he is required to list.—Anonymous, Case No. 457.

In a bankrupt's schedule of creditors containing debts owing to newspapers, the names of the proprietors of the newspapers should be given, and not the names of the newspapers only.—Anonymous, Case No. 462.

A judgment due a firm should be scheduled in the firm's name, without setting forth the names of its members; but, if their names are set forth, the schedule is not thereby vitiated.—Anonymous, Case No. 457.

A judgment in favor of a bankrupt should be set forth in Schedule B, No. 2, under letter b.—In re Sallee, Case No. 12,256.

The certificate of the register as to the sufficiency of the inventory of the assets of a bankrupt is not conclusive so as to preclude inquiry at the proper time, and in the proper manner, as to the sufficiency of the same.—In re Hill, Case No. 6,481.

§ 24. —— Verification.

The schedule may be verified before a notary. —In re Bailey, Case No. 727.

§ 25. —— Amendments, when allowed.

A register may allow amendments to the schedules on the ex parte application of the bankrupts, at any time while the cause is pending before him.—In re Heller, Case No. 6,339.

A register may allow a bankrupt to amend his schedules when such amendment is not opposed. Such amendments should be filed with the clerk. —In re Morford, Case No. 9,796.

The register may, of his own motion, order a bankrupt to amend his schedules after the adjudication of a bankruptcy and the appointment of an assignee.—In re Orne, Case No. 10,582.

A bankrupt cannot amend his schedules by adding other names to the list of creditors, as of course, after the warrant, and after the close of the business of the first meeting, but the register may report provisionally as to the conditions on which the amendments should be allowed.—In re Morganthal, Case No. 9,813.

Material additions to the schedules of debts, or to the property, are not allowable, by way of amendment, after the first meeting of creditors, except upon such conditions as may prevent injustice.—In re Ratcliffe, Case No. 11,578.

The application of the bankrupt for leave to amend his schedule by adding property omitted as appearing on his examination is an ex parte one, which no creditor has any right to oppose.—In re Watts, Case No. 17,293.

Amendments of schedules will be allowed on payment of costs where there is proof that the errors arose from inadvertence.—In re Frisbee, Case No. 5,130.

The bankrupt may, by order of court, amend his schedules, even after the consideration of specification in opposition to his discharge.—In re Preston, Case No. 11,392.

Procedure on allowance of amendments to schedules.—In re Morford, Case No. 9,796.

§ 26. —— Order for amendment.

Where the register makes an order that the bankrupt's schedules be amended, the order ought to specify particularly the respects in which it is to be amended.—In re Orne, Case No. 10,582.

§ 27. —— Operation and effect of amendment.

The allowance of an amendment of the schedule by adding property omitted does not conclude a creditor to avail himself of any ground of opposition to the discharge arising out of such omission.—In re Watts, Case No. 17,293.

Creditors whose names were omitted from the schedule on the erroneous supposition that their debts were barred by the statute of limitations, and brought in by amended schedules, are entitled to notice, and a new warrant should issue. —In re Perry, Case No. 10,998.

In such case, where an assignee has already been chosen, notice of an application to remove him should be given, to enable all creditors to be heard.—In re Perry, Case No. 10,998.

§ 28. Records and files.

The record of the bankruptcy court showing that a petition in bankruptcy was filed at a particular time is conclusive, and cannot be contradicted by parol evidence.—Alabama & C. R. Co. v. Jones, Case No. 127.

Where the record of the federal district court shows that the judge ordered a petition in bankruptcy to be filed, and made an order to show cause thereon, it will be presumed that the petition was filed before or contemporaneously with the order to show cause, unless the record shows the contrary.—Alabama & C. R. Co. v. Jones, Case No. 127

Where the record of the federal district court shows that a petition in bankruptcy was not filed on the same day that an order to show cause was made thereon, if in fact the petition was filed on that day, an order may be entered by the district court nunc pro tunc correcting the date of filing.—Alabama & C. R. Co. v. Jones, Case No. 127.

Original papers referred to in bankrupt's deposition, and annexed thereto, cannot be withdrawn from the files at the option of the bankrupt, but the bankruptcy court may order a withdrawal for good reason shown by party interested.—In re McNair, Case No. 8,908.

§ 29. Depositions.

The statutes authorizing the taking of testimony (Act 1789, § 30; Act 1817; Act 1872) do not apply to proceedings in bankruptcy.—In re Dunn, Case No. 4,173.

Testimony in bankruptcy proceedings can only be taken on commission, and cannot be taken on notice.—In re Dunn, Case No. 4,173.

The jurat subscribed by the commissioner need not contain a venue, when it appears from the deposition itself that the oath was administered where the officer resides.—In re Hill, Case No. 6,485.

The register has power to take affidavits and depositions at any time after petition filed.—In re Dean, Case No. 3,700.

§ 30. Motions and decisions thereon.

A motion in a bankruptcy proceeding, which has been denied without prejudice to any other motion, suit, action, or proceeding in respect thereto, cannot be repeated on the same facts, nor upon additional papers which do not touch the merits of the controversy.—In re Mott, Case No. 9,878a.

§ 31. Production of bankrupt on habeas corpus.

A bankrupt who is in custody may be produced in court on habeas corpus whenever necessary for further proceedings in bankruptcy before the court or a commissioner.—In re Cheney, Case No. 2,636.

Rule 27 of the "general orders in bankruptcy," authorizing the district courts to issue writs of habeas corpus in certain cases, applies only to the court in which the proceedings in bankruptcy are had.—In re Seymour, Case No. 12,684.

(B) VOLUNTARY PROCEEDINGS.

§ 32. By corporation.

A petition by a corporation in voluntary bankruptcy should be authorized by a vote of a majority of the corporators at a legal meeting called for the purpose. Rev. St. § 5122.—Freeman's Nat. Bank v. Smith, Case No. 5,089.

Such meeting need not be called in the manner prescribed by section 21 of Act N. Y. Feb. 17, 1848, in regard to the formation of corporations.—Freeman's Nat. Bank v. Smith, Case No. 5,089.

Under Act 1867, § 37, authority to file a petition in behalf of a corporation can only be given by a vote of a majority of the stockholders, even if the management of the corporate affairs is vested by the state law in a board of trustees.—In re Lady Bryan Min. Co., Case No. 7,978.

A contumacious resignation by officers of a company cannot prevent the company from filing a petition in bankruptcy authorized by the majority shareholders.—Davis v. Railroad Co., Case No. 3,648.

Under Rev. St. § 5122, which requires a petition in voluntary bankruptcy to be authorized by a majority of the corporators, stock of an intestate, on whose estate administration has not been granted, is not to be counted.—Freeman's Nat. Bank v. Smith, Case No. 5,089.

A voluntary petition, filed in behalf of a corporation without express authority by a vote of the stockholders, gives the register no jurisdiction; and a ratification by the stockholders, after adjudication, does not cure the defect.—In re Lady Bryan Min. Co., Case No. 7,978.

The policy holders in a mutual life insurance company are "corporators," within Rev. St. § 5122, requiring them to be notified of the meeting called to authorize proceedings in bankruptcy.—In re Atlantic Mut. Life Ins. Co., Case No. 628.

After the lapse of four years, it will be presumed, as against a stockholder of the corporation, that a petition filed by an officer by order of the directors was authorized by the stockholders as required by law.—In re Jefferson Ins. Co., Case No. 7,253.

The authority of the officer of a corporation to file a petition in bankruptcy cannot be disputed in a collateral proceeding.—Davis v. Railroad Co., Case No. 3,648.

Bankruptcy proceedings by a corporation, authorized by a minority of the members, will not be dismissed on the petition of an officer for the purpose of his evading an alleged liability, after the lapse of a year, as brought without authority, where the corporation was hopelessly insolvent, and the stockholders did not differ as to the propriety of the proceedings.—In re Collateral Loan & Savings Bank, Case No. 2,997.

§ 33. By partners.

Where there are no partnership assets to be collected and distributed, an individual member of a former partnership may, upon his own petition, be discharged from all his debts, both partnership and private.—In re Marks, Case No. 9,094.

A member of an existing firm having firm debts and firm assets cannot be discharged on his individual petition unless the firm is also declared bankrupt.—In re Winkems, Case No. 17,875.

On a voluntary petition by a member of a firm, the bankruptcy court has power to determine the question what persons constituted the firm.—In re Griffith, Case No. 5,820.

Where one member of a firm files his petition, scheduling both firm and individual assets and liabilities, it is the right of the other member to be made a party to the proceedings.—In re Gorham, Case No. 5,624.

Where all the partners do not join in the petition, a nonresident partner cannot join in a petition filed in a district in which he neither resided nor carried on business.—In re Prankard, Case No. 11,366.

A decree cannot be rendered against a firm on a voluntary application therefor, unless the whole of the partners unite therein. Act 1841.—Ex parte Hartz, Case No. 6,174.

Where a voluntary petition in bankruptcy omits the names of some members of the firm which it is asked shall be declared bankrupt, proceedings against the nonjoining partners

cannot be made by a creditor.—Citizens' Nat. Bank v. Cass, Case No. 2,732.

Parties cannot apply jointly for a decree in bankruptcy after a dissolution of their partnership. Act 1841.—Ex parte Hartz, Case No. 6,174.

After a sale by a partner of all his interests as co-partner to a third person, who is taken into the firm, neither the old firm nor the retiring partner can be adjudged bankrupts on the petition of the continuing partner.—In re Hartough, Case No. 6,164.

A dissolution of a partnership will not prevent the bankrupt court taking jurisdiction, so long as any unfinished business, debts, credits, or assets remain.—In re Crockett, Case No. 3,402; In re Noonan, Id. 10,292.

One partner may petition to have himself and his co-partner adjudged bankrupt after a dissolution of the co-partnership; and he will not be estopped from petitioning by having undertaken to pay all the joint debts, the joint creditors not having accepted him as their sole debtor.—In re Stowers, Case No. 13,516.

Where one partner of a dissolved firm petitions for an adjudication in bankruptcy against himself and his late partner, and it appears that the petitioner has undertaken to pay all the joint debts, and has given a bond to his late partner with a solvent surety conditioned for such payment, and the creditors did not desire an adjudication, and that such partner was solvent, the petition will be dismissed.—In re Bennett, Case No. 1,314.

An adjudication against a firm by a partner on his voluntary petition, where the firm had been dissolved by the death of a co-partner, is void.—In re Temple, Case No. 13,825.

One or more partners may file their petition praying that the firm be declared bankrupt without making the others parties, but notice of the pendency of the proceedings must be given to the other partners.—In re Moore, Case No. 9,750.

A firm may be adjudicated bankrupt so long as there are undistributed partnership assets, and partnership debts and liabilities.—In re Gorham, Case No. 5,624.

§ 34. Who may petition.

The petitioner cannot be decreed a bankrupt while he owes debts which were created while he was acting in a fiduciary character. Act 1841.—In re Hardison, Case No. 6,053; In re Cease, Id. 2,540.

A municipal officer who receives moneys as license fees is a public officer, within Act 1841 (9 Stat. 440, c. 9), and, if a defaulter in such office, cannot maintain a voluntary petition under the act.—In re Johnson, Case No. 7,365a.

A judgment obtained in bastardy proceedings for the maintenance of a child and a judgment for damages in an action of seduction are not "debts," within Act 1841, § 1, and the debtor cannot maintain a petition founded thereon.—In re Cotton, Case No. 3,269.

A fraudulent transfer by the petitioner will not prevent his being declared a bankrupt under the act of 1841.—In re Houghton, Case No. 6,727.

Where the debtor in involuntary proceedings indorses on the copy of the petition served on him an admission of the truth of its allegations, except those relating to fraud, but before the day to appear files an involuntary petition, and is adjudicated a bankrupt thereon by the register, such adjudication is void, and an adjudication will be made in the involuntary proceeding.—In re Stewart, Case No. 13,419.

A petition by a debtor to be declared a bankrupt will be received, notwithstanding a petition for a compulsory decree has already been filed, and an order of notice to show cause thereon obtained by a creditor against the same debtor.—In re Canfield, Case No. 2,380.

The pendency of a petition in involuntary proceedings, not carried to adjudication, a composition having been made, is no bar to a voluntary petition, where the composition has been set aside for the reason that the debtor was unable to carry it into effect.—In re Flanagan, Case No. 4,850.

A bankrupt to whom a discharge has been refused, and who has contracted new debts, may file a new petition. Case No. 4,090 affirmed.—In re Drisco, Case No. 4,086.

§ 35. Defenses and objections.

The allegation filed to deprive a debtor of the benefit of the insolvent act (2 Stat. 237) must be specific and certain.—Connelly's Case, Case No. 3,111.

Where the bankruptcy court has jurisdiction over the debtor, an adjudication on his petition cannot be resisted on the ground that he is solvent, as the filing of the petition is an act of bankruptcy.—In re Fowler, Case No. 4,998.

Proof of ownership in past years, or dissipation or dishonest squandering of property, is not sufficient to defeat a petition under Act 1841.—In re Bailey, Case No. 726.

As to property subsequently acquired which is matter of record, the creditors must move within a reasonable time to have the same shown. Act 1800.—In re Morris, Case No. 9,825.

§ 36. Parties and intervention.

Persons cannot join in a petition with a view to separate decrees; and, where a petition is disallowed conjointly, it cannot avail petitioners individually. Act 1841.—In re Moritz, Case No. 9,814.

In a voluntary proceeding, where the bankrupt neglects to move for a decree of bankruptcy, so that an assignee may be appointed, the creditors may move the court for that purpose.—Ex parte Harris, Case No. 6,110.

Under the act of 1841, a proceeding upon the debtor's petition was not ex parte.—Lathrop v. Stuart, Case No. 8,113.

§ 37. Petition.

A voluntary petition in bankruptcy need not allege the insolvency or dissolution of a firm of which the petitioner was a member.—In re Dodge, Case No. 3,946a.

An averment that petitioner "is a copartner in the firm of C., P. & Co., a copartnership composed of said petitioner" and certain persons named, is a sufficient averment of a subsisting copartnership. Act 1867, § 36.—In re Penn, Case No. 10,927.

On a petition by a partner for a separate decree he need not set forth the partnership accounts in detail, but he must allege his share of the partnership property.—Ex parte Norcross, Case No. 10,293.

An allegation by a bankrupt that he had made an assignment for the benefit of his creditors some time before the date of his petition is not open to the objection that it fails to state what estate remains undisposed of, or that it fails to give the assignment itself, if accompanied by the sworn statement that the assigned property will not pay the debts it was conveyed to provide for.—In re Mott, Case No. 9,878b.

Where the interlineations in a debtor's petition are small and not such as affect its sense, the decree will not be denied on that ground. —In re Malcom, Case No. 8,986.

§ 38. Verification.
The petition and schedules may be verified by the debtor's attorney, if he is a notary public. —In re Mauer, Case No. 9,304.

An involuntary petition in bankruptcy cannot be verified before a notary public.—In re Heller, Case No. 6,338.

In the petition to be declared a bankrupt, the date of the jurat is not essential.—In re Houghton, Case No. 6,727.

§ 39. Oath of allegiance.
The oath of allegiance annexed to the debtor's petition may be taken before a register.—In re Walker, Case No. 17,062.

§ 40. Amendments.
The register should allow all necessary and proper amendments whenever a proper cause therefor is shown.—In re Heller, Case No. 6,339.

A creditor, after his claim has been duly proved, has the right to ask that the petitioner amend defects in his petition or schedule.—In re Jones, Case No. 7,447.

A bankrupt filing a petition in which no allusion was made to the fact that he was a member of a firm will be allowed to amend so as to bring in the other members of the firm, where his schedule showed firm debts and assets.—In re Little, Case No. 8,390.

Where a bankrupt is liable for both personal and partnership debts, his petition for discharge, individually, may be amended so as to cover the partnership debts.—In re Bidwell, Case No. 1,392.

In a partner's petition against his co-partner, an omission to state the latter's residence may be supplied by amendment.—In re Vanderhoef, Case No. 16,841.

§ 41. Withdrawal of petition.
The petitioner under Act 1841 cannot withdraw his petition before adjudication, without showing good cause, if opposed by any creditor. —Ex parte Harris, Case No. 6,110.

A voluntary petition under Act 1841 may be withdrawn, and all further proceedings stayed, on the application of the petitioner, before the decree has been made, upon proper cause shown and the payment of costs.—Ex parte Randall, Case No. 11,550.

A petition under Act 1841 cannot be withdrawn, and further proceedings stayed, after the decree, without the concurrence of all whose interests may be affected.—In re Gile, Case No. 5,423.

The court may allow the bankrupt to withdraw his petition for discharge, and file a new one at a later day.—In re Svenson, Case No. 13,659.

A voluntary petition will be annulled on motion on due notice, where all the claims against the bankrupt have been paid by an assignment to one creditor, who has released the bankrupt.—Case of Stern, Case No. 13,376.

§ 42. Arrest of bankrupt.
Act 1867 does not authorize the arrest of the bankrupt in a voluntary proceeding.—In re Hale, Case No. 5,911.

§ 43. Adjudication.
A petitioner cannot be decreed a bankrupt when, in his petition and schedule, he does not include all his creditors, and the debts due to them.—In re Hardison, Case No. 6,053.

The adjudication will not be postponed until the register has certified the petition and schedules to be correct.—In re Patterson, Case No. 10,815.

An adjudication against a firm, obtained by one partner on his voluntary petition, without giving the notice required by general order 18 is void.—In re Temple, Case No. 13,825; In re Moore, Id. 9,750.

An adjudication upon a voluntary petition is a conclusive finding that the petitioner is insolvent, and owes more than $300, but not that he is within the jurisdiction of the court in other respects.—In re Goodfellow, Case No. 5,536.

An ex parte adjudication obtained by the bankrupt on the filing of amendments by him after objections to the form of his proceedings will be vacated.—In re Oakley, Case No. 10,392.

The correctness of a decree declaring a corporation bankrupt upon its voluntary petition cannot be impeached, after the lapse of a year, by a stockholder who had full knowledge of all the facts.—In re Baltimore County Dairy Ass'n, Case No. 828.

A receiver of a corporation, appointed under state laws, may move the bankruptcy court to set aside an adjudication that the company is bankrupt, as unauthorized by the members, obtained on petition by one of its trustees in its behalf, but will not be heard on such motion to contest that the company is insolvent, as the rule that the filing of the petition by the bankrupt is per se an act of bankruptcy, and that his actual solvency or insolvency is not material, applies as well to proceedings by corporations as by individuals.—In re Atlantic Mut. Life Ins. Co., Case No. 628.

A motion by partner five months after joining in a petition for involuntary bankruptcy to set aside the adjudication, on the ground of fraudulent misrepresentations of his copartners, inducing him to join in the petition when the firm was solvent, for the purpose of depriving him of his property, will be denied, where it appears that the rights of creditors have become fixed through such partner's voluntary acts.—In re Court, Case No. 3,284.

The adjudication on a voluntary petition as to what persons constitute a firm will not be set aside after six years, on petition filed four years after a different decision in the state court, where rights and interests of third persons have grown up under it and been adapted to it.—In re Griffith, Case No. 5,820.

(C) INVOLUNTARY PROCEEDINGS.

1. In General.

§ 44. Against whom lies.
Where the owners of a planing mill contracted debts as traders, but discontinued that branch of the business a few months before committing an act of bankruptcy, they will be considered merchants as to such debts, within the meaning of Act 1841.—Baldwin v. Rosseau, Case No. 803.

A trader who has withdrawn from business may be proceeded against upon debts which were contracted while he was actually in trade. Act 1841.—Everett v. Derby, Case No. 4,576.

An insane person may be made a bankrupt for an act of bankruptcy committed while sane. —In re Pratt, Case No. 11,371.

A party under guardianship as a lunatic may be adjudged a bankrupt, against the consent of his guardian.—In re Weitzel, Case No. 17,365.

Since Act June 22, 1874, a corporation cannot be subjected to compulsory bankruptcy upon the petition of a single creditor.—In re Detroit Car Works, Case No. 3,833.

§ 45. Defenses.
It is no defense to a petition in invitum that the petitioning creditor is the only creditor of

the supposed bankrupt.—In re Alexander, Case No. 161.

It is a good answer to a petition alleging, as an act of bankruptcy, the suspension of payment of commercial paper, that the paper in question is usurious.—In re Staplin, Case No. 13,304.

In an involuntary proceeding, the debtor may show that the petitioner is not a creditor, and have the petition dismissed. Case No. 3,250 affirmed.—In re Cornwall, Case No. 3,251.

A plea of tender can, under no circumstances, be a defense to the petition to have a debtor adjudged a bankrupt.—In re Ouimette, Case No. 10,622.

Preferences, concealment of property, or other acts done in contravention of Act 1841, §§ 2, 4, cannot be set up in opposition to the decree of bankruptcy; such acts may be set up in opposing his final discharge only.—Ex parte Paget, Case No. 10,670.

2. Against Partners.

§ 46. Who may petition.

Where a person, who is a member of two partnerships, without notice to his co-partners, files his individual petition, showing in his schedule assets and liabilities of the two firms, upon his being declared a bankrupt his assignee may petition for the adjudication of both of the firms, where it appears that they are insolvent, for the purpose of administering their assets in the bankruptcy court.—In re Grady, Case No. 5,654.

An involuntary petition cannot be maintained by a copartnership against one of its members.—Robinson v. Hanway, Case No. 11,953.

§ 47. Against whom petition lies.

One who permits himself to be held out as a partner may be made a bankrupt as a member of the firm, at the suit of the creditors.—In re Krueger, Case No. 7,941.

A partnership consisting of husband and wife may be adjudicated bankrupts, and it seems the wife may also be adjudged individually bankrupt.—In re Kinkead, Case No. 7,824.

A creditor cannot compel partners, willing or unwilling, to petition for the adjudication of other persons, who are alleged to be their fellow-partners.—In re Harbaugh, Case No. 6,045.

A firm may be declared bankrupts, although one of its members may have already been adjudicated on a creditor's petition.—Hunt v. Pooke, Case No. 6,896.

A person not actually a copartner cannot be adjudged bankrupt upon petition of a pretended copartner.—In re Berryman, Case No. 1,360.

§ 48. Effect of dissolution or proceedings therefor.

For the purposes of petitioning in an involuntary proceeding, a partnership is held to subsist so long as there are outstanding debts against the firm, or assets, undistributed, belonging to it.—Hunt v. Pooke, Case No. 6,896.

So long as partnership debts remain due and outstanding, a joint petition in bankruptcy may be brought by or against the partners, notwithstanding a dissolution of the partnership.—In re Williams, Case No. 17,703.

Where a firm has been dissolved by mutual consent, and the members continue to treat each other as partners after the alleged dissolution, and to act as such in their business transactions with third persons, a petition can still be filed against the members of the firm as though there had never been a dissolution.—In re McFarland, Case No. 8,788.

Where a partnership has been dissolved more than a year, and a partner files his individual petition in bankruptcy for an adjudication against himself and his late partnership, no partnership assets appearing, the case is not within Act 1867, § 36.—In re Work, Case No. 18,044.

A suit by a partner, in the state court, against his copartners, for an accounting, in which he was appointed receiver, will not prevent jurisdiction in bankruptcy, on petition of defendant partners.—In re Hathorn, Case No. 6,214.

After a sale by a partner of all his interests as co-partner to a third person, who is taken into the firm, neither the old firm nor the retiring partner can be adjudged bankrupt on the petition of the continuing partner.—In re Hartough, Case No. 6,164.

Proceedings pending in a state court to wind up a partnership and the appointment of a receiver will not prevent the bankrupt court taking jurisdiction of a petition by one partner to have the firm declared bankrupt.—In re Noonan, Case No. 10,292.

A petition by a partner of a dissolved firm against his copartners will be dismissed where it appears that the firm was dissolved by judicial decree, and all its assets transferred to a receiver.—Hopkins v. Carpenter, Case No. 6,686; In re Oehninger, Id. 10,441.

The bankruptcy court on petition against surviving partners cannot take the estate out of the hands of the administrator of the deceased partner, who has possession thereof under the state statutes. Case No. 3,536 affirmed.—In re Daggett, Case No. 3,535.

§ 49. Grounds of proceedings and defenses.

Partners in trade cannot be decreed bankrupts in invitum, on the ground of insolvency alone.—Albany Exch. Bank v. Johnson, Case No. 133.

A petition by one partner against another is quasi in invitum, and the objecting partner may show that the firm is not insolvent.—In re Fowler, Case No. 4,998.

§ 50. Number and amount of creditors.

In estimating the number and amount of creditors on a petition against a partner, partnership creditors must be considered.—In re Price, Case No. 11,408a; In re Lloyd, Id. 8,429.

Where the requisite number of creditors join in a petition against a firm, they need not all be creditors of the firm.—In re Matot, Case No. 9,282.

§ 51. Indebtedness to support proceedings.

The right of one partner to have the firm adjudicated bankrupt is coextensive with the right of the firm creditors, or of another partner.—In re Gorham, Case No. 5,624.

An adjudication may be made against one partner only, upon a joint debt.—In re Melick. Case No. 9,399.

A member of a dissolved firm is not entitled to an adjudication against his copartner on the ground that he can prove a debt against him in respect to bonds and mortgages given by them jointly.—Sigsby v. Willis, Case No. 12,849.

A member of a dissolved firm cannot have an adjudication against his copartner on the ground of having a contingent debt against him; but he may prove a claim for fraudulent misappropriation of partnership funds precisely as if no partnership had existed.—Sigsby v. Willis, Case No. 12,849.

§ 52. Acts of bankruptcy.

An assignment of firm property by two resident members to secure part of the firm creditors is an act of bankruptcy as to such members, and where the nonresident members had no previous knowledge of the assignment, and dissent therefrom as soon as they hear thereof, they will not be affected thereby personally, but where it appears that the firm and partners are

insolvent, they will, by reason of their insolvency, be declared bankrupt under Act 1841, § 14.—Ex parte Galbraith, Case No. 5,187.

A surviving partner may be adjudged bankrupt on an act of bankruptcy committed by him in administering the partnership assets, although the separate estate of the deceased partner will pay all his debts, joint and separate.—In re Stevens, Case No. 13,393.

Where the petitioning creditors at the time the indebtedness was incurred knew that a person was a secret partner of a firm, and such partner is a guarantor on commercial paper, the nonpayment of which constitutes the alleged acts of bankruptcy, he may, although solvent and having personally committed no acts of bankruptcy, be adjudged a bankrupt on petition filed against him and his partners.—In re Ess, Case No. 4,530.

A conveyance by a partner, of his individual property, though made with intent to hinder, delay, or defraud firm creditors, or to prefer one of them, will not sustain a proceeding against the firm.—In re Redmond, Case No. 11,632; In re Williams, Id. 17,703.

§ 53. Parties.

In involuntary proceedings against a partnership, one of whose members is a married woman having separate property, it is not necessary to join her husband.—Lastrapes v. Blanc, Case No. 8,100.

A petition by a member of an insolvent firm who was adjudged a bankrupt in proceedings in invitum and his assignee to bring the other members in for adjudication is entitled to consideration, and the relief asked is not so obviously beyond the power of the bankruptcy court that the petition will be dismissed summarily.—In re Kelley, Case No. 7,656.

One or more partners may file their petition for adjudication against the firm without making the others parties.—In re Mitchell, Case No. 9,656.

A firm cannot be adjudicated bankrupt in an involuntary proceeding to which one of the members is not a party, and the petition cannot be amended by adding a new party after all the testimony has been taken, and the case is on hearing before the court.—In re Pitt, Case No. 11,188.

Distinct firms, consisting of three persons, one of whom was a partner of both, cannot be joined in one proceeding, though one was the successor of the other, and undertook to pay its debts.—In re Wallace, Case No. 17,095.

§ 54. Petition.

On a petition by one partner against the firm, acts of bankruptcy need not be alleged.—In re Noonan, Case No. 10,292.

§ 55. Adjudication.

Where the partners of a firm are insolvent, and there is a sufficient ground for decree of bankruptcy against any member of the firm, the decree will go against all the members of the firm, and all the joint and separate property of the partners will pass to the assignee.—Fisher v. Currier, Case No. 4,818; Ex parte Galbraith, Id. 5,187.

An adjudication of a firm as bankrupt on a petition of one partner, individually, is erroneous, where the other members were not made parties to the proceedings, or did not assent to the adjudication.—In re Lewis, Case No. 8,311.

But a petition by the other partners praying leave to join in the first petition is a sufficient expression of assent to validate the adjudication against the firm.—In re Lewis, Case No. 8,311.

An adjudication against a partnership is not void merely because a dormant partner was not originally made a defendant, but was subsequently brought into court by a supplemental petition.—Metcalf v. Officer, Case No. 9,496.

3. Acts of Bankruptcy.

By partners, see ante, § 52.
Preferences, see, also, post, §§ 214–286, 594–601.

§ 56. Capacity to commit.

The giving of a mortgage by an infant is not an act of bankruptcy, as it is subject to the infant's election to affirm or disaffirm it after coming of age.—In re Derby, Case No. 3,815.

An insane person cannot commit an act of bankruptcy.—In re Weitzel, Case No. 17,365.

One whose mind is so unsound as to be wholly incapable of managing his affairs can commit no act by which he can be forced into bankruptcy against the objection of his guardian.—In re Marvin, Case No. 9,178.

§ 57. Joint liability.

An act of bankruptcy by one of two persons jointly and severally liable for a debt, who are not co-partners, is no ground of adjudication against the other.—James v. Atlantic Delaine Co., Case No. 7,179.

§ 58. Departure from state.

For one partner to influence or procure the departure of another partner from the state is not an act of bankruptcy.—In re Terry, Case No. 13,836.

§ 59. Concealment of debtor.

Concealment of debtor from creditors does not constitute an act of bankruptcy unless service of process is thereby prevented.—Barnes v. Billington, Case No. 1,015.

Denial to an officer by an insolvent, whereby he is prevented serving process, must be really adversary, and not by concert between the creditor and the debtor, to constitute an act of bankruptcy.—Barnes v. Billington, Case No. 1,015.

A denial to a sheriff is not an act of bankruptcy, unless he went to serve on the debtor, nor a debtor's concealing himself, nor being denied to his creditors, if he did not thereby prevent service of process.—Barnes v. Billington, Case No. 1,015.

An examination in supplementary proceedings under a state law is "legal process," within the meaning of Act 1867, § 39, authorizing proceedings in bankruptcy where the debtor conceals himself to avoid service of process.—Brock v. Hoppock, Case No. 1,912.

§ 60. Concealment or removal of property.

The secretion of goods by an insolvent to prevent their being taken on attachment is an act of bankruptcy. Act 1867.—Anonymous, Case No. 466.

There is no concealment where the debtor makes a bona fide conversion of his property, and shows good faith in respect to the care of the money received therefrom.—Fox v. Eckstein, Case No. 5,009.

A deposit of bonds which were not included in the bankrupt's schedule in New York, by a bankrupt residing in North Carolina, will be held as a device to defraud creditors, in absence of proof to the contrary, where they were delivered up shortly after the petition was filed, and he drew dividends on them.—Fullings v. Fullings, Case No. 5,151a.

§ 61. Arrest or imprisonment of debtor.

An order of arrest in a civil action, where defendant immediately gave bail and was not lodged in jail, though it remained in force for more than seven days, is no ground of adjudication, under Act 1867, § 39.—In re Davis, Case No. 3,615.

An imprisonment for but seven days, exclusive of the first day, is not sufficient to support an adjudication.—Hunt v. Pooke, Case No. 6,896.

Unlawful imprisonment in a civil action founded on contract, submitted to for more than seven days before an effort at liberation was made, is an act of bankruptcy, under Act 1867, § 39.—In re Cohn, Case No. 2,967.

§ 62. Transfer of property—In general.

A conveyance or assignment which contravenes the provisions or objects of Act 1841 is an act of bankruptcy, though good at common law.—Gassett v. Morse, Case No. 5,264.

Gift of all property to wife is an act of bankruptcy.—In re Alexander, Case No. 161.

An assignment of property which bears no internal revenue stamp, being void, will not support the petition.—In re Dunham, Case No. 4,143.

A mortgage by an insolvent railroad company to secure all its creditors equally out of its earnings, or to pay such as refuse the security their ratable proportion of the proceeds, is not an act of bankruptcy.—In re Union Pac. R. Co., Case No. 14,376.

A mortgage to secure prior advances is not in the usual course of business, and is prima facie fraudulent and evidence of an intended fraud.—In re Holland, Case No. 6,603.

A common carrier is not a trader, and a mortgage by a railroad company is not an act out of the ordinary course of its business, within the meaning of the bankrupt law.—In re Union Pac. R. Co., Case No. 14,376.

The giving of a chattel mortgage on tools and a stock in trade, to secure certain creditors, where the debtor a few days afterwards suspended payment, is an act of bankruptcy.—In re Rogers, Case No. 12,002.

A transfer by an insolvent, where both transferror and transferee have knowledge of the insolvency, though to pay a just debt, is an act of bankruptcy, within Act 1867, § 35.—Brock v. Terrell, Case No. 1,914.

Where a partnership is dissolved, and the whole stock transferred to the only solvent partner for the purpose of settling the affairs of the partnership, a sale of the whole stock by such partner is not an act of bankruptcy.—In re Weaver, Case No. 17,307.

The transfer of firm property from one member of a solvent firm to another is not an act of bankruptcy, within Act 1867, § 39.—In re Munn, Case No. 9,925.

§ 63. —— Intent, in general.

Where there is no fraudulent intention, a dealer may, though insolvent, continue to sell his stock at retail, and endeavor to effect, if possible, a compromise with his creditors. In re Munger, Case No. 9,923, reversed.—Curran v. Munger, Case No. 3,487.

An indorsement of a bill of lading to a third person, to protect the property from attachment and save it for the benefit of all the creditors, is not an act of bankruptcy.—Ex parte Potts, Case No. 11,344.

§ 64. —— Intent to hinder, delay, and defraud creditors.

Giving a chattel mortgage to secure a pre-existing indebtedness with intent to delay, hinder, and defraud the creditors is an act of bankruptcy.—In re Cowles, Case No. 3,297.

The giving of a mortgage of the whole of bankrupt's estate and effects to a particular creditor, to hinder and delay the general creditors, is an act of bankruptcy, within the express terms of Act 1841.—Baldwin v. Rosseau, Case No. 803.

A fraudulent chattel mortgage on the bankrupt's stock of goods, made with intent to hinder, delay, and defraud creditors, is an act of bankruptcy.—In re McKibben, Case No. 8,859.

Where the members of a commercial partnership owning jointly a plantation, and, not being indebted individually, mortgage the same, without consideration, to defraud firm creditors, such transaction is an act of bankruptcy.—Lastrapes v. Blanc, Case No. 8,100.

Where a conveyance is made with intent to delay one creditor, it is an act of bankruptcy if its necessary effect is to delay all the creditors, and such an act may be declared on either as a fraudulent conveyance or as a concealment.—In re Williams, Case No. 17,703.

§ 65. —— Intent to prefer and in contemplation of insolvency.

Although a mortgage is given for a precedent debt, and with intent to prefer the creditor, yet if it is not given with intent to hinder or defraud other creditors, or in contemplation of bankruptcy or insolvency, it is not an act of bankruptcy. Act 1867, § 39.—In re Dunham, Case No. 4,143.

The making of conveyances in contemplation of bankruptcy and to prefer creditors, which are declared void by Act 1841, § 2, are acts of bankruptcy.—Stewart v. Loomis, Case No. 13,433.

Retirement of one partner, and consequent transfer of assets and liabilities to the other, are not necessarily acts of bankruptcy in the partnership, but may be so if intended in order to give a preference to a separate creditor over partnership creditors, or to place him on an equality with them, or in any other way to cover actual or legal fraud.—Ex parte Shouse, Case No. 12,815.

The act of payment by an insolvent debtor is, of itself, sufficient evidence of the intent to prefer, casting the burden upon the debtor to show that he was not aware of his insolvency. Case No. 10,559, reversed.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561

A payment to a creditor is not fraudulent unless the debtor was insolvent, and intended to prefer the creditor. Act 1867, § 39.—Morgan v. Mastick, Case No. 9,803.

A conveyance by an insolvent of property to secure a creditor, if not made to give a preference or in contemplation of bankruptcy, is not an act of bankruptcy. Act 1841.—Jones v. Sleeper, Case No. 7,496.

A mere security, though given as a preference, is not an act of bankruptcy, unless given in contemplation of bankruptcy.—In re Bonnet, Case No. 1,632.

A conveyance made by an insolvent in contemplation or with the intention of breaking up his business is an act of bankruptcy. Act 1841.—Jones v. Sleeper, Case No. 7,496.

Where a trader gives a mortgage to one of his creditors, in contemplation of bankruptcy, and for the purpose of giving such creditor a preference over the others, it is an act of bankruptcy, within the meaning of Act 1841.—Arnold v. Maynard, Case No. 561.

If a person gives a preference to a creditor in contemplation of bankruptcy, it does not change the nature or effect of the act if done under the threats and coercion of the creditor.—Atkinson v. Farmers' Bank, Case No. 609.

Making a transfer of property, giving a warrant to confess judgment, or procuring or suffering property to be taken on legal process, constitute acts of bankruptcy when done by an insolvent or in contemplation of bankruptcy

with intent to give a preference.—In re Craft, Case No. 3,316.

See, also, post, § 216.

§ 66. —— As affected by question of solvency.

A debtor who is solvent may pay any or all of his debts, although proceedings in bankruptcy are pending against him. Case No. 10,559, reversed.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561.

The sale of a stock of goods will not be considered an act of bankruptcy, where there is no evidence of the seller's insolvency at the time of the sale, and it appears that his only object was to change his business, and the purchaser acted in good faith.—In re Valliquette, Case No. 16,823.

To constitute a transfer to a creditor a fraudulent preference, on the ground that the debtor was insolvent, he must have known himself so to be, and have intended to give a preference.—Miller v. Keys, Case No. 9,578.

See, also, post, § 215.

§ 67. —— As affected by time.

The clause in the act of 1841 relating to transactions entered into in good faith more than two months before petition filed does not protect the bankrupt either in a question of bankruptcy or right to a discharge, but protects only the party dealing with him.—Gassett v. Morse, Case No. 5,264.

A prior agreement that securities purchased with all overdrafts made by a debtor shall be the property of the bank prevents a subsequent transfer of securities made in pursuance thereof from being an act of bankruptcy; but an agreement to turn over the title as a future act does not rest a title to the securities in the bank, and such a transfer of them will not be a preference.—Payne v. Solomon, Case No. 10,856.

It is not an act of bankruptcy for a party to transfer property after he has become involved, according to an agreement which was made while in prosperous circumstances, to transfer specific property as collateral security for advances made.—Ex parte Potts, Case No. 11,344.

An executory agreement by a railroad company to transfer certificates of its stock is not an act for which it can be forced into bankruptcy.—Winter v. Iowa, M. & N. P. Ry. Co., Case No. 17,890.

The recording after the passage of the bankrupt act of a deed of trust made before such passage cannot be held to be an act of bankruptcy, but the consequences flowing from the act of the grantor attach as from the date of its execution.—In re Wynne, Case No. 18,117.

See, also, post, § 600.

§ 68. —— Payment of present consideration.

A transfer of property made in payment for advances made at the time is not an act of bankruptcy.—In re Pierson, Case No. 11,153.

The giving of mortgages by the debtor upon a present consideration and in good faith to raise a contested attachment and pay overdue paper, to enable the debtor to continue business, is not an act of bankruptcy.—In re Sanford, Case No. 12,310.

See, also, post, § 225.

§ 69. —— Exchange or return of property.

Where, pending negotiations for an extension of time on debtor's business paper, a piano ordered for a customer, who refused to receive it, is returned to the sellers, the return thereof is not a preference of creditors or an act of bankruptcy.—Doan v. Compton, Case No. 3,940.

Where bankrupts, before adjudication, believing themselves to be solvent, give security to their creditors in exchange for a smaller amount given for the same debt, such act is not in itself an act of bankruptcy.—Albany Exch. Bank v. Johnson, Case No. 133.

See, also, post, § 231.

§ 70. —— Conveyances fraudulent at common law.

A conveyance or assignment, fraudulent at common law, is an act of bankruptcy. (Act 1841, § 1.)—Gassett v. Morse, Case No. 5,264.

A mortgage of a stock of goods to secure the mortgagee as security on the mortgagor's note, given less than six months before the petition was filed and with the understanding that the mortgagor should continue his business in the ordinary way, and the subsequent taking possession thereunder by the mortgagee, are acts of bankruptcy, the former as a fraudulent conveyance and the latter as an unlawful preference.—In re Foster, Case No. 4,964.

The giving of a mortgage by a debtor on a large portion of his property, purporting to be security for a debt which in fact never existed, is an act of bankruptcy.—In re Ryan, Case No. 12,183.

The taking of partnership property, when the firm is insolvent, to pay a debt not a debt of the firm, is an act of bankruptcy, although each of the partners may be liable therefor (Rev. St. § 5021).—In re Matot, Case No. 9,282.

See, also, post, §§ 236, 237.

§ 71. —— Payments to creditors.

Where policies in an insurance company are terminated, the insured do not become creditors of the company for the amount of unearned premiums, within the purview of Act 1867, §§ 35, 39, so that a payment of them will be held a preference to a creditor.—Knickerbocker Ins. Co. v. Comstock, Case No. 7,879.

Certifying a check, in reliance upon the promise of the maker to make his account good during the day, creates the relation of debtor and creditor, and the payment of such a debt after insolvency is an act of bankruptcy.—Payne v. Solomon, Case No. 10,856.

A payment by an insolvent debtor is an act of bankruptcy, although it is made in the usual course of business. Case No. 10,559, reversed.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561.

The payment of running expenses for the month previous to the making of a general assignment, where made in good faith with no intent to create a preference, is not an act of bankruptcy (Act 1867).—Smith v. Teutonia Ins. Co., Case No. 13,115.

Payment of wages to employés, though made in the regular course of business, is an act of bankruptcy if done in contemplation of insolvency.—In re Kenyon & Fenton, Case No. 17,780, note.

Payment by a corporation, actually insolvent, of rent necessary to preserve a valuable lease, is an act of bankruptcy, though judicious in itself and made in good faith.—In re Merchants' Ins. Co., Case No. 9,441.

A conveyance by an insolvent railroad company in trust to secure bonds to be issued and sold to pay unsecured debts made in good faith to enable it to continue its business, is not an act of bankruptcy.—In re Union Pac. R. Co., Case No. 14,376.

The issue at par of the stock of a railroad company, not theretofore issued, in payment of the bona fide debts of the company, is not an act of bankruptcy.—Winter v. Iowa, M. & N. P. Ry. Co., Case No. 17,890.

But, where paid-up stock is disposed of to creditors under circumstances to give them an illegal preference, it will be an act of bankruptcy.—Winter v. Iowa, M. & N. P. Ry. Co., Case No. 17,890.

A payment by an insolvent debtor of a percentage on claims of a part of his creditors which does not lessen the percentage which his other creditors will receive, is not a preference.—In re Hapgood, Case No. 6,044.

The fact that the debt paid was a fiduciary debt, and that the creditor pressed for payment, will not prevent the payment's being an act of bankruptcy.—In re Dibblee, Case No. 3,884.

Where the debtor, being insolvent, pays freight debt in full by procuring an order from the railroad for and furnishing lumber, such payment is a preference of a creditor, and an act of bankruptcy.—Farrin v. Crawford, Case No. 4,686.

See, also, post, § 232.

§ 72. —— Preferences.

Under Act 1841, § 2, an act of preference is an act of bankruptcy, although it is shown to have been made by the debtor upon the demand or request of a creditor.—Van Kleeck v. Thurber, Case No. 16,861.

Transference by a partnership of the note of a third party to one creditor as security for an antecedent debt, on the day of calling a meeting of their general creditors, is a fraudulent preference, and an act of bankruptcy.—Ex parte Shouse, Case No. 12,815.

An insolvent debtor who prefers one or more of his creditors necessarily thereby commits an act of bankruptcy.—In re Drummond, Case No. 4,093; In re Ryan, Id. 12,183.

Where a transfer of property places a creditor in a better position as to his debt than he occupied by reason of a levy made by him on the property of the bankrupt, he receives a preference, within the meaning of Act 1867.—In re Dibblee, Case No. 3,884.

The transfer to one of the creditors of a bankrupt of the book accounts within two months of commencement of proceedings is not presumptively a fraudulent preference.—In re Broich, Case No. 1,921.

The knowledge or motive of the preferred creditor is immaterial in an involuntary proceeding. Case No. 10,559, reversed.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561.

See, also, post, §§ 214–250.

§ 73. —— Assignment for benefit of creditors.

A general assignment by an insolvent with preferences, though made without moral fraud, is an act of bankruptcy.—Wakeman v. Hoyt, Case No. 17,051; Ex parte Breneman, Id. 1,830; Gassett v. Morse, Id. 5,264; Grow v. Ballard, Id. 5,848; In re Burt, Id. 2,210.

A general assignment by an insolvent, though without preferences, and untainted by actual fraud, is nevertheless an act of bankruptcy, as being, in contemplation of law, made with intent to defeat or delay the operation of the bankrupt act.—Jones v. Sleeper, Case No. 7,496; Perry v. Langley, Id. 11,006; In re Randall, Id. 11,551; In re Smith, Id. 12,974; Spicer v. Ward, Id. 13,241; In re Burt, Id. 2,210; Cragin v. Thompson, Id. 3,320; In re Mendelsohn, Id. 9,420; In re Frisbee, Id. 5,129; In re Croft, Id. 3,404. CONTRA, see Farrin v. Crawford, Case No. 4,686; In re Kintzing, Id. 7,833; Langley v. Perry, Id. 8,067; Smith v. Teutonia Ins. Co., Id. 13,115.

Where the execution of such an assignment is admitted, an adjudication will be made, although the respondent denies any intent to defeat or delay the operation of the bankruptcy act.—In re Smith, Case No. 12,974.

An assignment for benefit of creditors will be deemed to have been made with intent to delay the operation of the bankrupt law, where the exercise of the powers granted by it would have that effect.—In re Chamberlain, Case No. 2,574.

A general assignment under a state insolvent law for the benefit of creditors, made when a creditor is about to obtain a judgment, is a conveyance with intent to delay, defraud, and hinder the creditor (Act 1867 § 39).—Perry v. Langley, Case No. 11,006.

An assignment for the benefit of creditors, at a time when a judgment is about to be recovered against the assignor, is not a conveyance with intent to delay and defraud creditors unless made with such intent (Act 1867).—Langley v. Perry, Case No. 8,067.

An assignment for benefit of creditors, made with intent to defeat and delay the operation of the bankrupt law, is complete on the day of its execution, and the intent existing at that time determines its character.—In re Chamberlain, Case No. 2,574.

A general assignment under a state law will be held an act of bankruptcy where the debtor did not turn over to the assignee money in excess of the authorized exemptions.—Farrin v. Crawford, Case No. 4,686.

A voluntary assignment is an act of bankruptcy and a ground for an adjudication, although such assignment is defectively executed.—In re Lawrence, Case No. 8,133.

An assignment invalid under the state laws, and so defective in its execution that it cannot be enforced, but used as a means of giving a preference, is an act of bankruptcy.—In re Mendelsohn, Case No. 9,420.

See, also, post, §§ 249, 250, 599.

§ 74. Warrant to confess judgment.

Giving a bond with warrant to confess judgment, to one creditor, upon the eve and in contemplation of bankruptcy, does not constitute an act of bankruptcy, under the act of 1800, unless the judgment entered on the bond and the issuing of the execution were at the instance or by the procurement of the debtor.—Barnes v. Billington, Case No. 1,015.

Giving a warrant of attorney to a mere indorser, whereby he secures a priority, is not to be considered an involuntary act, so as to prevent it from being an act of bankruptcy, under Act 1841, for an indorser has no legal power of coercion.—Stewart v. Loomis, Case No. 13,433.

To render the confession of a judgment an act of bankruptcy, under Act 1841, it must not only have been intended as a preference, but also have been given in contemplation of bankruptcy.—Atkinson v. Farmers' Bank, Case No. 609.

A judgment given to a particular creditor, followed by an execution, in the absence of evidence that the debtor was insolvent at the time he gave such judgment, or that it covered the whole of the debtor's effects, does not amount to an act of bankruptcy, under Act 1841.—In re Bonnet, Case No. 1,632.

A warrant of attorney to confess judgment, made to enable the debtor to continue in business, where there was no intention to defeat or delay the operation of Act 1867 is not an act of bankruptcy.—In re Leeds, Case No. 8,205.

The fact that a confession of judgment is signed by only one member of the firm does not impair the effect of the judgment in determining the question of bankruptcy.—In re Dibblee, Case No. 3,884.

A debtor commits an act of bankruptcy within Act 1867, § 39, although the warrant of attorney to confess judgment by which a preference was given by a creditor was executed under threats of legal process and arrest, and in fear of disgrace.—Campbell v. Traders' Nat. Bank, Case No. 2,370.

A confession of judgment by an insolvent debtor, and the levy upon and sale of his property, will make out a case under Act 1867, § 39, though the debtor did not know that there was such a law as the bankruptcy law.—In re Craft, Case No. 3,316.

The giving of a warrant of attorney to confess judgment for full consideration is not an act of bankruptcy, though the warrant was not recorded, but kept in the creditor's custody, unknown to others.—Blabon v. Hunt, Case No. 1,455.

See, also, post, § 245.

§ 75. Procuring or suffering person or property to be taken on legal process.

Act 1841, § 1, which makes it an act of bankruptcy for a debtor to "willingly or fraudulently procure himself to be arrested," extends to the case of a debtor who, in a state, willingly or fraudulently procures himself to be arrested by a creditor, although he is not arrested, the laws of such state forbidding arrest in actions founded on contract.—Van Kleeck v. Thurber, Case No. 16,861.

Voluntary aid given by the debtor in taking his property upon attachment, or in perfecting an attachment previously incomplete, is an act of bankruptcy (Act 1841).—Fisher v. Currier, Case No. 4,818.

It is an act of bankruptcy for a trader willingly to procure himself to be arrested, or his goods to be attached, although the attachment was not fraudulent.—Wakeman v. Hoyt, Case No. 17,051.

A debtor cannot be said to have procured his goods to be taken on execution where he remains passive when they are attached, and does nothing to aid the creditor.—Jones v. Sleeper, Case No. 7,496.

A debtor who directly or indirectly assists or facilitates the obtaining of a judgment on which an execution has followed is guilty of procuring or suffering his property to be taken in execution.—In re Woods, Case No. 17,990.

Mere honest inaction on the part of an insolvent debtor who is sued on a just debt, and allows judgment to go against him, is not an act of bankruptcy, within Act 1867, § 39, unless it appears that there was an actual intent to prefer a creditor.—Wright v. Filley, Case No. 18,077.

An insolvent who makes no defense to an action by a creditor, and does nothing to prevent his obtaining a preference, suffers his property to be taken under legal process under Act 1867, § 39, and the law presumes that he intended to give a preference.—In re Heller, Case No. 6,337; Fitch v. McGie, Id. 4,835.

The inaction of a debtor after the passage of Act 1867, in taking no steps to set aside a fictitious judgment entered before the passage of such act and to prevent execution being issued on it, is a procuring or suffering by him of his property to be taken on legal process.—In re Schick, Case No. 12,455.

A debtor suffers his property to be taken on legal process where, knowing that a debt is past due, or being insolvent or contemplating insolvency, he refrains from voluntary bankruptcy, and his property is taken on legal process.—In re Dibblee, Case No. 3,884.

An intention in law to give a preference is conclusively shown from a levy which operates as a preference, suffered by a debtor, insolvent or contemplating insolvency.—In re Dibblee, Case No. 3,884.

Where one of the members of an insolvent firm, with knowledge of such insolvency, delivers a message at the request of a creditor, although unwillingly, to an attorney, directing him to enter judgment upon a judgment note which the firm had previously given, such member procures the judgment and the enforcement thereof.—In re Benton, Case No. 1,333.

Suffering a sale to take place, from inability to resist it, is not an act of bankruptcy, even if, by so doing, one creditor should be preferred to another.—Rankin v. Florida, A. & G. C. R. Co., Case No. 11,567.

An insolvent person who fails to petition, and his property is taken by creditors on legal process, may be adjudged a bankrupt on petition of his creditors whose claims have not been satisfied by the taking of the property.—In re Wells, Case No. 17,388.

The appointment by a state court of a receiver to take possession of the property and assets of the corporation is "a taking on legal process," within the meaning of Act 1867, § 39.—In re Merchants' Ins. Co., Case No. 9,441.

The appointment by a state court of a receiver, for the purpose of paying debts, defeats and delays the operation of the act; and, where procured by the debtor, he must be presumed to have intended such effect.—In re Bininger, Case No. 1,420.

The collection, under legal process, by the receiver of a dissolved corporation, appointed more than six months before the commencement of bankruptcy proceedings, of a claim due the corporation, is not an act of bankruptcy.—In re New Amsterdam Fire Ins. Co., Case No. 10,140.

See, also, post, § 243.

§ 76. Compromises.

Where an insolvent debtor compromises with all his creditors except one, whom he promises to pay in full on a large extension of time, transferring to him property as security therefor, he commits an act of bankruptcy.—Ecfort v. Greely, Case No. 4,260.

Where, pending proceedings in bankruptcy, a preferred creditor and the insolvent settle the petitioning creditor's debt, and, through an attorney, compromise with the other creditors, paying some one price and others another, such compromise is prima facie fraudulent, and the burden is on the acting parties to show that all creditors consented to discrimination in the payment of claims. In re Munger, Case No. 9,923, reversed.—Curran v. Munger, Case No. 3,487.

See, also, post, § 233.

§ 77. What constitutes insolvency.

The word "insolvency," in Act 1841, § 14, as applied to voluntary applications for a decree, means inability to meet engagements; but, in relation to compulsory proceedings by creditors, it means the bankruptcy of the debtor as known to the court as a ground for proceedings, and must be proved in the manner indicated by section 1 of the statute.—Ex parte Hull, Case No. 6,856.

Where it appears that, if all the property of the debtor were sold, it would not produce sufficient funds to pay his debts, he is insolvent, within the meaning of Act 1867, § 39.—In re Wells, Case No. 17,388.

A debtor is insolvent if his property, put up on reasonable notice for sale, where it exists under the circumstances of the case, will not bring cash enough to pay his debts. Case No. 10,559, reversed.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561.

Inability to pay debts as they mature, in the ordinary course of business, constitutes "insolvency," under Act 1867, § 39.—In re Dibblee, Case No. 3,884; In re Randall, Id. 11,551; In re Wells, Id. 17,388; In re Bininger, Id. 1,420; In re Holland, Id. 6,603.

A debtor, if unable to meet his engagements as they accrue, is insolvent, though his assets greatly exceed his liabilities.—Morgan v. Mastick, Case No. 9,803; In re Woods, Id. 17,990.

The ordinary course of business in Act 1867 does not mean an ability to turn out goods or other property to pay one debt, without leaving in the debtor's hands assets to provide for other debts as they become due.—In re Dibblee, Case No. 3,884.

See, also, post, § 215.

§ 78. What constitutes "contemplation of" bankruptcy or insolvency.

"In contemplation of bankruptcy" (Act 1841) means simply in contemplation of a state of bankruptcy, or a known insolvency and inability to carry on business, and a stoppage in business.—Hutchins v. Taylor, Case No. 6,953.

To constitute a conveyance "in contemplation of bankruptcy," it is not necessary that the transferee should know of his debtor's insolvency, or should co-operate with him to obtain priority of payment. (Act 1841.)—Peckham v. Burrows, Case No. 10,897.

A conveyance of the bulk of the debtor's property to a creditor, where the debtor owed claims to a greater amount than its value, will be regarded as having been made in contemplation of bankruptcy and in fraudulent preference of creditors. (Act 1841).—Peckham v. Burrows, Case No. 10,897.

The words "in contemplation of bankruptcy," in Act 1867, § 39, mean in contemplation of committing what is made by the act an act of bankruptcy.—In re Craft, Case No. 3,317.

If a debtor, at any time, from the state of his circumstances, contemplates that he will not be thenceforth able to pay his debts as they mature in the ordinary course of business, he contemplates insolvency.—In re Dibblee, Case No. 3,884.

See, also, post, § 216.

§ 79. Suspension of payment of commercial paper—To whom applicable.

Act 1867, § 39, cl. 9, provides that any person "who, being a banker, merchant, or trader, has fraudulently stopped or suspended and not resumed payment of his commercial paper, within a period of 14 days," shall be deemed to have committed an act of bankruptcy. This was amended by Act July 14, 1870, so as to read "who, being a banker, broker, merchant, trader, manufacturer or miner, has fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper within a period of 14 days." *Held*, that a railroad company is not within the meaning of such acts.—In re Greenville & C. R. Co., Case No. 5,787; Winter v. Iowa, M. & N. P. Ry. Co., Id. 17,890. But see In re Hercules Mut. Life Assur. Soc., Case No. 6,402.

Charter authorizing railroad company to manufacture materials for equipment does not constitute the company a "manufacturer," within such section.—Alabama & C. R. Co. v. Jones, Case No. 126.

One who prepares for market and sells lumber, the growth of his own land, is a manufacturer, within such act.—In re Chandler, Case No. 2,591.

The publishers of a daily paper and proprietors of a book and job printing office are manufacturers within the meaning of such act.—In re Kenyon & Fenton, Case No. 17,780, note.

One engaged in a manufacture and sale of lumber is a "trader." (Act 1841.)—In re Cowles, Case No. 3,297.

The owner of oil lands who divides them into leaseholds, and receives the rent in oil, is not a trader, within such act, as he deals only in the product of his land.—In re Woods, Case No. 17,990.

One contracting to grade and build a railroad is not, by virtue of such contract or his acts under it, a merchant or trader, within the act.—In re Smith, Case No. 12,981.

A petition against a married woman in New York, grounded on nonpayment of her notes, will be dismissed, where it does not appear from the notes, or by allegation, that they were given for the benefit of her separate estate, or in course of trade.—In re Howland, Case No. 6,791.

Suspension of payment by a solvent trader for 14 days is an act of bankruptcy.—In re Bininger, Case No. 1,420.

Where a merchant fails to pay, for 14 days, commercial paper given before, but falling due after, he became engaged in business, he can be adjudged a bankrupt under Act 1867, § 39.—In re Carter, Case No. 2,470.

Under Act 1867, § 39, as amended by Act July 14, 1870, a person who is not a banker, merchant, trader, manufacturer, or miner is liable to be put into bankruptcy if he has stopped or suspended, and has not resumed, payment of his commercial paper within a period of 14 days.—In re Hercules Mut. Life Assur. Soc., Fed. Cas. No. 6,402. CONTRA, see In re Greenville & C. R. Co., Case No. 5,787; Winter v. Iowa, M. & N. P. Ry. Co., Id. 17,890.

§ 80. —— Retired traders.

Suspension of payment of a negotiable note given by a retired trader for a trade debt is not an act of bankruptcy.—In re Jack, Case No. 7,119; McKenney v. Baker, Id. 8,853.

The fact that the debtor ceased to be a trader before the period of suspension of payment of his negotiable paper is no defense.—Davis v. Armstrong, Case No. 3,624.

Where, on the dissolution of a firm, one member agrees to pay its outstanding commercial paper, and payment thereof is suspended for 14 days, it is an act of bankruptcy of the firm.—In re Weikert, Case No. 17,361.

§ 81. —— Commercial paper.

"Commercial paper," as used in Act 1867, denotes bills of exchange, promissory notes, and negotiable bank checks, which are governed by what is known as the "law merchant."—In re Nickodemus, Case No. 10,254.

"Commercial paper" means paper, which, by the law governing the contract, has the ordinary qualities and incidents of negotiable paper, in the sense of the law merchant.—In re Hollis, Case No. 6,621.

The bonds and coupons of a railroad company are not commercial paper within the meaning of Act 1867.—In re Opelousa & G. W. R. Co., Case No. 10,547.

A note payable in money is commercial paper, though, at the time and place of its execution, Confederate currency was the only medium of exchange.—Mendenhall v. Carter, Case No. 9,426.

Promissory notes given by a firm as vouchers or memoranda in exchange for notes of like amount simultaneously given to them, but not as obligations to be paid at maturity, are not commercial paper, as between the firm and the person to whom they were given.—In re Westcott, Case No. 17,430.

Commercial paper mentioned in Act 1867, § 33, includes all negotiable paper irrespective of the

mode in which it was issued or used in a given case.—In re Chandler, Case No. 2,591.

To be a debtor's commercial paper, within Act 1867, § 39, cl. 9, the debt which the paper represents must have been incurred by him in his character of banker, merchant, or trader; whether as principal or otherwise, is immaterial.—In re Lowenstein, Case No. 8,574; In re McDermott Patent Bolt Mfg. Co., Id. 8,750; In re Nickodemus, Id. 10,254.

Accommodation paper signed by a trader is not his commercial paper, within the bankruptcy acts. Act 1867, Amend. Act 1874.—McKenney v. Baker, Case No. 8,853.

A negotiable note is not the "commercial paper" of an accommodation indorser thereof, within the meaning of Act 1867, § 39.—Innes v. Carpenter, Case No. 7,049; In re Clemens, Id. 2,877, reversing Case No. 2,878. CONTRA, see In re Chandler, Case No. 2,591.

A note, given by a merchant for money loaned payable to his own order on demand, and duly indorsed by him, is "commercial paper."—In re Sykes, Case No. 13,708.

A note and a duebill given for money loaned to a manufacturing company, payable on demand, are not "commercial paper," within the meaning of Act 1867, § 39.—In re McDermott Patent Bolt Mfg. Co., Case No. 8,750.

A person who guarantied paper given by partners in settlement of their indebtedness, and subsequently became a partner with them, cannot be made a party to bankruptcy proceedings founded on nonpayment of such paper.—In re Manning, Case No. 9,040.

A judgment note is not commercial paper, so that a stoppage of payment of it for 14 days will constitute an act of bankruptcy. Act 1867.—Love v. Love, Case No. 8,549.

Renewed commercial paper subjects a trader to the same legal consequences, under Act 1867, that the original paper did.—McKenney v. Baker, Case No. 8,853.

Notes given in settlement of partnership accounts, on dissolution of a manufacturing firm, are not commercial paper given in the course of business, nonpayment of which would constitute an act of bankruptcy.—In re Lanz, Case No. 8,079.

Where, after the dissolution of a firm, a solvent partner gives notes by way of settlement to a creditor who has assisted in dissolving the firm, the notes will not be considered as commercial paper of such partner, it appearing that he was not by business a merchant, and that he entered the firm for the purpose of benefiting a relative, and closing it up as soon as it was discovered to be unprofitable.—In re Weaver, Case No. 17,307.

The object to which the money borrowed was applied cannot affect the character of the instrument given as evidence of the indebtedness, so as to make the instrument commercial paper, under Act 1867, § 39.—In re McDermott Patent Bolt Mfg. Co., Case No. 8,750.

§ 82. —— Character of stoppage and length of suspension of payment.

A stopping of payment of commercial paper under Act 1867, § 39, is fraudulent, where the liability is undisputed, when it is done purposely, and not by accident or mistake.—In re Hollis, Case No. 6,621.

The word "fraudulently," as used in Act 1867, § 39, cl. 9, does not qualify the whole sentence, and an adjudication can be had where the suspension continues for 14 days, although such suspension was not fraudulent, and may be had at once where the original suspension was fraudulent.—In re Cowles, Case No. 3,297; Doan v. Compton, Id. 3,940; In re Sohoo, Id. 13,162; In re Hall, Id. 5,920; In re Thompson, Id. 13,936; In re Weikert, Id. 17,361; In re Wells, Id. 17,387; Baldwin v. Wilder, Id. 806. CONTRA, see In re Cone, Case No. 3,095; In re Jersey City Window-Glass Co., Id. 7,292; In re Leeds, Id. 8,205; In re Davis, Id. 3,615; In re Hollis, Id. 6,621.

The suspension of payment of commercial paper for 14 days by a banker, merchant, or trader is prima facie evidence of fraud, and, where unexplained, will support a decree of bankruptcy.—In re Ballard, Case No. 816; In re Shea, Id. 12,729.

A bona fide refusal of payment of commercial paper on the ground of a legal defense is not a stoppage or suspension of payment, within the meaning of the statute.—In re Thompson, Case No. 13,936; In re Sykes, Id. 13,708; McLean v. Brown, Id. 8,880; In re Hercules Mut. Life Assur. Soc., Id. 6,402; In re Mannheim, Id. 9,038; In re Westcott, Id. 17,430; In re Munn, Id. 9,925.

Where the debtor, 8 days after the maturity of a note, is served with an injunction restraining him from making any disposition or transfer of his property, nonresumption of payment within 14 days cannot be alleged as an act of bankruptcy.—In re Pratt, Case No. 11,369.

Where the stockholders of a trading corporation having agreed to lend it money, one gives his note, which the company indorses and agrees to provide for at maturity, and it fails to do so, and the promisor pays it within 14 days, such suspension is not an act of bankruptcy by the corporation.—In re Massachusetts Brick Co., Case No. 9,259.

The running of the 14 days, necessary, after stoppage of payment of commercial paper, to make an act of bankruptcy, cannot be prevented by making an assignment for benefit of all creditors previous to the expiration of such period.—In re Laner, Case No. 8,055.

A petition which alleges as the act of bankruptcy the failure to pay commercial paper maturing after December 1, 1873, filed before the expiration of 40 days from such maturity, is prematurely filed, and cannot be amended (Act June 22, 1874).—In re Tivoli Brewing Co., Case No. 14,064.

The continued neglect to pay commercial paper may be alleged as an act of bankruptcy, although the first 14 days after maturity expired more than 6 months before the filing of the petition (Act 1867, § 39).—In re Raynor, Case No. 11,597.

A creditor need not commence proceedings to have his debtor adjudged a bankrupt within six months from the first suspension of the payment of commercial paper, if he can show that the debtor had suspended payment within the six months, although the suspension commenced before that time.—Baldwin v. Wilder, Case No. 806.

Where the only act of bankruptcy alleged in the petition is the failure to pay specified commercial paper, and where the original default in payment occurred and had continued more than seven months before the proceedings were commenced, the petition cannot be sustained.—In re Brewer & Bemis Brewing Co., Case No. 1,850.

Under the provision of the amendment of Act 1867, of July 14, 1870, that if a merchant has fraudulently stopped payment, "or has stopped and suspended and not resumed payment of his commercial paper he shall be adjudged a bankrupt," a suspension, commenced before and continued after the amendment, is per se an act of bankruptcy.—Baldwin v. Wilder, Case No. 806.

§ 83. —— Extent of stoppage.

The nonpayment of a single piece of commercial paper by a person within the statute

for 14 days, without legal excuse, is an act of bankruptcy, without reference to whether he is actually insolvent.—McLean v. Brown, Case No. 8,880; In re McNaughton, Id. 8,912; In re Wilson, Id. 17,780.

§ 84. —— What is a suspension within the statute.

There is no suspension of payment of commercial paper, within the bankrupt law, where a note payable one day after date remains unpaid for 40 days, where no demand is made.—In re Wolf, Case No. 17,923.

Stopping payment of a note long before the passage of Act 1867, and not resuming afterwards, is not an act of bankruptcy.—Mendenhall v. Carter, Case No. 9,426.

§ 85. —— Resumption of payment.

A resumption of payment of commercial paper after the expiration of the 14 days during which payment was suspended does not cure the act of bankruptcy unless the debtor's whole indebtedness is paid, and any creditor may petition.—In re Ess, Case No. 4,530.

§ 86. —— Effect of extension of time of payment.

An agreement on the maturity of a note given in the course of business that it may lay over for that day is only a forbearance to sue, and does not destroy its character as commercial paper.—Perin & Gaff Mfg. Co. v. Peale, Case No. 10,981.

A suspension of payment of commercial paper for 14 days, where the debtor subsequently obtained an extension of time from all but one creditor, is not an act of bankruptcy.—Doan v. Compton, Case No. 3,940.

A stipulation in a suit at law upon a note giving time to plead does not operate as an extension of time upon the note, as against Act 1867.—In re Sykes, Case No. 13,708.

§ 87. —— Who may take advantage of suspension.

Suspension of payment of commercial paper held by another than the petitioning creditor may be alleged as an act of bankruptcy.—In re Hall, Case No. 5,920.

§ 88. Acts of agent.

When an insolvent's agent compromises with creditors, and some of them, through him, return different terms than those submitted, such agent does not thereby become that of such creditors, but remains the agent of the debtor, and his knowledge, mistakes, and acts are those of his principal, the insolvent.—Curran v. Munger, Case No. 3,487, reversing In re Munger, Case No. 9,923.

§ 89. Effect of rescission.

The legal liability for an act of bankruptcy cannot be discharged by a subsequent rescission of the transaction.—In re Ryan, Case No. 12,183.

§ 90. Estoppel to set up act of bankruptcy.

A creditor may allege as an act of bankruptcy the taking of property on his own execution in such manner as would operate to give preference to himself.—Coxe v. Hale, Case No. 3,310.

Creditors who have obtained a preference by a bill of sale from the debtor are estopped to set up the execution of the same as an act of bankruptcy.—In re Williams, Case No. 17,706.

Creditors are not estopped from treating a general assignment as an act of bankruptcy, by an unaccepted offer to assent to the assignment, if the assignee should be changed.—Spicer v. Ward, Case No. 13,241.

An application by a creditor to the state court to have increased the security of assignees under a general assignment will not estop such creditor from claiming that the assignment was an act of bankruptcy.—Perry v. Langley, Case No. 11,006.

Creditors who have taken possession of the entire property of the debtor, under a general assignment or bill of sale intended to prefer them, are estopped from setting up the nonpayment of a note as an act of bankruptcy, for by taking possession of his entire property they deprive him of the means of making payment.—In re Williams, Case No. 17,706.

A creditor who accepts a certain sum as a compromise,, and is not misled as to payments to others, cannot sustain a petition alleging a fraudulent preference of those who received a greater percentage. In re Munger, Case No. 9,923, reversed.—Curran v. Munger, Case No. 3,487.

The failure of a stockholder, who was present at a meeting of the stockholders, to object to the giving of a mortgage to secure another stockholder for advances, at which meeting it was voted unanimously to give the mortgage, will estop him from setting up the mortgage as an act of bankruptcy.—In re Massachusetts Brick Co., Case No. 9,259.

A petition in an involuntary proceeding which states the giving to the petitioner of an unlawful preference in respect to his debt, but does not surrender the preference, will be dismissed.—In re Rado, Case No. 11,522.

4. PARTIES.

§ 91. Who are parties.

The only parties to bankruptcy proceedings are the bankrupt and the creditors.—In re Fredenberg, Case No. 5,075.

The only parties to an involuntary proceeding are the petitioning creditors and the bankrupt, and the mere service of an injunction upon a person, restraining him from interfering with the bankrupt's property, does not make him a party, and give him the right to contest or move to vacate the adjudication.—Karr v. Whittaker, Case No. 7,613.

§ 92. Who may file petition generally.

The pendency of a suit at law is not a bar to a petition by the creditor on a distinct and independent demand.—Everett v. Derby, Case No. 4,576.

An attachment by creditors is an unequivocal dissent from an agreement for extension of credit, and creditors who signed on the agreement that it was not to be binding unless joined in by all creditors are released therefrom.—Ex parte Potts, Case No. 11,344.

The fact that a debtor, after judgment against him in a state court, fraudulently conveyed all his real property, of a value greater than the debt, to his sons, is not a sufficient cause of bankruptcy as to the judgment creditor, whose remedy is to have the conveyance set aside in a court of equity.—Avery v. Johann, Case No. 675.

A petition to have a corporation adjudged a bankrupt may be maintained by any creditor, under Rev. St. § 5122. Case No. 10,558, reversed.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561.

§ 93. Indebtedness to support petition.

A petitioning creditor's debt, which is certain and liquidated, though payable in future, will support a decree in bankruptcy. (Act 1841.)—In re King, Case No. 7,785.

A petition may be filed by a creditor under the act of 1841 upon a claim which is not yet due if it is provable in bankruptcy.—Barton v. Tower, Case No. 1,085.

The same is true under the act of 1867.—Phelps v. Clasen, Case No. 11,074; In re Muller, Id. 9,912; In re Alexander, Id. 161·

Linn v. Smith, Id. 8,375; In re Ouimette, Id. 10,622.

A debt contracted prior to passage of Act 1841 is within its operation, and will support a decree.—Ex parte Hull, Case No. 6,856.

A secured debt will support a petition, and it is not necessary to waive the security in the petition.—In re Bloss, Case No. 1,562; In re Stansell, Case No. 13,293.

The levy of an execution on sufficient property to satisfy the debt does not estop the creditor from filing a petition in bankruptcy, but the levy will be held to have been waived thereby.—In re Sheehan, Case No. 12,737.

A creditor who holds security from the supposed bankrupt may petition for adjudication against him, if the security falls short of the debt by $250 or more.—In re Alexander, Case No. 161.

A creditor fully secured by attachment cannot, while holding on to his attachment, sustain, on the same debt, a petition in bankruptcy.—In re Hazens, Case No. 6,285.

A promissory note, overdue on its face at the time the petition is presented to the judge, is sufficient to support the proceedings. Act 1841. —In re Hill, Case No. 6,485.

A claim which is barred by the statutes of limitation of the state cannot be the foundation of a petition in involuntary bankruptcy. Case No. 3,250 affirmed.—In re Cornwall, Case No. 3,251.

A debt merged in a judgment which is clearly a fraudulent preference cannot be the foundation of a petition by the judgment creditors, unless the preference is surrendered.—In re Hunt, Case No. 6,882.

A note of the alleged bankrupts delivered by them to the payee after it was due, and after the alleged acts of bankruptcy, and subsequently purchased by the petitioning creditor, to enable him to petition, is a sufficient debt for that purpose.—Ex parte Shouse, Case No. 12,815.

The existence of the creditor's claim as a liability, and not as a debt at the time a transfer was made, does not prevent such transfer being fraudulent as to him.—Burpee v. First Nat. Bank, Case No. 2,185.

A judgment creditor of a manufacturing corporation cannot sustain a petition against its officers or stockholders who are made personally liable for its debts for failure to comply with the law.—James v. Atlantic Delaine Co., Case No. 7,179.

When an indorser's liability becomes fixed it is a debt which may be made the foundation of involuntary proceedings.—In re Nickodemus, Case No. 10,254.

A voluntary agreement between certain persons, to which the debtor is in no wise a party, to make a contribution to him, does not create an indebtedness to him. Case No. 10,559 reversed.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561.

A note given in place of a lost note, which latter was without consideration, will not support a petition.—In re Cornwall, Case No. 3,-251.

A debt founded upon a note made prior to the emancipation proclamation of which slaves were the consideration will support a petition. —Miller v. Keys, Case No. 9,578.

The debt provable under Act 1867 which a creditor must have as a foundation for his petition may be an equitable demand.—Sigsby v. Willis, Case No. 12,849.

A married woman may avail herself of her coverture to defeat the debt which is the basis of the proceeding, unless it is rendered a valid obligation by the state laws.—In re Slichter, Case No. 12,943.

§ 94. Number and amount of creditors who should join in petition—To what debtors statute applies.

The same proportion of creditors must join in the proceeding to force a corporation into bankruptcy that is required in the case of natural persons, under Act June 22, 1874, § 12.—In re Leavenworth Sav. Bank, Case No. 8,165, affirming Case No. 8,166; In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561, reversing Case No. 10,558.

The petition will be dismissed where the debtor has counterclaims against the petitioning creditor, of such a nature as are provable in bankruptcy, sufficient to reduce his claim below $250.—In re Osage Val. & S. K. R. Co., Case No. 10,592.

§ 95. —— How computed.

An involuntary petition must be signed by one-third in value of all the creditors, and by one-fourth in number of creditors whose debts exceed $250. If there are none such, or if a sufficient number of them do not petition, the one-fourth in number may be made up from the smaller creditors, and it is not necessary that the larger creditor should refuse to sign. It is sufficient if they do not sign. (Act 1874, § 12.)—In re Currier, Case No. 3,492.

In computing the number of creditors who must join in the petition, creditors whose debts do not exceed $250 are not to be reckoned, but, in computing the amount or value, all should be included. (Act 1867, as amended Act June 22, 1874.)—In re Hadley, Case No. 5,894; In re Broich, Id. 1,921; In re McAdam, Id. 8,654; In re Woodford, Id. 17,972; In re Hymes, Id. 6,986; In re Philadelphia Axle Works, Id. 11,-091.

The petitioning creditors whose debts equal or exceed $250 must be one-fourth of all that class of creditors.—In re Riker, Case No. 11,-833.

The aggregate of petitioners' debts must be equal to one-third of all the debts, irrespective of their individual amounts, provable against the estate (Act June 22, 1874).—In re Bergeron, Case No. 1,342; In re Hadley, Id. 5,894. CONTRA, see In re Hymes, Case No. 6,986.

One-fourth of the creditors, whose provable debts severally are over $250, and in the aggregate are equal in amount to one-third of the provable debts, are sufficient to constitute a legal quorum of petitioning creditors.—In re Lloyd, Cases Nos. 8,429, 8,430.

In default of enough of this class signing the petition, one-fourth in number of all the creditors, whose debts, without regard to their several amounts, equal in the aggregate one-third of all the provable debts, must be joined. —In re Lloyd, Case No. 8,429.

In making up the requisite number, petitioners may compute those simply whose debts exceed $250, or proceed upon the hypothesis that they represent one-quarter of the entire number of creditors, in which case those of less amount than $250 may be reckoned.—In re Hall, Case No. 5,923.

Where petitioners who hold debts exceeding $250 do not represent one-third of all provable debts, every $250 creditor sinks into a common unit in the mass of creditors, and counts but one.—In re Blair, Case No. 1,481.

Creditors whose claims are under $250 are not to be counted in computing the number who must unite in an involuntary petition, if one-fourth of the creditors whose claims are above that sum join in the petition.—In re Woodford, Case No. 17,972.

The petitioning creditors cannot add their costs to their debt, in order to raise it above

the jurisdictional amount.—In re Skelley, Case No. 12,921.

All the creditors joining in a petition need not file proofs of debts.—In re Philadelphia Axle Works, Case No. 11,091.

§ 96. —— What demands are included in computation.

Costs of attachment proceedings do not constitute a demand against a debtor which can be included in estimating the amount of his provable debts.—In re Hatje, Case No. 6,215.

In computing the quorum of creditors, debts secured and debts barred by the statute must be eliminated, and all offsets due the debtor deducted.—In re Bouton, Case No. 1,706.

Secured creditors or those claiming liens are not counted in determining whether the requisite number of creditors have joined in the petition. Act June 22, 1874.—In re Frost, Case No. 5,134; In re Green Pond R. Co., Id. 5,786; In re Crossette, Id. 3,435.

The claim of a creditor on a bond, the sureties on which have been indemnified by mortgage, is not a secured claim, and should be counted in computing the legal quorum of petitioning creditors.—In re Lloyd, Case No. 8,429.

An indorsed promissory note is not a secured claim, within the meaning of Rev. St. § 5075 (Act 1867).—In re Broich, Case No. 1,921.

A secured creditor may be counted as having a provable debt if he seasonably releases his security before the hearing and decision as to a quorum.—In re Crossette, Case No. 3,435.

The act of joining in a creditors' petition by a secured creditor, without reference to the security, is a waiver of such security.—In re Broich, Case No. 1,921.

Creditors fraudulently preferred are not to be counted in estimating the number and value of creditors who must join in the petition (Act 1867, § 39, as amended Act 1874, § 12).—Clinton v. Mayo, Case No. 2,899; In re Currier, Id. 3,492; In re Israel, Id. 7,111.

Attachment creditors who acquired their liens within four months are not to be reckoned in computing the proportion of creditors who must unite in the petition.—In re Scrafford, Case No. 12,556, reversing Id. 12,557; In re Jewett, Case No. 7,305. CONTRA, see In re Broich, Case No. 1,921.

A party may purchase a claim in good faith, in order to join in an involuntary petition, and make the necessary number.—In re Woodford, Case No. 17,972.

If such sale of a claim is void for fraud or want of consideration, the claim is to be deemed to belong to the assignor, and will be so treated in determining whether the requisite creditors have joined in the petition.—In re Woodford, Case No. 17,972.

An indorser of the bankrupt's paper, who has, before the filing of the petition, become absolutely liable to the holders, by due notice of dishonor, is not a creditor of the bankrupt at the time of such filing.—In re Riker, Case No. 11,833.

Where an indorser pays an indorsee of a note pending bankruptcy proceedings against the maker, the indorsee is no longer a creditor of the maker, and the indorser becomes subrogated to the indorsee's rights.—In re Broich, Case No. 1,921.

§ 97. —— Time to join in petition.

Twenty days will be allowed pending investigation of the sufficiency of the bankrupt's list of creditors for other creditors to join in the petition for adjudication.—In re Bullock, Case No. 2,130.

Creditors may unite in the proceedings any time before the judicial ascertainment, made on notice to creditors, that the requisite number and amount have not joined. Rev. St. § 5021, as amended Act June 22, 1874, § 12.—In re Frisbee, Case No. 5,129.

Where the ascertainment as to whether the requisite number and amount of creditors have joined is not made upon reasonable notice to the creditors, the power to grant time for other creditors to join is not limited by Act June 22, 1874, § 12.—In re Rebmeister, Case No. 11,623.

Petitioning creditors will be allowed 10 days further time, in which to obtain the consent of others to join in the petition.—In re California Pac. R. Co., Case No. 2,315.

§ 98. —— Hearing and determination.

Where a question is made as to whether a sufficient number of creditors have joined in an involuntary petition in bankruptcy, the case may be referred to a register or commissioner to examine the proofs and report.—In re Sargent, Case No. 12,361.

On a denial by the debtor that the requisite number and amount of creditors have joined, a reference will be ordered to ascertain the fact, on 10 days' notice to all creditors, on which reference the creditors have the affirmative of the issue.—In re Hymes, Case No. 6,986.

Upon a reference to a register to determine whether or not there is a legal quorum of petitioning creditors, he should return with his report lists of the claims counted and rejected.—In re Lloyd, Case No. 8,429.

In determining whether the petitioners represent one-third of all the debts provable, the bankruptcy court may examine a petition for an injunction filed with the petition in bankruptcy.—In re California Pac. R. Co., Case No. 2,315.

An affidavit of debtors admitting that the petition is presented by the requisite creditors accompanying a petition for involuntary bankruptcy is no part thereof, but is evidence of good faith in admissions by bankrupts on which the adjudication was founded, and any examination of the facts adjudged by the court is forbidden unless fraud is alleged.—In re Duncan, Case No. 4,131.

The allegation and proof as to the requisite number of creditors joining in the petition cannot be waived by the debtor.—In re Scammon, Case No. 12,427.

The petition will be dismissed on motion without requiring the debtor to file a schedule, where it appears that the petitioning creditors knew that they did not constitute the requisite number of creditors, under Act June 22, 1874.—In re Scammon, Case No. 12,429.

On such motion the court will hear affidavits in evidence offered by either party, and may order an examination of the persons verifying the petition.—In re Scammon, Case No. 12,429.

Since the amendatory act of June 22, 1874, a petition by a single creditor will not be sustained, if it appears that he did not have good reason to believe that he constituted the requisite portion of the creditors.—In re Scammon, Case No. 12,428.

Affidavits are admissible to show that a single creditor, filing a petition, had good reason to believe that he did not constitute the requisite proportion of creditors (Act June 22, 1874).—In re Scammon, Case No. 12,428.

The bankruptcy court may inquire into the value of securities held by creditors, to determine whether the debts due petitioners are of the amount required, and that a secured creditor has a provable debt.—In re California Pac. R. Co., Case No. 2,315.

The judgment of the district court declaring that a legal quorum of petitioning creditors have joined in the proceeding (Act June 22, 1874) is final, and precludes further review by the circuit court.—In re Lloyd, Case No. 8,431.

§ 99. —— Objections.

A merchant who has refused to give creditors demanding it information about his affairs sufficient to enable them to know the number and amount of his debts will not be heard to object that a sufficient number of his creditors did not join in the petition, if enough have come in before trial (Act 1867).—Perin & Gaff Mfg. Co. v. Peale, Case No. 10,981.

Lawful solicitation by a debtor to induce his creditors to sign a petition against him in involuntary bankruptcy is permissible.—In re Bouton, Case No. 1,706.

§ 100. —— Withdrawal of petitioners.

A creditor voluntarily joining in a petition to make up the requisite number and amount cannot afterwards defeat the proceedings by withdrawing his consent.—In re Rosenfields, Case No. 12,061; In re Heffron, Id. 6,321; In re Philadelphia Axle Works, Id. 11,091.

Such creditor cannot withdraw on the ground that he was induced to join in the petition by misrepresentations made by the debtors.—In re Vogel, Case No. 16,981. CONTRA, see In re Sargent, Case No. 12,361.

§ 101. Effect of tender or payment by debtor.

If the debtor against whom a petition in bankruptcy is pending is clearly insolvent, he cannot defeat the petition by tendering the petitioning creditor the amount of his debt.—In re Williams, Case No. 17,703.

The district court has no jurisdiction of an involuntary case unless the debtor owes provable debts exceeding $300, and owes the petitioning creditors $250 thereof. If the indebtedness is reduced, by payments after the filing of the petition, below those sums, jurisdiction is lost.—In re Skelley, Case No. 12,921.

Receipt by petitioning creditors of payments reducing the indebtedness below the minimum fixed by the statute in order to confer jurisdiction is a waiver of the act of bankruptcy alleged in their petition.—In re Skelley, Case No. 12,921.

The receipt by a creditor of part of his claim does not preclude him from becoming a petitioner in an involuntary proceeding against his debtor, if he offers to bring the payment into the registry of the court.—In re Marcer, Case No. 9,060.

§ 102. Substitution of parties.

Where one who files a petition in bankruptcy against another is himself adjudged a bankrupt, his assignee may be properly substituted as petitioner in his place. Act 1867, § 16.—In re Jones, Case No. 7,450.

§ 103. Intervention—To prosecute petition.

Where an application is made by creditors for an involuntary decree, under Act 1841, in bankruptcy, it is open to other creditors to come in on the day appointed by the court for the hearing, and pray for a decree, although the petitioning creditors may in the meantime have arranged with the debtors.—Ex parte Calendar, Case No. 2,307.

The application of a creditor to have his debtor decreed a bankrupt, in invitum, under Act 1841, inures to the benefit of all the creditors, any of whom may come in within a reasonable time, and prosecute the petition, but a delay by such creditors for 17 months to prosecute the petition will deprive them of the right.—Ex parte Freedley, Case No. 5,079.

Where the petitioning creditor, under Act 1867, fails to prosecute, another creditor may intervene and prosecute the petition.—In re Lacey, Case No. 7,965; In re Buchanan, Id. 2,073; In re Calendar, Id 2,307; In re Sheffer, Id. 12,742.

The right of such creditor to intervene cannot be defeated by any settlement whereby the petitioning creditor attempts to withdraw the petition.—In re Lacey, Case No. 7,965; In re Buchanan, Id. 2,073; In re Calendar, Id. 2,307.

The application of a creditor for an adjudication upon the petition of another creditor cannot be made after the return or adjourned day of the order to show cause.—In re Olmsted, Case No. 10,505.

Where the parties appear and join issue, and no further proceedings or adjournment is had, the matter will be regarded as pending from day to day, until disposed of, to permit any other creditor to come in and prosecute the original petition.—In re Buchanan, Case No. 2,073.

Such intervening creditors need not constitute one-fourth in number of the creditors, or represent one-third in value of the debts due by the debtors.—In re Sheffer, Case No. 12,742.

On such intervention, the case proceeds upon the original petition, and the adjudication will operate upon preferences given within four months before it was filed.—In re Lacey, Case No. 7,965.

Where the original petition was insufficient as to the number and amount who signed, the fact that intervening petitions sufficient, of themselves, as to number and amount, to constitute the necessary quorum, were afterwards filed, will not sustain the jurisdiction of the court.—Robinson v. Hanway, Case No. 11,953.

An order in an involuntary proceeding that the petition be dismissed, when all the fees due the clerk and marshal shall be paid, is not a financial discontinuance, so as to deprive another creditor of the right to intervene and prosecute the original petition at any time before such fees are paid.—In re Lacey, Case No. 7,965.

§ 104. —— To oppose adjudication (Act 1841).

The debtor alone is properly the "person interested" to appear and contest the facts stated as the grounds for the petition (Act 1841).—Dutton v. Freeman, Case No. 4,210.

The stockholders of a creditor bank are not parties in interest so as to be entitled to object to a decree.—In re Tallmadge, Case No. 13,738.

Where it is alleged in the petition that certain creditors have been fraudulently preferred, and the bankrupt does not appear, they may appear and contest the allegations.—In re Heusted, Case No. 6,440.

An attaching creditor is not a "person interested," and has no right to appear and contest the facts stated in the petition of creditors in an involuntary proceeding.—Dutton v. Freeman, Case No. 4,210.

§ 105. —— To oppose adjudication (Act 1867).

An attaching creditor, though not a party, may intervene and oppose an adjudication.—In re Mendelsohn, Case No. 9,420; In re Hatje, Id. 6,215; In re Williams, Id. 17,706; In re Scrafford, Id. 12,557; In re Burton, Id. 2,214.

Such creditor may oppose the adjudication on the ground of fraud and collusion between the petitioner and debtor.—In re Mendelsohn, Case No. 9,420.

Or on the ground that the requisite number and amount of creditors have not joined.—In re Hatje, Case No. 6,215.

Such creditor may intervene to oppose, not only to object to the jurisdiction, but also to contest the proceeding upon the merits, and may take advantage of any ground of defense which would be available to the debtor.—In re Williams, Case No. 17,706.

A creditor who, after the filing of the petition in bankruptcy, obtains an attachment and a judgment in a pending suit, has only the rights of a creditor at large, and cannot intervene and contest the right to an adjudication.—In re Vogel, Case No. 16,981.

The levies of execution by the creditors applying to intervene and contest the adjudication, after the filing of the petition in an involuntary proceeding, gives them no greater right to intervene than the creditors at large.—In re Lawrence, Case No. 8,133.

A creditor or other person having an adverse interest to be affected by an adjudication in bankruptcy may be admitted to defend.—In re Austin, Case No. 662; In re Jonas, Id. 7,442; Anonymous, Id. 441. CONTRA, see In re Boston, H. & E. R. Co., Case No. 1,679; In re Bush, Id. 2,222.

Judgment creditors who would be damaged by the adjudication in an involuntary proceeding may intervene to oppose proceedings alleged to have been brought by fraudulent collusion between petitioner and defendant.—In re Jack, Case No. 7,119.

A creditor of a corporation upon whose petition it has been adjudged a bankrupt will be allowed to intervene to prevent bankruptcy proceedings subsequently commenced in another state.—In re Boston, H. & E. R. Co., Case No. 1,677.

Where debtor in involuntary bankruptcy proceedings declines to defend in form, but is personally present, the court will hear suggestions from any creditor that an insufficient number of persons had joined in the petition.—Clinton v. Mayo, Case No. 2,899.

A creditor at large may suggest suspicious circumstances, upon which the bankruptcy court will direct an inquiry to ascertain whether the petition is not collusively and fraudulently prosecuted.—In re Hopkins, Case No. 6,684.

5. Pleadings and Depositions.

§ 106. In general.

A formal plea in bankruptcy is not necessary nor usual, and, if filed, will be treated as a motion.—In re Book, Case No. 1,637.

The construction and sufficiency of pleadings depend upon the rules of the court in which the petition is pending.—In re Sutherland, Case No. 13,638.

§ 107. Petition—Formal requisites.

In a case of involuntary bankruptcy, the name of the judge to whom the petition is addressed must be correctly stated, and when stated incorrectly it cannot be stricken out as surplusage, and permission to file such petition will be denied.—Anonymous, Case No. 459.

A petition will not be allowed to be filed where the writing is illegible.—Anonymous, Case No. 471.

§ 108. —— Allegations in general.

Facts relied upon to justify a warrant of arrest and seizure should not be set forth in the creditors' petition.—In re Hadley, Case No. 5,894.

A petition against a corporation which does not show that the corporation is either a moneyed, business, or commercial corporation is insufficient. Cases Nos. 10,558, 10,559, reversed.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561.

§ 109. —— Allegations as to number and amount of creditors.

Under Act June 22, 1874, a petitioner in proceedings commenced since December 1, 1873, where no adjudication is had, must file a sworn amendment to the petition, alleging that the petitioners represent the requisite number and amount of creditors.—In re Joliet Iron & Steel Co., Case No. 7,436.

The allegation as to the requisite number of creditors may be on information and belief.—In re Scammon, Case No. 12,427; Id. 12,430.

It is sufficient to state upon belief, without averring either knowledge or information, that the petitioning creditors constitute the required number, and that their debts constitute the required amount (Act 1867, § 39, as amended Act June 22, 1874, § 12).—In re Mann, Case No. 9,033; Perin & Gaff Mfg. Co. v. Peale, Id. 10,981.

The absence of an allegation as to the number and amount of the creditors joining in the petition is not supplied by an admission in writing of the debtor, not duly authenticated, and not shown to have been made in good faith.—In re Keeler, Case No. 7,638.

Where it appears that the claims of several of the petitioners are each less than $250 in amount, the petition is not thereby rendered invalid, where they have included in their petition the ordinary allegation that the petitioners constitute one-fourth in number, etc., and that the aggregate of their debts amounts to at least one-third of the provable debts, etc.—In re Hall, Case No. 5,923.

§ 110. —— Allegations as to indebtedness.

An allegation by petitioning creditors that there is due them by the alleged bankrupts $500 and upward is a sufficient statement of their debt to enable them to institute proceedings.—Ex parte Shouse, Case No. 12,815.

A rule of court requiring the petition to state the consideration or cause of indebtedness does not apply to a debt converted into a judgment.—In re Mott, Case No. 9,878b.

An allegation of the dissolution of a partnership between the petitioner and the alleged bankrupt, and of an indebtedness "for assets and money of said co-partnership," because of unsettled partnership transactions, will not warrant an adjudication.—Sigsby v. Willis, Case No. 12,849.

A petition alleging that the debtor owes a debt, but not alleging that it is owed to the petitioning creditor, is insufficient.—In re Western Savings & Trust Co., Case No. 17,442.

The nature of petitioners' debts should be so far stated in the petition that the court may see they are provable against the estate.—In re Hadley, Case No. 5,894.

An involuntary petition need not allege that petitioners' debts are unsecured, when it is alleged that they are provable debts.—In re Harmon, Case No. 6,078.

§ 111. —— Allegations as to acts of bankruptcy.

The petition in invitum must allege that the debtor was a trader when he committed the act of bankruptcy.—In re Bonnet, Case No. 1,632.

Fraudulent suspension and nonpayment need be averred only when the act of bankruptcy charged is that specified in Act 1867, § 39, cl. 9.—In re Nickodemus, Case No. 10,254.

A petition for adjudication of bankruptcy against a railroad company, on the ground that it had fraudulently stopped payment of its commercial paper, which fails to aver, in the terms of Act 1867, § 39, that the company was a "banker, broker, merchant, trader, manufacturer, or miner," is fatally defective; and, where

no proof of such facts is offered, the petition should be dismissed.—Alabama & C. R. Co. v. Jones, Case No. 126.

An averment that the debtor, "being a merchant, has fraudulently stopped payment," etc., is a sufficient averment that he is a merchant, under Act 1867, § 39, cl. 9.—In re Nickodemus, Case No. 10,254.

The intent of the debtor in suspending payment of commercial paper should be alleged in an involuntary petition as a fact.—In re Orem v. Harley, Case No. 10,567.

Under the amendatory act of 1874, a general allegation that a debtor, "being a merchant and trader, fraudulently stopped payment," is sufficient, although it is not alleged that the stoppage was of commercial paper, as such act covers the fraudulent stoppage of the payment of debts generally.—In re Hadley, Case No. 5,894.

A petition founded upon the suspension of payment of commercial paper need not negative all the circumstances which might excuse the nonpayment.—In re Wilson, Case No. 17,780.

An allegation in a petition that the debtor, being a trader, stopped payment of his commercial paper within a period of 14 days, is too indefinite to put the burden of proof upon the debtor concerning such alleged stoppage, and may be disregarded as immaterial.—In re Randall, Case No. 11,551.

The allegation of suspension of payment of commercial paper on a certain day, and that payment had been demanded at different times thereon, is equivalent to an allegation of demand on that day.—In re Chappel, Case No. 2,612.

When the act of bankruptcy charged is suspension of commercial paper, such paper should be described or identified.—Anonymous, Case No. 441.

A general reference in a voluntary petition to an assignment for creditors, where a copy is given, is sufficient.—In re Plimpton, Case No. 11,227.

The facts concerning an alleged act of bankruptcy should be stated in the petition with such certainty and detail as to inform the debtor of what he is required to make proof or explanation, as provided in Act 1867, § 41.—In re Randall, Case No. 11,551.

The allegations as to the existence of the debt or the commission of the acts of bankruptcy need not be made upon the personal knowledge of petitioner.—In re Muller, Case No. 9,912.

A petition which states that the debtor committed the alleged acts of bankruptcy, "within six calendar months next preceding the date thereof," and on or about a certain day therein, is sufficiently certain in this respect; and as to third persons, in collateral proceedings, the allegation is sufficient without the mention of a particular day.—In re Muller, Case No. 9,912.

In an involuntary petition a charge in the alternative that the debtor was insolvent, or in contemplation of bankruptcy, at the time of the act in question, is insufficient.—In re Hanibel, Case No. 6,023.

Where a preference is alleged, it is not necessary to state that such preference was in fraud of Act 1867 (14 Stat.), but the name of the person preferred should be set forth.—In re Hadley, Case No. 5,894.

§ 112. Depositions.

The allegations in proof of the act of bankruptcy should be made by separate deposition, and upon personal knowledge, and should make out a prima facie case.—In re Hadley, Case No. 5,894.

The depositions in proof of debt are intended to support the allegations of the petition, not to supply defects in them.—In re Hadley, Case No. 5,894.

The deposition of acts of bankruptcy, to authorize the making of an order to show cause, must be such as constitutes legal testimony.—In re Rosenfields, Case No. 12,061.

On a petition to have a person declared an involuntary bankrupt, an omission to file proof of an act of bankruptcy is substantial, and cannot be remedied.—In re Brown, Case No. 1,981.

A deposition to a proof of a claim in involuntary bankruptcy must show whether the claim is secured or unsecured.—Cunningham v. Cady, Case No. 3,480.

The depositions in support of an involuntary petition in reference to the debts of the petitioners must definitely describe the debts, and show that they were unsecured.—In re Harmon, Case No. 6,078.

In a petition in involuntary bankruptcy, an allegation that the debtors "have fraudulently stopped and suspended, and not resumed payment of their commercial paper for a period of 14 days," is insufficient, where no affidavit accompanied it to show that such stoppage was fraudulent.—In re Cone, Case No. 3,095.

A deposition to an act of bankruptcy, consisting of a fraudulent conveyance, must allege or show the fraudulent intent of the debtor in making the conveyance.—Cunningham v. Cady, Case No. 3,480.

A petition in involuntary bankruptcy will not be dismissed because the depositions in support thereof are defective, but the order to show cause will be set aside, and the petitioning creditor, on motion, will be allowed to file supplemental depositions, and a new order to show cause may be issued thereon.—Cunningham v. Cady, Case No. 3,480.

§ 113. Demurrer.

A demurrer is not the proper mode of objecting to irrelevant or immaterial allegations of a creditor's petition, or the mingling in one plea of distinct defenses, but such objection should be made by a motion to strike out.—In re Ouimette, Case No. 10,622.

The sufficiency of an averment in an involuntary petition as to the suspension of payment of commercial paper cannot be raised by demurrer.—In re Orem v. Harley, Case No. 10,567.

Where the overruling of a demurrer to an amended involuntary petition was without prejudice to an application for leave to answer on showing satisfactory cause, and such an application to answer is promptly and duly made, and the proposed answer is duly verified, and contains valid defenses, the leave to answer should be granted.—In re Morse, Case No. 9,851.

§ 114. Answer.

The debtor's answer to the creditor's petition, in order to entitle him to a hearing by the court, or a trial by jury, need not be in writing or verified. It is sufficient if he appear in court, and deny the truth of the facts set forth in the petition.—In re Heydette, Case No. 6,444. CONTRA, see In re Findlay, Case No. 4,789.

A paper simply denying the acts of bankruptcy charged, and demanding a trial by jury, is a proper response to a rule upon the debtor to show cause why he should not be declared a bankrupt.—Phelps v. Clasen, Case No. 11,074.

In a petition in an involuntary proceeding, the debt and the act of bankruptcy constitute the cause of action, and the defense thereto may go to either or both of these matters.—In re Ouimette, Case No. 10,622.

A debtor who has paid one creditor to the exclusion of others cannot be heard to say that he did not intend a preference. And, if his answer sets up no other defense than a denial of the intent, judgment may be given against him as upon failure to answer.—Silverman's Case, Case No. 12,855.

Pleadings in the district court in bankruptcy cases must be special, and a mere general denial of the intent with which an alleged act of bankruptcy is averred to have been done is insufficient; respondent must allege and prove with what intent he did the act.—Silverman's Case, Case No. 12,855.

Where a debtor denies the allegation of a creditor's petition respecting his insolvency, he has made a sufficient answer thereto, and a further statement as to the value of his property, as compared with the amount of his indebtedness, is surplusage and is immaterial.—In re Ouimette, Case No. 10,622.

Distinct defenses to a petition in an involuntary proceeding should be separately pleaded.—In re Ouimette, Case No. 10,622.

§ 115. Replication.

In involuntary proceedings no replication to the denial by the debtors, according to Form No. 61, is necessary to raise an issue as to the acts of bankruptcy alleged in the petition.—In re Dunham, Case No. 4,143.

§ 116. Signature and verification.

If neither the petition nor the deposition of the act of bankruptcy is signed by the petitioner, in person, the defect is fatal.—Hunt v. Pooke, Case No. 6,896.

In an involuntary proceeding the failure of petitioners to subscribe the affidavit to the petition is an incurable defect.—Moore v. Harley, Case No. 9,764.

Where several petitioners join in separate and distinct rights, a verification by or on behalf of each is required.—In re Simmons, Case No. 12,864.

A verification of the petition by a person whose name is omitted from the body is ineffectual as to him.—In re Rosenfields, Case No. 12,061.

A petition may be signed and sworn to by an attorney of the petitioning creditor duly authorized.—In re Raynor, Case No. 11,597.

The signing of a petition by an attorney who was not admitted to practice in the district court is no ground for dismissing the proceedings—In re O'Halloran, Case No. 10,463.

The signing and verification for all the signers may be done by one agent.—In re California Pac. R. Co., Case No. 2,315.

The authority under which an agent of a petitioning creditor acts need not be set forth, even though both signing and verification have been done by him.—In re California Pac. R. Co., Case No. 2,315.

Where the petition is signed and verified by an agent, proof of his agency, or of express authority, is necessary.—In re Rosenfields, Case No. 12,061.

Where a petition in bankruptcy is verified by attorney, he must show his authority for making such verification.—In re Sargent, Case No. 12,361.

A petition in an involuntary proceeding is defective in not setting out the special authority of the president of a bank, who is one of the petitioning creditors, to sign and verify the same on behalf of the bank, his general authority as an officer not being sufficient.—Roche v. Fox, Case No. 11,974.

Supplementary proof may be received nunc pro tunc, in the discretion of the court, to establish the authority of the agent to sign and verify the petition.—In re Rosenfields, Case No. 12.061.

Where a petition is verified by an attorney, the nonresidence of his principal should be directly alleged, and not by way of recital.—In re Hadley, Case No. 5,894.

Where the petitioners, constituting one-fourth in number and one-third in value of the creditors, are less than five, it is unnecessary for a person verifying the petition as agent to state the residence of his principals. (Act June 22, 1874, § 12.)—In re Simmons, Case No. 12,864.

Where a petition is filed by a corporation it may be verified by an agent who is not an officer thereof, but the authority of such agent must be established, and it is not sufficient that it is stated by the way of recital following his name.—In re Hanibel, Case No. 6,023.

Where, in an involuntary proceeding under Act 1867, as amended by Act June 22, 1874, it is stated in the petition upon belief, without averring either knowledge or information, that the required creditors in number and amount have joined, the oath to such petition may be in the form prescribed in Form No. 54.—In re Mann, Case No. 9,033.

The debtor's answer need not be verified.—In re Heydette, Case No. 6,444; In re Gebhardt, Id. 5,294. CONTRA, see In re Findlay, Case No. 4,789; In re Hymes, Id. 6,986.

A statement of creditors filed by the debtor on denial of bankruptcy must be verified. (Act June 22, 1874.)—In re Hymes, Case No. 6,986; In re Steinman, Id. 13,357.

Objections by the debtor to the verification of the petition are waived by taking issue thereon and demanding a jury trial.—In re McNaughton, Case No. 8,912.

The defect in the verification is waived by the debtor when he calls a meeting for composition; and, in the absence of fraud, the dissenting creditors cannot take advantage of it.—Ex parte Jewett, Case No. 7,303.

§ 117. Issues and proof.

Evidence of acts of bankruptcy must be confined to those alleged in the petition.—Ex parte Potts, Case No. 11,344; Ex parte Shouse, Id. 12,815.

A refusal to pay commercial paper at a date prior to that stated in the petition cannot be given in evidence.—In re Sykes, Case No. 13,708.

Petitioners must support their allegations by proof where the facts charged are formally denied by answer. (Act 1841.)—In re Scudder, Case No. 12,563.

Under the issue made by the denial of bankruptcy, the debtor may prove that, at the time of the trial, he does not owe the amounts necessary to give the court jurisdiction.—In re Skelley, Case No. 12,921.

The creditor will be compelled to make out his case as in any other issue.—Brock v. Hoppock, Case No. 1,912.

Act 1867, § 41, allows the debtor to disprove on the trial all the material allegations of the petition.—In re Skelley, Case No. 12,921.

Where it is alleged in an involuntary petition that a claim is due, and the proof shows that it was not due, this is not a fatal variance, as it was not necessary to aver that the demand was due.—Linn v. Smith, Case No. 8,375.

When two distinct matters are alleged conjunctively, each of which contains a good cause for the debtor to be declared a bankrupt, it is enough if either of them be satisfactorily proved.—In re Drummond, Case No. 4,093.

Where the acts of bankruptcy are denied, though insolvency is admitted, a decree will not be entered until an act of bankruptcy alleged is proven.—In re Safe Deposit & Savings Inst., Case No. 12,211.

§ 118. Defects and objections.

The corporation, after appearing and answering, cannot afterwards object that the petition does not allege that it is a moneyed, business,

or commercial corporation. Case No. 10,559, reversed.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561.

§ 119. Amendments—Power to allow.

The bankruptcy court under Act 1867, on trial before a jury as to the facts of bankruptcy may permit amendment of the creditor's petition.—In re Bininger, Case No. 1,420.

The bankruptcy court may allow amendments where defective averments in the petition resulted from misapprehension of counsel.—In re Hill, Case No. 6,485.

The bankruptcy court has jurisdiction when a petition is filed, notwithstanding the insufficiency of the verification, and therefore power to allow the same to be amended.—In re Simmons, Case No. 12,864.

The allegation as to number and amount of creditors is an allegation of a jurisdictional fact, and, where the petition does not clearly show that the proper proportion has joined, the court has not jurisdiction, and it is not subject to amendment.—In re Rosenfields, Case No. 12,061. CONTRA, see Ex parte Jewett, Case No. 7,303.

A petition which shows, in contradiction of its general allegation, that the provable debts of some of the petitioners do not amount to $250, is demurrable, but the court may allow an amendment to remedy the defect.—Roche v. Fox, Case No. 11,974.

Where, in involuntary bankruptcy, the affidavits to the petition, or the depositions as to indebtedness and acts of bankruptcy, are insufficient, the court has power to allow supplemental affidavits or proofs to be filed.—In re Hanibel, Case No. 6,023.

In an involuntary proceeding the deposition of a witness to acts of bankruptcy cannot be amended, as it is the proof upon which the rule to show cause issues, and without which the whole proceeding is defective.—May v. Harper, Case No. 9,333.

§ 120. —— Objections.

A creditor who has joined in the petition cannot object to an amendment thereof which is necessary to the prosecution of the same to final effect.—In re Sargent, Case No. 12,361.

§ 121. —— Grounds.

An affidavit to an involuntary petition, being defective in form, may, on motion, be amended so as to conform to the law.—In re Sargent, Case No. 12,361.

A substantial amendment nunc pro tunc going to the foundation of the proceeding, under Act 1867, § 39, will not be allowed.—In re Craft, Case No. 3,317.

In cases pending at the time of the amendment of June 22, 1874, the petitions will not be dismissed because they do not contain the allegations required by the amendment, but the petitioners must insert the allegations as to number and amount of petitioners by amendment to the petition.—In re Scammon, Case No. 12,427; Id. 12,430; In re Scull, Id. 12,568.

Petitioners in an involuntary proceeding will not be allowed to amend the petition, to show jurisdiction, after an unexcused delay of nearly a year.—In re Freudenfels, Case No. 5,112a.

An amendment to the petition will not be allowed as to jurisdictional facts not required by law.—In re Wood, Case No. 17,935.

An amendment to the petition in involuntary proceedings will be allowed to cover the case made by the evidence where there is no surprise on the debtor.—In re Craft, Case No. 3,316.

The petitioners in an involuntary proceeding will not be allowed to amend their petition so as to allege new acts of bankruptcy.—Stern v. Schonfield, Case No. 13,377.

In an involuntary proceeding leave will not be granted to amend the petition so as to set up new causes or acts of bankruptcy, unless the debtor consents thereto.—In re Leonard, Case No. 8,255.

The bankruptcy court will not exercise its power of amendment, where the amendments proposed will introduce into the petition entirely new acts of bankruptcy, founded on facts not stated or referred to in the original petition.—Reed v. Cowley, Case No. 11,644.

Where the proofs disclose acts of bankruptcy not averred in the petition of the creditor the petition may be amended so as to conform to the proofs.—In re Gallinger, Case No. 5,202.

Where, in an involuntary proceeding, the petition fails to allege that the suspension of payment is fraudulent, leave will be granted to amend it in this particular.—In re Jersey City Window-Glass Co., Case No. 7,292.

Where the name of a creditor is stated in the petition, asserting a claim by a proper averment, but omitting the amount, the claim may be amended by adding the amount, if done in good faith.—In re Blair, Case No. 1,481.

Where it appears that the claims of creditors alleged to exceed $250 each do not amount to such sum, the petition is defective, but may be amended to conform to the facts.—In re McKibben, Case No. 8,859.

Where a petition avers that acts were committed by bankrupt in contemplation of bankruptcy and insolvency, and evidence of insolvency only is given, the petition may be amended accordingly.—In re Haughton, Case No. 6,223.

The petition in involuntary proceedings may be amended nunc pro tunc by averring that the act was done by a debtor "while insolvent or in contemplation of insolvency," where such facts are shown in the petition, and by evidence to which no objection is made by the debtor. Case No. 3,316 affirmed.—In re Craft, Case No. 3,317.

An amended petition in an involuntary proceeding cannot include a note indorsed by the debtor which did not fall due until after the original petition was filed.—In re Morse, Case No. 9,851.

An amended petition, filed by leave of court after the petitioner had assigned his demand, will be dismissed.—In re Western Savings & Trust Co., Case No. 17,442.

§ 122. —— Effect.

Amendments to a petition relate back to the time of the filing of the original petition, and have the same force and effect as though included in the petition itself.—Sherman v. International Bank, Case No. 12,765.

An amendment of a petition in bankruptcy to bring it within the amendment of June 22, 1874, is retroactive, and gives effect to action of the court taken on the original petition.—In re Williams, Case No. 17,700.

6. PROCEDURE AND ADJUDICATION.

§ 123. Service of order to show cause.

Where a corporation is chartered in four states, and in proceedings in bankruptcy against it in one of the states an order to show cause is served by delivering a copy to the superintendent of the company in another one of said states, such service is not sufficient, under Act 1867, § 40, providing that "if such debtor cannot be found," or his place of residence ascertained, service shall be made by publication, for the fact that it was chartered in four states did not make it one corporate body on which service could be made at its residence in any one of those states.—Alabama & C. R. Co. v. Jones, Case No. 126.

Service of the petition and order to show cause is made upon a corporation under Act 1867, which provides that service shall be made at the "usual place of abode" of the debtor or by delivering a copy to its principal officers at its principal place of business.—In re California Pac. R. Co., Case No. 2,315.

Jurisdiction of an insolvent banking corporation in the hands of a receiver of a state court is obtained by service of an order to show cause on its cashier on the day before a judgment of dissolution is entered.—Platt v. Archer, Case No. 11,213.

Service of an order to show cause upon the cashier of an insolvent banking corporation, who has given the keys of the bank to a receiver of its property appointed by a state court, and had become his clerk, on a salary, and ceased to act as cashier, but who is not displaced from his official relation to the corporation as cashier, is sufficient to give the district jurisdiction.—Platt v. Archer, Case No. 11,213.

Where an insolvent corporation has been dissolved, and a receiver appointed in a proceeding brought by the attorney general, in an involuntary proceeding against it, service of the order to show cause may be made by publication, as such case is one where the debtor cannot be found. — In re Washington Marine Ins. Co., Case No. 17,246.

§ 124. Default.

The register has power to make a valid adjudication in an involuntary case where the alleged bankrupt has made default.—In re De Ford, Case No. 3,744.

A motion to set aside the debtor's default on the ground that petitioner's debt, being based upon the sale of intoxicating liquor, was not provable, is too late where no excuse is shown for his default or delay.—In re Neilson, Case No. 10,090.

§ 125. Adjournment of hearings.

By the consent of parties, on the return day of an order to show cause in an involuntary proceeding, when an adjournment is applied for, it may be ordered that the adjourned day is to be with like effects, in all respects, as if such adjourned day were the return day of the order.—In re Pupke, Case No. 11,468.

§ 126. Termination of proceedings—In general.

The bankrupt cannot acquire a right to have involuntary proceedings dismissed by voluntarily surrendering himself to a sheriff, who has an order for his arrest, but with instructions not to proceed under it.—In re Merkle, Case No. 9,458.

In proceedings in invitum, the want of an adjournment to a day certain, after issue joined as to acts of bankruptcy, does not terminate the proceedings.—In re Buchanan, Case No. 2,073.

Proceedings for adjudication of bankruptcy in invitum can be discontinued only by an order of the bankruptcy court on special application.—In re Buchanan, Case No. 2,073.

The bankrupt court has full equitable discretion, and can allow a case to be withdrawn if without prejudice to any party.—In re Indianapolis, C. & L. R. Co., Case No. 7,023.

§ 127. —— Death of debtor.

The proceedings abate by the death of the debtor between the time of serving the rule to show cause and the adjudication.—Frazier v. McDonald, Case No. 5,073.

A proceeding in bankruptcy will not be discontinued by the death of the bankrupt between the time of the entry of the order of adjudication and the physical "issuing of the warrant," under Act 1867, § 12.—In re Litchfield, Case No. 8,385.

After a petition has been filed against partners, the decease of one partner prior to any adjudication upon the question of bankruptcy is not legal cause for dismissing the petition.—Hunt v. Pooke, Case No. 6,896.

See, also, post, § 538.

§ 128. —— Withdrawal by creditor.

After an adjudication has been made, it is too late to make a motion to dismiss the proceedings and settle with the debtor.—In re Sherburne, Case No. 12,758.

The petitioning creditor may discontinue proceedings, and have his petition dismissed before adjudication, without giving notice to other creditors.—In re Camden Rolling-Mill Co., Case No. 2,338.

A motion, on the return day of the order to show cause, by the petitioning creditor, on receiving payment, to dismiss the petition, will be denied where another creditor has intervened and prays that the cause may proceed.—In re Mendenhall, Case No. 9,424.

The proceedings will be dismissed before the choice of an assignee when this is desired by the petitioning creditor, the bankrupt, and all creditors who have proved their debts.—In re Miller, Case No. 9,553.

A bankruptcy court will not set aside a stipulation discontinuing the bankruptcy proceedings given upon a release procured by fraud until relief is sought in a court having jurisdiction to set aside the release for fraud, or to award damages.—In re Bieler, Case No. 1,394.

§ 129. —— Dismissal.

A petition in involuntary bankruptcy will not be dismissed on the ground that a suit at law has been commenced and prosecuted to judgment by the petitioner against the debtor since the filing of the petition.—Van Kleeck v. Thurber, Case No. 16,861.

If the petitioner does not appear before the register at the time fixed in the order of reference, or within a reasonable time thereafter, excusing his delay, the petition may be dismissed.—In re Hatcher, Case No. 6,210.

When, on the day to which the proceedings for a hearing on the petition were adjourned, the petitioning creditor does not "appear and proceed," and the understanding with the debtor is that such failure to appear shall be equivalent to a dismissal, and no other creditor appears to be substituted, under Act 1867, § 42, the proceedings are at an end.—In re Camden Rolling-Mill Co., Case No. 2,338.

The other creditors must file a new petition, or appear on the adjourned day and petition to be substituted, under Act 1867, § 42.—In re Camden Rolling-Mill Co., Case No. 2,338.

The bankruptcy court will dismiss proceedings on petition filed by one member of a firm solely for the purpose of vexing and harassing the other partner.—In re Hamlin, Case No. 5,994.

The bankruptcy court considers a petition in bankruptcy as the joint act of all the petitioners, and willful falsehood in one petitioner's verification will cause a summary dismissal of the petition as the fraud of all, and an injunction issued therein will be vacated, and no co-petitioner's prayer for an amendment will be heard.—In re Keiler, Case No. 7,647.

A bankrupt cannot acquire the right to have involuntary proceedings dismissed, by surrendering himself to an officer who has an order for his arrest, issued by a state court, but with instructions not to proceed thereunder.—In re Merkle, Case No. 9,458.

Where the only debt on which an adjudication may be entered is that of the petitioner, the bankrupt may have the petition dismissed

on its payment, with costs.—In re Sheehan, Case No. 12,738.

Where a bankrupt can settle all but a few contested claims, the bankruptcy court may, on consent of creditors, dismiss the proceedings on security being given to the nonassenting creditors.—In re Great Western Tel. Co., Case No. 5,739.

Where stockholders of bankrupt railroad purchase all outstanding floating indebtedness save minor claims held by petitioners, they may have proceedings dismissed on securing payment to them, as the bankruptcy court has full equitable discretion, and can allow a case to be withdrawn if without injury to any party.—In re Indianapolis, C. & L. R. Co., Case No. 7,023.

§ 130. Evidence—Presumptions and burden of proof.

Neither an order to show cause, nor an order of seizure, injunction, or arrest, will be granted where the petitioner does not make a prima facie case.—In re Leonard, Case No. 8,255.

In a case of involuntary bankruptcy, the burden of proof is on the petitioning creditor. Case No. 10,559 reversed.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561.

The burden is upon the debtor to disprove the facts set forth in the petition in an involuntary proceeding for an adjudication. (Act 1867, § 41.)—In re Price, Case No. 11,411.

Full and complete proof by the petitioning creditor of insolvency is not required, but proof tending to show insolvency casts the burden on the debtor to explain the evidence. Case No. 10,559 reversed.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,561.

The burden of proving that the debtor's submission to judgment, etc., was with intent to give a prohibited preference, is on the petitioning creditor.—In re King, Case No. 7,783.

A farmer is not prima facie insolvent because unable to pay his debts in the ordinary course of business, and the burden of proof of insolvency is on petitioner. (Act 1867.)—Miller v. Keys, Case No. 9,578.

The giving of a confession of judgment does not of itself raise a presumption of insolvency.—In re Dibblee, Case No. 3,884.

§ 131. —— Competency and sufficiency.

On the trial of the issues in involuntary bankruptcy proceedings, it is proper to admit evidence as to negotiations between the petitioning creditors and the respondents, preceding the consummation of a compromise, for the purpose of ascertaining whether or not an arrangement was made.—In re Jelsh, Case No. 7,257.

Letters written by a debtor to a third person, admitting the payment of a claim, interposed by attaching creditors in favor of another alleged creditor to defeat adjudication, are admissible in evidence in a contest upon such claim between the attaching and petitioning creditors.—In re Hatje, Case No. 6,215.

Where it is doubtful whether or not the intention of a transfer of property was such as to make it an act of bankruptcy, evidence will be received to prove the true circumstances of the whole transaction.—Ex parte Potts, Case No. 11,344.

The intent to prefer is to be proven as a fact by direct evidence, or as the necessary and certain consequence of other facts clearly proved.—Morgan v. Mastick, Case No. 9,803.

The admission of a fact from which a fraudulent intent will be inferred will be given full effect, though it be coupled with a denial of such fraudulent intent.—In re Sutherland, Case No. 13,638.

The oath of the petitioning creditor to his debt, without further proof, is not sufficient, where the debtor offers prima facie evidence that it is not due.—Ex parte Foster, Case No. 4,959.

Where the only proof of an act of bankruptcy is the statement of the bankrupt, such statement must be accepted, in its entirety, as true.—In re Franklin, Case No. 5,053.

Under Act 1841, the proof of mere insolvency of the partners, without evidence of any fraudulent acts on their part, is not sufficient to sustain a petition against them in an involuntary proceeding.—Ex parte Hull, Case No. 6,856.

§ 132. —— Production of books and papers.

The district court has power to order the production of books and papers at the summary hearing on the return day of the order to show cause why such books and papers should not be produced.—In re Mendenhall, Case No. 9,423.

§ 133. Trial and new trial.

A demand for a trial by jury, where an application for the benefit of Act 1841 is dismissed, must be made at the term in which the decision is made.—In re Hunter, Case No. 6,902.

In a proceeding in invitum, where the insolvency is denied by the debtor, a jury trial will be granted if demanded, but not in a case where the debtor denies only the acts of bankruptcy alleged in the petition.—In re Grady, Case No. 5,654.

Where the debtor, in cases of involuntary bankruptcy, does not appear on return day of rule, he cannot demand a trial of issues by a jury.—In re Gebhardt, Case No. 5,294.

Where a debtor does not demand jury on return day after continuance he cannot afterwards demand jury. (Act 1867, § 41.)—Clinton v. Mayo, Case No. 2,899.

When the existence of the debt is denied, and the petitioning creditor desires a trial by jury, the bankruptcy court may grant it upon a proper issue framed for the purpose of ascertaining whether the debt is due or not; but, if the petitioning creditor does not desire it, the court may or may not, in its own discretion, order a trial by jury.—Ex parte Foster, Case No. 4,959.

The bankruptcy court has power to summon a jury to try the issue of bankruptcy during the vacation of the district court proper.—Lehman v. Strassberger, Case No. 8,216.

The bankruptcy court may in its discretion issue a special venire and impanel a jury to try the issue at any time, without waiting for a regular term.—In re Findlay, Case No. 4,789.

In an involuntary proceeding the respondents have the right to open and close the case on a trial on the issue of bankruptcy.—In re Jelsh, Case No. 7,257.

In an involuntary proceeding, if the nature of the debt is set forth in the petition, which avers that the debt is provable under Act 1867, the question whether it is so provable is to be determined as a question of law, and not of fact.—Sigsby v. Willis, Case No. 12,849.

A proceeding to have a debtor adjudged bankrupt is a civil, and not a criminal, proceeding; and the federal district court has the same power over verdicts rendered in bankruptcy cases, whether for or against the debtor, as courts of common law, and may, on proper cause shown, set them aside and order a new trial.—In re Corse, Case No. 3,254; In re De Forrest, Id. 3,745.

§ 134. Adjudication—Form and entry.

In making an adjudication, the bankruptcy court need not formally determine whether the

requisite proportion of creditors in number and amount have joined in the petition, where no direct issue is made on this point by the pleadings.—Lastrapes v. Blanc, Case No. 8,100.

The entry of an order constitutes the adjudication. A mere memorandum of the judge on the petition directing an order to be entered does not complete it; and the order cannot be entered nunc pro tunc where the amendatory act of June 22, 1874, imposing new conditions, has meanwhile taken effect.—In re Hill, Case No. 6,484.

§ 135. —— Persons and matters concluded.

An adjudication in bankruptcy is in the nature of a judgment in rem, and binding upon all the world.—In re Wallace, Case No. 17,094.

A creditor not appearing to the petition in bankruptcy is not estopped from denying the acts of bankruptcy charged so far as they affect him with notice.—In re Thomas, Case No. 13,891.

Where the record of the bankruptcy on its face shows jurisdiction, the decree adjudicating a debtor to be a bankrupt is conclusive as to the jurisdiction of the court in all collateral proceedings.—In re Ives, Case No. 7,115.

An adjudication of bankruptcy, had after due service by publication, is final, and will not be set aside on petition of the bankrupt and creditors disputing the allegations of the petition in bankruptcy, when no fraud or collusion is shown.—In re McKinley, Case No. 8,864.

The judgment of the bankruptcy court that the requisite number and amount of creditors have petitioned is final, and the matters so adjudged are not thereafter re-examinable, except in cases of fraud and imposition practiced on the court.—In re Duncan, Case No. 4,131; In re Funkenstein, Id. 5,158.

While an adjudication in bankruptcy stands unrevoked, all inquiry by a creditor who claims adversely to the assignee into the validity of the debt of the petitioning creditor in the involuntary proceedings is precluded.—In re Fallon, Case No. 4,628.

It is too late, after parties have been declared bankrupts as partners, to allow objections to be filed disputing their being partners at the time of their application.—In re Gilbert, Case No. 5,411.

§ 136. —— Vacating and setting aside.

An attaching creditor may move to set aside an adjudication of bankruptcy, though no party to the bankruptcy proceedings.—In re Bergeron. Case No. 1,342.

Mortgagees in a chattel mortgage given by an infant may petition to vacate an adjudication in bankruptcy against the mortgagor, made in proceedings on a petition filed before the mortgagor came of age.—In re Derby, Case No. 3,815.

Where an adjudication is had, and an assignee regularly appointed, the proceedings will not be set aside on the application of a creditor showing a prior filing of the petition against the bankrupt in another district.—In re Harris, Case No. 6,111.

An adjudication entered upon a confession of the acts of bankruptcy charged cannot be set aside after the death of the bankrupt on the application of a creditor who has proved his debt.—In re Thomas, Case No. 13,891.

That the bankrupt caused an involuntary petition to be prepared and presented to creditors, who signed and verified it without inquiry, shows a prima facie case of collusion, warranting a reference to take proofs, under a petition to set aside the adjudication.—In re Lalor, Case No. 8,001.

Where the adjudication of a corporation is made upon the waiver of important rights by its attorney, and the stockholders do not move to have the adjudication set aside until six months after it was made, and a large amount of the assets have been collected for distribution, and until they are themselves sued for their liability on unpaid stock, they are chargeable with laches, and their application will be denied.—In re Republic Ins. Co., Case No. 11,706; Leiter v. Republic Fire Ins. Co., Id. 8,227.

The proceedings may be set aside on motion, if made within a reasonable time, where an adjudication is had upon a waiver of important rights of the alleged bankrupt made by his attorney. Leiter v. Republic Fire Ins. Co., Case No. 8,227, affirmed.—In re Republic Ins. Co., Case No. 11,706.

Where a creditor seeks to vacate an adjudication he must make his application with due diligence on being informed of the facts, and where a creditor who opposed the bankrupt's discharge delays for nearly a year to apply for an order vacating the adjudication he is chargeable with laches.—In re Meade, Case No. 9,370.

There is no presumption that a creditor who is a party to the proceedings knows of the fraud of the bankrupt in procuring the petition in invitum to be signed by creditors, etc., and a delay by such creditor of two months and a half, after discovering that the proceedings were instituted by collusion, is not necessarily laches, which will prevent him from moving to set aside the adjudication.—In re Lalor, Case No. 8,001.

A default and an adjudication in involuntary proceedings will be set aside on petition of the bankrupt showing that he was non compos mentis at the time the alleged debts were contracted and the proceedings instituted.—In re Murphy, Case No. 9,946.

The fact that the debtors solicited creditors to join in the petition for involuntary bankruptcy furnishes no ground for setting aside an adjudication.—In re Duncan, Case No. 4,131.

It is no ground for setting aside the adjudication in involuntary bankruptcy that in some parts of the petition, owing to a clerical error, the amount of the debts was not filled in.—In re Duncan, Case No. 4,131.

The fact that the debtors, who have admitted by affidavit the acts of bankruptcy alleged, and that the requisite creditors have joined in the petition, may be able to obtain a discharge in the proceedings without paying any percentage on their debts, or proving the assent of creditors, is no ground for setting aside the adjudication.—In re Duncan, Case No. 4,131.

An adjudication will not be set aside after default merely to permit the bankrupt to contest the allegations in the petition as to the number and amount of petitioning creditors.—In re Le Favour, Case No. 8,208.

There is no legal fraud in the bankrupt's procuring an adjudication on involuntary proceedings to avoid the necessity of procuring the assent of the necessary number of creditors in the case of a deficiency of assets, unless it should be followed by a discharge which could not be had in voluntary proceedings.—In re Matot, Case No. 9,282.

The order of adjudication will be vacated upon proof being made of the assent of all known creditors that it may be vacated and publication of the notice of the application for annulment.—In re Magee, Case No. 8,941.

An application to set aside an adjudication on the ground of a prior agreement of compromise with the petitioning creditor, will be denied, where it is doubtful whether such agree-

ment was not made for benefit of all the creditors.—In re Bush, Case No. 2,222.

Notice must be given to the bankrupt of an application to annul the adjudication in an involuntary proceeding, as the bankrupt has an interest in the continuance of the proceeding which may result in his discharge.—In re Bush, Case No. 2,222.

The question of want of jurisdiction, because of the insufficiency of the petition, cannot be raised on an application to set aside the adjudication on that ground.—In re Penn, Case No. 10,926.

§ 137. —— Conclusiveness and effect in general.

Involuntary proceedings cannot be impeached by the fact that the petition was delayed until the assignee was barred from attacking certain transfers.—In re Duncan, Case No. 4,131.

In the absence of all fraud the original adjudication must be considered as final and conclusive upon all the creditors, and cannot be disputed upon the question of granting a discharge.—In re Ordway, Case No. 10,552.

The adjudication of a firm in one district does not prevent a subsequent adjudication in another district of a firm in part composed of the same persons. Case No. 7,306 affirmed.—In re Jewett, Case No. 7,307.

The rights of the parties are fixed at the date of adjudication in bankruptcy.—In re Kerr, Case No. 7,729.

An adjudication in bankruptcy relates back to the filing of the original petition, and not to the time of an ancillary petition filed to correct an irregularity, and the levy after the filing of the original petition gives no lien.—In re Bear, Case No. 1,177.

Objections which might have been urged to show that a decree ought not to have been granted will be considered waived after the court have declared the petitioner a bankrupt.—In re Banks, Case No. 958.

The verification of a petition before a notary public is irregular, but does not affect the jurisdiction, and is cured by the adjudication.—In re Getchell, Case No. 5,371.

The absence of depositions from the files is a matter of practice and regularity, and not of jurisdiction, and is cured by the adjudication.—In re Getchell, Case No. 5,371.

An order adjudicating a debtor a bankrupt, made after the return day, but upon a petition of a creditor, and after notice to and appearance by the debtor, though it may be irregular, is not void, and cannot be collaterally assailed by his assignee under a previous voluntary assignment.—Hobson v. Markson, Case No. 6,555.

An adjudication without the appointment of an assignee and the issue of a warrant does not devest the bankrupt of the title to his property, and a mortgage given on a compromise with his creditors is valid as against the assignee, in subsequent proceedings in bankruptcy.—Robinson v. Hall, Case No. 11,952.

The verdict on a question as to whether an act of bankruptcy has been committed will not affect the question of the right to recover back the property transferred, or a right to a discharge.—In re Dibblee, Case No. 3,884; Harmanson v. Bain, Id. 6,072.

An adjudication of bankruptcy, in invitum, is not conclusive evidence as against such execution creditor as to the allegations in the petition for adjudication, found to be true by such decree.—In re Dunkle, Case No. 4,160.

§ 138. Collusive proceedings.

The motive of petitioners and of one of debtors co-operating will not be considered where the acts of bankruptcy are established.—In re Bininger, Case No. 1,420.

A bankrupt who procures a fraudulent petition to be filed by his creditors with intent to procure a discharge, which he could not obtain by voluntary proceedings, is in contempt of court in every movement based thereon.—In re Lalor, Case No. 8,001.

(D) WARRANT AND EXECUTION THEREOF.

§ 139. Provisional warrant — When granted generally.

The warrant provided for in Act 1867, § 40, may issue against the person and property of the debtor, or either of them.—In re Muller, Case No. 9,912.

§ 140. —— Seizure of property.

An order to show cause is not a preliminary requisite to the issuing of an injunction and warrant.—In re Muller, Case No. 9,912.

Injunctions and warrants may be allowed and issued under section 40 (Act 1867), without notice to the adverse party.—In re Muller, Case No. 9,912.

The bankruptcy court, in an involuntary proceeding, has no authority, under a provisional warrant, to order the seizure of property from the possession of a person to whom the debtor transferred it before the filing of the petition.—In re Harthill, Case No. 6,161; In re Holland, Id. 6,605; In re Manahan, Id. 9,003.

Where property is taken on a provisional warrant from the custody of a voluntary assignee, it will be restored to him on petition, only on condition of his releasing the marshal from all damages, and his agreeing not to dispose of the same except with the approval of the bankrupt court.—In re Manahan, Case No. 9,003.

Where the marshal in bankruptcy proceedings has seized property that the bankrupt had conveyed, and the grantee of such property appeared for the purpose of contesting the warrant for such seizure, he does not thereby become a party to the proceedings, so that the validity can be tried in the bankruptcy proceeding.—In re Harthill, Case No. 6,161.

Where a surviving partner is adjudged bankrupt on an act of bankruptcy committed in administering the partnership assets, the messenger will take possession of the joint assets in his hands, and also of his separate property.—In re Stevens, Case No. 13,393.

A finding by a jury that the debtor committed an act of bankruptcy in transferring certain property to a creditor authorizes the marshal to take possession thereof.—In re Miller, Case No. 9,551.

The marshal, under a warrant issued under Act 1867, § 40, may take possession of the bankrupt's property, wherever found, and, if indemnified, he has no option.—In re Briggs, Case No. 1,869.

The marshal is responsible for seizing property not belonging to the bankrupt, and the petitioning creditors who have indemnified him are bound to defend a suit by the claimant, and the bankruptcy court will not enjoin such suit at the instance of the assignee in bankruptcy who claims the property.—In re Marks, Case No. 9,095.

Under a warrant to take possession of the property of a debtor, the messenger is authorized to take such property in whosesoever hands he may find it; and if, by mistake or otherwise, he should take property not belonging to the debtor, it is no ground for discharging the warrant or vacating the order for its allowance, but the party aggrieved by such wrongful seizure has his

remedy against the officer making it.—In re Muller, Case No. 9,912.

A provisional warrant in voluntary proceedings, on proof by affidavit of its necessity, will not be vacated, where such facts are not disproved, and it appears that the purpose of the bankrupts in making the motion to vacate is to deprive the marshal of his fees.—In re Clark, Case No. 2,811.

The taking possession by a marshal, under warrant in bankruptcy, of alleged property of a bankrupt, of which plaintiffs in replevin had obtained possession, is not a case of conflict between the marshal and the officers of the state court, and summary relief will not be granted.—In re Davidson, Case No. 3,598.

The federal circuit court has power to enjoin the prosecution of an action of trover in a state court against the marshal, for seizing the property of a third person under his warrant in bankruptcy.—Hudson v. Schwab, Case No. 6,835.

§ 141. —— Forthcoming bonds.

On breach of the condition of a bond given, pursuant to an order of the bankruptcy court, for the forthcoming of property, which the bankrupt is allowed to retain, the court has jurisdiction to proceed against the sureties by summary petition.—Case No. 9,353 affirmed.—In re Mayo, Case No. 9,353a.

Such a proceeding is not barred by the fact that the assignee previously brought a suit at law on the bond, resulting in a verdict for defendant, which was set aside and a new trial granted. Case No. 9,353 affirmed.—In re Mayo, Case No. 9,353a.

Where a forthcoming bond has been given for the release of goods under seizure, the bankruptcy court may summarily order the goods, or the value thereof, to be brought into court by the parties to the bond.—Rosenbaum v. Garnett, Case No. 12,053.

§ 142. —— Arrest of debtor and bail.

A provisional warrant will be granted where the bankrupt remained in possession of his assets, and disposed of a portion of them, and expressed an intention of going abroad to adjust his foreign accounts.—In re Hale, Case No. 5,911.

On application for a provisional warrant and order of arrest of the debtor under Act 1867, § 40, a separate petition, supported by affidavits of persons having knowledge of the facts, should be filed, where the facts are not stated in the petition of the petitioner's own knowledge.—In re McKibben, Case No. 8,859.

An action of debt lies upon a bond given by a bankrupt conditioned for his appearance in court from day to day agreeable to its order.—Marble v. Fulton, Case No. 9,059.

What amounts to a breach of the condition of such bond, and the damages recoverable thereon.—Marble v. Fulton, Case No. 9,059.

In the assessment of damages in a suit on a bail bond in bankruptcy proceedings, the pleadings are not regarded.—Marble v. Fulton, Case No. 9,059.

A charging in execution *held* to relate back to a prior surrender in exoneration of bail on arrest on mesne process.—Hazleton v. Valentine, Case No. 6,287.

A bankrupt, surrendered by his bail, during the time allowed for his examination, will not be committed in execution under the bankrupt law of 1800.—Foxall v. Levi, Case No. 5,015.

The court will not commit a bankrupt for want of bail who has surrendered to the commissioners, and whose examination is not closed, although the 42 days have expired.—Lingan v. Bayley, Case No. 8,370.

§ 143. Notices—Form.

The notices published and served on the creditors of a bankrupt by the marshal are not defective for an immaterial variance between them and the notices contained in the warrant, when such variance is not calculated to mislead.—In re Pulver, Case No. 11,466.

It is not a valid objection to proceedings that in the notices to the creditors objecting there is a variance in the middle letter of the bankrupt's name, provided they have not been misled thereby.—In re Hill, Case No. 6,481.

A notice in bankruptcy addressed to "Levley, New York," is insufficient as notice to Lawrence J. Levley, residing in New York.—In re Archenbrown, Case No. 504.

§ 144. —— Service.

Under rule 5 of the general orders in bankruptcy, a register may order publication of notice to creditors in newspapers out of the district, and he is not prohibited from doing so by rules 5 and 21 of the district court for the Southern district of New York.—In re Robinson, Case No. 11,936.

The direction in the warrant for service, "either by mail or personally," does not confer discretionary power upon the marshal, who must serve all by mail, unless the warrant directs him to serve personally certain specified persons.—Anonymous, Case No. 458.

Notices of the first meeting of creditors must be served, and the publication completed, before the commencement of the 10 days immediately preceding the return day of the warrant. (Act 1867, § 11.)—In re Devlin, Case No. 3,841.

The clause in Act 1867, § 11, concerning service of notice on creditors by mail, refers to creditors residing out of the United States as well as those residing within.—In re Heys, Case No. 6,447.

Publication "once a week for three successive weeks" means publication once in every seven days, the interval between the last publication and any proceeding dependent upon the publication, as well as the intervals between the publications, being not less than seven days.—In re Bellamy, Case No. 1,266.

§ 145. —— Return or certificate of service.

The return of the marshal of the service of the warrant and order of adjudication may be made wholly on the warrant, or separately on the warrant and order of adjudication.—In re Kennedy, Case No. 7,699.

A return of the marshal that he had "sent written or printed notices to the creditors named on the schedules, and herewith returned, which schedules were made up by him on the best information he could obtain in respect thereto, after diligent search," is sufficient.—In re Adams, Case No. 41.

Under Act 1867, § 12, and general order 13, a marshal's return is defective, where, in a proceeding in invitum, he returns to the warrant that he has sent notices to the creditors named on a schedule delivered to him by the attorney for the petitioning creditor.—In re Ferris, Case No. 4,748.

The return of the marshal as to service of notice on creditors is not conclusive.—In re Hill, Case No. 6,481.

The marshal's return to the warrant, though not conclusive, is sufficient to authorize the register to proceed, if it shows due service and publication.—In re Pulver, Case No. 11,466.

The clerk's certificate under seal, that notices "were duly mailed to each creditor," will prevail, though it appear that a notice was mailed by the clerk to one of the creditors, naming a different day than that fixed.—In re Townsend, Case No. 14,116.

§ 146. —— Defective or insufficient service or proof.

Under Act 1867, § 40, service of a copy of the order of adjudication by publication is a right personal to the bankrupt, and delay therein should not retard the general course of proceedings where he has made default.—In re Kennedy, Case No. 7,699.

If the marshal undertakes the service of the warrant, the service of the order of adjudication is a necessary incident thereto, though not embraced within the command of the writ.—In re Kennedy, Case No. 7,699.

Where notice of the issuing of the warrant and the first meeting was duly published and served by mail, the regularity of the proceedings is not affected by the failure of the creditor to receive it.—In re Stetson, Case No. 13,381.

The proceedings will be set aside for the omission to publish notice of the first meeting of creditors in one of the papers designated, and for irregularities in, and false return to, the warrant of the register.—In re Hall, Case No. 5,922.

Where, on the return day of a warrant in involuntary bankruptcy, there is no proof of service of notices, the register should adjourn the meeting, and direct new notices to be served; but where, instead thereof, he certifies the facts to the court, a new warrant must issue.—In re Schepeler, Case No. 12,452.

Where a warrant states that the residence of a creditor is unknown, and gives his former residence, it is correct for the marshal in his notice to state that his residence is unknown, and the failure to serve him with notice is not error.—In re Pulver, Case No. 11,466.

§ 147. Enjoining transfer, disposition, or interference with debtor's property—Power to grant injunction.

The bankruptcy court may enjoin the debtor and any other person, pending involuntary proceedings, from conveying away, disposing of, or interfering with any property once owned by the debtor, and claimed to have been fraudulently transferred by him and concealed, upon prima facie proof of the fraud.—In re Abbott, Case No. 10; In re Holland, Id. 6,605.

The bankruptcy court may enjoin a receiver appointed in partnership dissolution proceedings in a state court from disposing of partnership assets, or from any interference with them, until the question whether or not the firm is bankrupt can be tried.—In re Hathorn, Case No. 6,214.

The jurisdiction of the bankruptcy court to enjoin third persons from interfering with the goods of the debtor, or to issue a warrant to take provisional possession of them, does not depend upon the service on the debtor of a proper order to show cause why he should not be adjudged a bankrupt, but upon the filing of a petition in bankruptcy against such debtor.—In re Muller, Case No. 9,912.

§ 148. —— Grounds.

Where a debtor takes advantage of a state insolvent law after Act 1841 has gone into operation, and an assignee is duly appointed in pursuance of the insolvent law, and subsequently such debtor petitions for the benefit of Act 1841, an injunction will be granted by the bankruptcy court against the assignee, under the state insolvent law, restraining him from intermeddling with the property of the debtor. — Ex parte Eames, Case No. 4,237.

Where there is a covinous connivance between the bankrupt and others to embezzle the estate for the benefit of the bankrupt and his preferred creditors, the court will interpose by injunction, upon adequate security to cover probable losses, and will not compel creditors to await the remedies of suits by the assignees at some future day and against parties of questionable responsibility.—In re Smith, Case No. 12,993.

A mere possibility of waste or misapplication of the bankrupt's estate by assignee in insolvency against whom an adverse decree is sought will not justify an injunction.—Ex parte Nightingale, Case No. 10,263.

An injunction will be granted by the bankruptcy court to restrain the bankrupt and other parties from disposing of the bankrupt's property until the further order of the court.—In re Camp, Case No. 2,346.

An injunction will be granted by the federal circuit court to restrain persons from collecting rents from real estate in which the bankrupt has an interest, and a receiver of the rents will be appointed.—Keenan v. Shannon, Case No. 7,640.

On proceedings in bankruptcy against a savings institution, an injunction to restrain its officers from collecting any rents from real estate in which the institution has any legal or equitable estate may be granted, it appearing that the principal executive officer was speculating with the funds of the institution for his own benefit, and that nearly all of its securities are mortgages held in his name, or in the names of persons previously associated with or controlled by him.—Keenan v. Shannon, Case No. 7,640.

On petition of creditors after an adjudication and before the appointment of an assignee, an injunction may be issued restraining interference with the property of the bankrupt.—In re Ulrich, Case No. 14,328.

An assignee for benefit of creditors may be enjoined from interfering with the debtor's assets even before an adjudication is had.—In re Skoll, Case No. 12,926.

§ 149. —— Application and notice.

An application for an injunction should contain a description of the property sought to be protected by a decree, together with the appropriate allegations of the danger or loss impending.—Blackburn v. Stannard, Case No. 1,468.

A bill by creditors to restrain an alleged fraudulent transferee of the debtor from disposing of the property, filed before a petition in bankruptcy, *held* to be an application under the bankrupt act.—In re Fendley, Case No. 4,728.

The federal circuit and district courts can exercise the power of granting injunctions in cases of bankruptcy ex parte, and without notice to the adverse party or his attorney.—In re Smith, Case No. 12,994.

Notice of an application for an injunction in bankruptcy need not be given unless specially directed, the provision in Act March 2, 1793, not being applicable.—In re Wallace, Case No. 17,094.

Injunction will be granted, pending petition restraining debtors from collecting and disposing of their assets, but will not be extended to persons not served with notice of application.—In re Calendar, Case No. 2,308.

§ 150. —— Form of injunction.

When a petition for injunction against third parties is united with a petition in involuntary bankruptcy, the injunction will be only provisional until the debtor is adjudged bankrupt, and a bill must then be filed against such third parties.—In re Kintzing, Case No. 7,833.

§ 151. —— Hearing.

On an application for an injunction, it is not competent for the respondents, by reciting an original petition in bankruptcy, and concluding in demurrer, to test the sufficiency of the original petition in bankruptcy, that being collateral.—Blackburn v. Stannard, Case No. 1,468.

A sale of a stock of goods, not made in the usual and ordinary course of business, is prima facie evidence of fraud. Act 1867, § 35.—In re Dean, Case No. 3,700.

Presumptions are against a person who withholds his books of account.—In re Abbott, Case No. 10.

§ 152. —— Violation.

A bankrupt who receives money from his debtor after the filing of a petition in bankruptcy and service of the injunction is guilty of contempt; but where he afterwards turns over to the assignee all his assets the contempt is purged, even though he may have spent part of the money thus collected.—In re Hayden, Case No. 6,257.

An involuntary bankrupt, who swore that he had sold certain notes and spent the proceeds before an injunction was served on him, and whose testimony was utterly discredited, may be ordered to turn over the amount within five days, on pain of attachment for contempt.—In re Kempner, Case No. 7,689.

Contempt proceedings against a third person for disobedience of an injunction issued in aid of the writ of bankruptcy must be distinct from those against the bankrupt.—Creditors v. Cozzens, Case No. 3,378.

§ 153. —— Dissolution of injunction.

An injunction, under Act 1867, § 40, upon third persons to refrain from interfering with the debtor's goods, does not extend beyond the time of making the adjudication, and any proceedings to punish parties for contempt in violating the injunction after adjudication will be dismissed.—In re Moses, Case No. 9,869.

An injunction to restrain the bankrupts from a transfer of their property issued under Rev. St. § 5024, will cease to operate when the adjudication is made, notwithstanding it contains the words "until the further order of the court."—In re Irving, Case No. 7,073.

An adjudication of bankruptcy does not necessarily dissolve injunctions granted after the commencement of the proceedings, restraining the bankrupt from disposing of his property.—In re Fendley, Case No. 4,728.

Act 1867, § 40, relating to the effect of the adjudication, only refers to such injunctions as were granted simultaneously with the order to show cause.—In re Fendley, Case No. 4,728.

That property is perishable is no ground for dissolving the injunctions which enjoin execution sales thereof prior to the adjudication.—In re Metzler, Case No. 9,512.

A judgment by default is prima facie fraudulent, and creditors petitioning for vacation of an injunction issued by the bankruptcy court against a sale thereunder must negative all circumstances under the statute making the transfer void.—In re Binns, Case No. 1,422.

On a motion to dissolve an injunction against third persons, such persons cannot be heard to object to the sufficiency of the petition, or the proof of debt or acts of bankruptcy.—In re Muller, Case No. 9,912.

Injunctions against execution sales of the debtor's property will not be dissolved on motion when such sales constitute the alleged acts of bankruptcy, and the debtor has taken issue thereon and demanded jury trial.—In re Metzler, Case No. 9,512.

§ 154. Custody and control of bankrupt's property—By bankrupt.

In voluntary petitions the rights of the bankrupt to the disposition of his property cease on the filing of the petition, but in involuntary petitions only upon the adjudication.—In re Dillard, Case No. 3,912.

The bankrupt, after filing his petition, has no right to sell any of his property, even to raise money to pay lawful fees.—In re Thompson, Case No. 13,938.

A bankrupt retail merchant has no right to sell any of his stock, after petition and schedule filed, without leave of court, though the goods are perishable.—In re Pryor, Case No. 11,457.

One borrowing money from the bankrupt after petition filed, and before adjudication, is liable therefor to the assignee.—Crompton v. Conkling, Case No. 3,407.

A transfer of promissory notes by the payee, pending bankruptcy proceedings against him which result in an adjudication and an injunction against disposing of his property, vests no title in the purchaser, though he had no actual notice of the proceedings. The purchaser takes with constructive notice, as all the world is bound to take notice of bankruptcy proceedings.—In re Lake, Case No. 7,992.

The voluntary bankrupt is intrusted with the care of his estate before an assignee is chosen, as a sort of trustee, and he has no right to buy of the marshal a stock of goods ordered by the court to be sold as likely to deteriorate, and such sale will be set aside on motion of the assignee, without proof that the price was inadequate or that there was any fraud in fact intended.—March v. Heaton, Case No. 9,061.

Where a note is given in payment of a book account, after a petition in bankruptcy is filed against the payee, but before the adjudication, and the note at maturity is paid to a bank which holds the same, this is a discharge of the maker, and the assignee in bankruptcy cannot maintain a suit against him for the amount of the note.—Galvin v. Boyd, Case No. 5,208.

A bankrupt indorser may waive demand and notice upon a note maturing before the choice of an assignee.—Ex parte Tremont Nat. Bank, Case No. 14,169.

§ 155. —— Powers of court or register.

All the property and assets of the bankrupt are considered in custodia legis from the filing of the petition. (Act 1867).—Davis v. Anderson, Case No. 3,623.

On a voluntary petition the bankruptcy court has power to take possession of the bankrupt's property pending the publication of notice and election of an assignee.—The Ironsides, Case No. 7,069.

The possession by the bankrupt of leased premises after petition filed is the possession of the bankrupt court, and any interference therewith, except by leave of that court, is in contempt of its authority.—In re Steadman, Case No. 13,330.

Where a debtor is adjudged a bankrupt upon his own petition, it is the duty of the register to take his property into his custody by the intervention of an agent or other proper means.—Zeiber v. Hill, Case No. 18,206.

On the adjudication, the register is authorized and required to receive the surrender of the bankrupt's estate, and to keep the property safely until it can be turned over to the assignee.—In re Hasbrouck, Case No. 6,189.

§ 156. —— Possession and care of property by messenger.

In involuntary proceedings the bankrupt is not authorized to surrender his property to the register, nor is the register authorized to receive it. The marshal alone is authorized, as messenger, to seize and retain the custody of the bankrupt's property until the assignee is appointed.—In re Howes, Case No. 6,787.

Where the marshal, as messenger, has taken possession of a bankrupt's property, but without any order of court, his possession is not that of

the court in bankruptcy.—The Ironsides, Case No. 7,069.

Property in the custody of a United States marshal, as messenger in bankruptcy, may be insured under the direction of the register.—In re Carow, Case No. 2,426.

§ 157. —— Appointment of receiver or provisional assignee.

After adjudication, and before selection of the assignee, a temporary receiver may be appointed under special circumstances.—Lansing v. Manton, Case No. 8,077.

Where there is delay in the prosecution of proceedings in bankruptcy, a receiver may be appointed to conserve the estate.—In re Cooke, Case No. 3,167.

A receiver may be appointed in bankruptcy proceedings against a savings institution, where the apparent titles to property are such on their face that the marshal cannot act efficiently under the usual warrant.—Keenan v. Shannon, Case No. 7,640.

A receiver appointed to care for the property, until the selection of an assignee, cannot sue to recover property fraudulently transferred; and if he commence such suit, the assignee will not, on motion, be admitted to prosecute it.—Lansing v. Manton, Case No. 8,077.

A provisional assignee will not be appointed unless the bankruptcy court is satisfied that it is necessary for the protection of the property, and that it will inure to the benefit of all the creditors.—M. & M. Nat. Bank of Pittsburg v. Brady's Bend Iron Co., Case No. 9,018.

§ 158. —— Effect of failure of debtor to account for or surrender property.

The bankrupt may be ordered to surrender or satisfactorily account for property which he has failed to turn over or account for, under penalty of being committed for contempt.—In re Salkey, Case No. 12,253.

Where debtors have been adjudged bankrupts on their own petition, but delay to surrender their assets to the register, an order will be issued for the immediate surrender thereof to the register, and the appointment by him of a proper custodian.—In re Shafer, Case No. 12,694.

Disobedience of an order of a register to the bankrupts to hand over funds in their hands to his custodian is a contempt, for which attachment will issue from the court.—In re Speyer, Case No. 13,239.

The bankrupt may be committed where the court is satisfied that he has not fully disclosed the facts concerning his property (Act 1867, § 26).—In re Salkey, Case No. 12,254.

§ 159. —— Sale of property.

A sale under Act 1867, § 20, cannot be ordered by the bankruptcy court until an assignee is appointed, but such court may permit the sale of securities by the pledgee, reserving the right of the court to ascertain and liquidate his lien without prejudice of the rights of the assignee to be appointed, and requiring the pledgee to file a sworn statement of the sale.—In re Grinnell, Case No. 5,830.

The district court has power to order the sale of the whole or any part of the property of the bankrupt by his consent, even before the declaration of bankruptcy.—In re Vila, Case No. 16,941.

The creditors must have due notice of any application for a sale, so that they may appear and show cause against such sale, or for a postponement thereof.—In re Vila, Case No. 16,941.

A sale by the marshal, as messenger, under a special order, prior to the appointment of an assignee, will be considered as in the nature of a sale made by a provisional assignee.—In re Hitchings, Case No. 6,542.

Where the marshal prior to the appointment of the assignee sells, as movables, articles which really passed on a prior sale to another, as fixtures, the purchaser may file a claim therefor against the assignee.—In re Hitchings, Case No. 6,542.

The court cannot sell property of the debtor as perishable, pending trial by jury of the issue on the acts of bankruptcy, unless it is in possession of the messenger.—In re Metzler, Case No. 9,512.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(A) APPOINTMENT, QUALIFICATION, AND TENURE OF ASSIGNEE.

Provisional assignee, see ante, § 157.

1. ELECTION.

§ 160. Time of meeting.

The time for the first meeting is a matter of discretion with the register (Act 1867, § 11), and sixty days from the date of the warrant for the first meeting of creditors was a reasonable time, where all the creditors resided in Germany.—In re Heys, Case No. 6,447.

Proceedings at a meeting of creditors held on Thanksgiving day will not be set aside where it appears that no one was injured thereby.—In re McGlynn, Case No. 8,804.

§ 161. Adjournment of meeting.

Where a register, prevented by prevalence of yellow fever from attending, attempts to adjourn the meeting by letter, the meeting wholly fails, and a new warrant must issue appointing another meeting, as a register can only adjourn a meeting of creditors by attending it at the time and place designated for its assembling.—In re Dickinson, Case No. 3,895.

Where there was no proper publication and service of notice of the first meeting of creditors, the register may adjourn the meeting, from time to time, to permit the same.—In re Devlin, Case No. 3,841.

§ 162. Conduct of election.

A meeting to prove debts and choose an assignee should be organized at the hour designated in the notice, and kept open until an assignee is chosen, or it is ascertained that no choice can be made.—In re Phelps, Case No. 11,071.

The first meeting of creditors should be kept open for one hour, and where the meeting is appointed for 10 o'clock, and certain creditors appear and vote for an assignee, and the register declares the polls closed at half past 10, and other creditors appear and vote before 11 o'clock, the last votes must be counted.—In re Gilley, Case No. 5,438.

Debts may be proven at any time during the sitting of the court on the day for showing cause, and are not restricted to the hour fixed in the notice.—In re Gaylor, Case No. 5,282a.

No particular manner is prescribed of voting for an assignee. It may be by ballot, viva voce, by calling the name of each creditor, or by calling upon the persons representing them to name their choice.—In re Lake Superior Ship Canal, Railroad & Iron Co., Case No. 7,997.

Registers should in no manner interfere with or influence the choice of an assignee by the creditors.—In re Smith, Case No. 12,971.

The cause will be sent to another register upon a petition therefor by creditors, alleging

that the register had interfered in the choice of an assignee.—In re Smith, Case No. 12,971.

The vote for assignee will not be postponed to allow other creditors to prove their claims, unless by consent of those who have already proved.—In re Lake Superior Ship Canal, Railroad & Iron Co., Case No. 7,997.

No creditor has a right to be heard in opposition to any of the proceedings until he has proved his debt.—In re Hill, Case No. 6,481.

§ 163. Who may vote—In general.

A debt assigned, after being proved, must be voted upon by the actual owner, and he will not be entitled to more than one vote.—In re Frank, Case No. 5,050.

The managing officers of a bankrupt corporation, when bona fide creditors, have the same rights to vote for assignee as any other claimant.—In re Northern Iron Co., Case No. 10,322.

Creditors proving claims filed after election of assignee cannot vote to change the result of an election appealed from.—In re Lake Superior Ship Canal, Railroad & Iron Co., Case No. 7,997.

Without a special order of court the register has no power to inquire into the rights of creditors to vote at a first meeting, except for the purpose of postponing proof of claims until the choice of an assignee.—In re Noble, Case No. 10,282.

The register should ordinarily demand the same degree of proof before admitting a creditor to vote for assignee, as is required in a trial at law or a hearing in equity.—In re Northern Iron Co., Case No. 10,322.

An unliquidated claim for damages which a bankrupt proposes to set off against a claim of a creditor must be wholly disregarded in the proceedings for the choice of an assignee.—In re Orne, Case No. 10,581.

§ 164. —— Amount of claim.

Interest may be added to the claim to the day of the adjudication where the debt was due before such day, but interest is to be deducted from such time where the debt is not payable until thereafter.—In re Orne, Case No. 10,581.

A joint creditor can vote the full amount of the debt, without the consent and authority of the other creditor, only in the case of partnership.—In re Purvis, Case No. 11,476.

§ 165. —— Agent or attorney.

The mere fact that a creditor is absent from the state, or from the locality where the proof is to be made, does not warrant resorting to proof by an agent.—In re Jackson, Case No. 7,123.

An agent of the creditor who proved the claim cannot vote for the assignee without a power of attorney, even though such agent be an attorney at law.—In re Purvis, Case No. 11,476.

One member of a firm, on behalf of the firm, may execute a power of attorney authorizing him to vote for the firm in the choice of assignees.—In re Barrett, Case No. 1,043.

If a power of attorney is given to a firm, and not to either member, one alone is not authorized to vote upon it in the choice of an assignee.—In re Frank, Case No. 5,050.

A notary public cannot take the acknowledgment of a creditor to a power of attorney to vote for the assignee. General order No. 34.—In re Higgins, Case No. 6,467.

A power of attorney which authorizes an agent to sign the principal's name to any paper or writing proper or necessary for the purpose of collecting and receiving any debt due to the principal, is sufficient to authorize the agent to vote in behalf of the principal for an assignee in bankruptcy, although such power of attorney is dated prior to the passage of Act 1867.—In re Knoepfel, Case No. 7,892.

§ 166. —— In proceedings against partners.

Where a separate adjudication is made against a bankrupt who is, or has been, a member of a firm, the separate creditors have a right to vote for the assignee.—In re Falkner, Case No. 4,624.

A joint creditor, on the separate bankruptcy of one member of a firm, may vote for assignee.—Wilkins v. Davis, Case No. 17,664; In re Webb, Id. 17,317. CONTRA, see In re Purvis, Id. 11,476.

Where co-partners are adjudged bankrupts, the partnership creditors only can participate in the election of assignees.—In re Phelps, Case No. 11,071; In re Scheiffer, Id. 12,445.

§ 167. —— Preferred or secured creditors.

A preferred creditor may surrender his preference at the first meeting, and vote for assignee, when the preference is of such a nature as to be effectually destroyed by such surrender.—In re Saunders, Case No. 12,371.

The mortgagee of a homestead may vote on the choice of an assignee on his whole claim.—In re Stillwell, Case No. 13,448; In re Tertelling, Id. 13,842.

A creditor holding security, although he has proved his debt as provided in Act 1867, § 22, cannot vote in the election of assignee.—In re Davis, Case No. 3,614.

A secured creditor may vote for assignee on so much of his debt as is unsecured, where the security applies only to a specific portion of his debt.—In re Parkes, Case No. 10,754.

A creditor holding a mortgage as security, who, in his proof of the debt, states, upon information and belief, that the mortgage is worth less than the amount of the debt, is not entitled to vote on the difference between its value, as stated by him, and the amount of his debt.—In re Hanna, Case No. 6,027.

A mortgage creditor, who, after the adjudication, sells the mortgaged premises, and himself becomes the purchaser, cannot vote on the deficiency as an unsecured creditor.—In re Hunt, Case No. 6,884.

§ 168. Postponement of proof of claim—Power of register.

Under Act 1867, § 23 (14 Stat. 528), which authorizes the judge, at the first meeting of creditors before the election of an assignee, to postpone proof of any claim which he regards as doubtful, the register may exercise the same discretion.—In re Bartusch, Case No. 1,086.

A postponement of proof of a claim until an assignee is chosen is entirely within the discretion of the register. Act 1867, § 23.—In re Jacoby, Case No. 7,166.

A register has power to postpone the proof of a claim until an assignee is chosen, if a case is made out for such postponement under the rules of court, but he has no power to institute an inquiry under the last clause (Act 1867, § 22), where certain creditors object to the votes of other creditors being received for a choice of an assignee.—In re Herrman, Case No. 6,426.

Where, at the first meeting of creditors, claims are objected to which the register regards as clearly valid, he can neither admit them as valid, nor postpone the proof merely because they are objected to, but he must apply to the court if the objections are not withdrawn. Act 1867.—In re Bartusch, Case No. 1,086.

§ 169. —— What claims postponed.
Such claims as are of questionable or doubtful character may be postponed until after an assignee is appointed. Act 1867.—In re Jones, Case No. 7,447.

The register may postpone, until the choice of an assignee, the proof of a debt, in respect to the validity of which a doubt has arisen on the ground of a preference.—In re Stevens, Case No. 13,391.

Taking property on attachment or execution is receiving a preference, but merely recovering judgment is not.—In re Stevens, Case No. 13,391.

Reasonable substantial doubt only of the validity of a claim in the mind of the register, and of the creditor's right to prove it, is sufficient to justify postponement of proof until after election of an assignee. Rev. St. § 5083. —In re Jackson, Case No. 7,123.

The surrender of a fraudulent preference can only be made to the assignee, and pending his appointment and qualification the proof of debt must be postponed and the offer of the preferred creditor to vote for assignee be denied. —In re Parham, Case No. 10,712.

Where it appears probable that a confession of judgment to a creditor was taken with knowledge of the debtor's insolvency, the proof of the creditor's claim will be postponed until after the choice of an assignee.—In re Walton, Case No. 17,128.

That proofs presented at the first meeting of creditors are in the names of persons not named in the schedule raises a doubt of their validity, and requires postponement until after election of the assignee. Rev. St. § 5083.—In re Milwain, Case No. 9,623.

Though proof of a debt has been regularly filed and accepted as satisfactory, the register may receive proof of fraud in relation thereto before election of assignee.—In re Frank, Case No. 5,050.

On proceedings for the choice of assignee the register must receive evidence from the bankrupt impeaching the consideration of a draft proved as a debt.—In re Orne, Case No. 10,581.

§ 170. —— Review.
The bankruptcy court will not review the action of the register in postponing proof of a claim until after the election of the assignee, where no objection is made until after the assignee is appointed.—In re Jackson, Case No. 7,123.

Creditors whose proofs of claims have been postponed, and who have not been allowed to vote for assignee, may have the proceedings certified to the court; and, if the postponement be held erroneous, the choice may be set aside, and a new vote taken.—In re Lake Superior Ship Canal, Railroad & Iron Co., Case No. 7,997.

§ 171. —— Effect.
Postponement of proof of claims affects no right of the creditor, except the right to vote for assignee.—In re Lake Superior Ship Canal, Railroad & Iron Co., Case No. 7,997.

§ 172. Counting votes.
Where a single creditor appears at the first meeting of creditors, and proves his debt, he may choose the assignee.—Anonymous, Case No. 458; In re Haynes, Id. 6,269.

A person to be elected assignee must receive a majority of the votes of all who have proved claims, and not simply a majority of the votes cast.—In re Purvis, Case No. 11,476; In re Scheiffer, Id. 12,445.

Where a firm is a creditor, and the vote of the firm for assignee is cast by one member thereof, in computing the number of votes such vote can be counted only as one, and each member of the creditor firm cannot be counted as a creditor who has voted.—In re Purvis, Case No. 11,476.

§ 173. Change of vote.
A creditor may change his vote as often as he sees fit, until he has signed the certificate of choice of assignee.—In re Pfromm, Case No. 11,061.

A creditor cannot change his vote after the meeting has adjourned, and thereby cause a failure to elect. If a mistake occurs he may make his objection to the judge.—In re Scheiffer, Case No. 12,445.

§ 174. Disapproval or confirmation.
When the register is satisfied that any reasons exist why an assignee elected or appointed should not be approved by the judge, it is his duty to state such reasons fully in submitting to the judge the question of approval.—In re Bliss, Case No. 1,543.

The discretion reserved to the court to approve or disapprove the creditors' election of an assignee (Act 1867) is a legal discretion, and a disapproval must be based upon sound reasons, and not upon rumors which, upon investigation, cannot be traced to any facts justifying them.—In re Funkenstein, Case No. 5,157.

Where an assignee is chosen by the greater part in value and number of the creditors who have proved their claims, and there is no imputation either upon his capacity or integrity, he is assignee by virtue of law, and the judge is not competent to interfere.—In re Grant, Case No. 5,692.

The bankruptcy court in a state in which the bankrupt corporation held property and carried on business will decline to approve the election of assignees in another jurisdiction, where its state is not given a representative.—In re Boston, H. & E. R. Co., Case No. 1,680.

The election of an assignee will be disregarded where it was secured by his agreeing to pay certain creditors their claims in full, if they would give him their powers of attorney. —In re Haas, Case No. 5,884.

The election of an assignee at his suggestion by one creditor, who alone appeared at first meeting of creditors, will not be sanctioned.—In re A. B., Case No. 2.

The court will not sanction the election of an assignee who makes it a regular business to solicit creditors' votes.—In re Doe, Case No. 3,957.

The bankruptcy court will decline to approve the election of an assignee selected by, or in the interest of, the bankrupt.—In re Bliss, Case No. 1,543; In re Wetmore, Id. 17,466.

The court will refuse to confirm the election of an assignee who was the bookkeeper of one of the bankrupts, where it appears that a large number of creditors could not be represented at the meeting, although the election was almost unanimous.—In re Wetmore, Case No. 17,466.

An election of a near relative of the bankrupt as assignee will be set aside, and the appointment by the register according to the rules of the district will be confirmed.—In re Zinn, Case No. 18,216.

The appointment of an assignee by the register after an informal vote or expression of choice, although not objected to at the time, will be set aside as irregular.—In re Pearson, Case No. 10,878.

A bankrupt has a standing in court to object to the confirmation of assignees of his estate.—In re McGlynn, Case No. 8,804.

An opposition to the appointment of a particular assignee, made at the first meeting, will be

considered as continuing at adjourned meetings, where it does not appear to have been withdrawn.—In re Norton, Case No. 10,348.

The bankruptcy court will not set aside an election of assignee on account of any irregularity in admitting a claim, when it appears that its exclusion would not affect the result of the election.—In re Jackson, Case No. 7,123.

The election of assignee will not be sent back because of a corrupt vote, where the result would not be changed by excluding the vote.—In re Pfromm, Case No. 11,061.

§ 175. Failure of choice.

When no creditor who has proved his debt appears at the time and place appointed for the first meeting of creditors, the judge, or, if there be no opposing interest, the register, is to appoint one or more assignees.—In re Cogswell, Case No. 2,959.

"Opposing interest," as used in Act 1867, § 13, does not mean opposition to the appointment of any particular person as assignee, but to the exercise of the appointing power by the register.—In re Jackson, Case No. 7,123.

Upon failure to elect an assignee by the creditors, the register may appoint one, if specific objections are not made. Rev. St. § 5034. —In re Jackson, Case No. 7,123.

Where no creditors have proved their debts, and no assets are shown, an assignee should, nevertheless, be appointed, since creditors may appear and assets may be found.—Anonymous, Case No. 457.

Where a majority of creditors proving claims by attorney vote for one person, and a majority of those proving in person vote for another person, as assignee, there is no election, and the court may appoint an assignee.—In re Portsmouth Sav. Fund Soc., Case No. 11,297.

§ 176. New election.

Where the judge refuses to approve the appointment of the assignee elected by the creditors, he may order a new election, under Act 1867, § 13, cl. 4.—In re Scheiffer, Case No. 12,445.

Where, after an assignee has been appointed, a creditor has been added to the schedules, no new choice of assignee is necessary.—In re Carson, Case No. 2,460.

2. APPOINTMENT, QUALIFICATION, AND REMOVAL.

§ 177. Who may be appointed.

The son of the bankrupt will not be appointed assignee where he will be obliged to investigate the claims of other members of the family. —In re Bogert, Case No. 1,600.

A person residing out of the district is disqualified to act as assignee.—In re Clairmont, Case No. 2,781; In re Havens, Id. 6,231.

A person residing without, but having a fixed place of daily business within, the judicial district, may be appointed assignee.—In re Loder, Case No. 8,459.

A person who has a direct interest adverse to that of the creditors generally, or who is the attorney of such person, is disqualified.—In re Clairmont, Case No. 2,781.

An attorney for a general creditor may be assignee of the bankrupt's estate.—In re Clairmont, Case No. 2,781; In re Lawson, Id. 8,150; In re Barrett, Id. 1,043.

A general creditor may be assignee of the bankrupt's estate.—In re Clairmont, Case No. 2,781.

An attorney of the bankrupt, in matters not connected with the bankruptcy, is not necessarily ineligible as assignee.—In re Clairmont, Case No. 2,781.

A person related to the bankrupt is ineligible.—In re Powell, Case No. 11,354.

A new election will be ordered where the assignee was a director of the bank to which the bankrupt had shortly before confessed judgment.—In re Powell, Case No. 11,354.

§ 178. Notice of appointment.

In publishing notice of the appointment of an assignee, under Act 1867, § 14, at least seven days must intervene between each publication.—In re Bellamy, Case No. 1,266.

§ 179. When appointment takes effect.

The assignee, whether elected by the creditors or appointed by the register, has no power to act until the judge's approval is certified.—In re Scheiffer, Case No. 12,445.

§ 180. Bonds.

A chosen assignee may, on application of a creditor, be required to give security.—In re Fernberg, Case No. 4,743.

The register may, upon request, in writing, of a creditor who has proved his claim, require the assignee to give bond.—In re Bininger, Case No. 1,421.

An assignee must give a special bond in each case where a bond is required; a general bond is not authorized by Act 1867.—In re McFaden, Case No. 8,785.

§ 181. Effect of failure to qualify.

Unless an assignee who has been appointed under a general order qualifies especially as required by Act 1867, § 13, in each particular case, he cannot be treated by the court as assignee in any such case.—Ex parte Bryan, Case No. 2,061.

An act of an assignee appointed under a general order and who has not qualified as required by Act 1867, § 13, is binding, so far as his competency is concerned, when, as to such act, he is treated by the court as assignee.—Ex parte Bryan, Case No. 2,061.

Where the register requires an assignee to file a bond, but specifies no time within which it must be filed, and one is not filed for 13 days, the assignee is not in default, and he must be removed before another can be appointed.—In re Sands, Case No. 12,301.

§ 182. Removal.

The bankruptcy court may exercise a judicial discretion in affirming or refusing to affirm the action of creditors in the removal of an assignee. Act 1867, § 18.—In re Dewey, Case No. 3,849.

An assignee cannot be removed except upon an application made for that purpose, under section 18, Act 1867, general order No. 23, and form No. 41.—In re Schapter, Case No. 12,438.

A motion by the bankrupt to set aside the appointment of an assignee can only be entertained by the district judge upon notice, and not by the register.—In re Stokes, Case No. 13,475.

Assignees will not be removed on the vote of majority creditors who were all parties to transactions which the assignees were seeking to impeach.—In re Dewey, Case No. 3,849.

An assignee, clerk of the bankrupt's attorney, who is charged with mismanagement, and whose removal is asked by the creditors, will be removed, but he will be protected against costs of the proceeding for removal, where it appears that he acted in entire good faith.—In re Mallory, Case No. 8,990.

An assignee will be removed if requested by a vote of a majority of those who have proved their debts; but he will not be removed if a majority vote against removal.—In re New York Mail S. S. Co., Case No. 10,209.

Involving the estate in unnecessary litigation, if caused through erroneous legal advice, is no

ground for removal of the assignee.—In re Blodget, Case No. 1,552.

The assignee will not be removed for unsuccessfully attacking mortgages given by the bankrupt, where it appears that such action was justifiable.—In re Sacchi, Case No. 12,201.

The assignee must disclose to the creditors, upon inquiry, all facts relating to the condition and assets of the bankrupt's estate.—Ex parte Perkins, Case No. 10,982.

A failure by the assignee to inform creditors in regard to their rights and the condition of the assets, where the suppression of facts was made in the interest of one class of creditors, is good cause of removal.—Ex parte Perkins, Case No. 10,982.

An assignee will be removed on petition at his own cost for neglecting to take proper measures to secure the bankrupt's property, and for allowing it to be sold for taxes.—In re Morse, Case No. 9,852.

Where an assignee fails to deposit funds in his hands belonging to the estate, and suffers the foreclosure of a mortgage, neglecting an opportunity to purchase it at less than its face, and is guilty of a similar neglect in regard to a judgment, and pays 7 per cent. interest, while he is loaning moneys belonging to the estate at 6 per cent., and fails to comply with the directions of the register, as required by Act 1867, and rules of court, an order will be issued to show cause why he should not be removed from his trust.—In re Price, Case No. 11,409.

A register may be directed to employ counsel to represent the estate of the bankrupt at the hearing of the order to show cause why the assignee should not be removed.—In re Price, Case No. 11,409.

§ 183. Additional assignee.

Upon a petition to the bankruptcy court showing sufficient reasons, an additional assignee may be appointed to act in conjunction with the one previously appointed.—In re Overton, Case No. 10,625.

(B) ASSIGNMENT, AND TITLE, RIGHTS, AND REMEDIES OF ASSIGNEE IN GENERAL.

1. Property and Rights Passing to Assignee.

§ 184. In general.

All property and rights of property of the bankrupt at the date of adjudication pass to the assignee for distribution among creditors. Act 1841.—Ex parte Newhall, Case No. 10,159.

Whether the bankrupt obtains a certificate of discharge or not, the property passes to the assignee, and is distributed among his creditors.—In re Cheney, Case No. 2,636.

Assignees in bankruptcy, except in cases of fraud, take only such rights and interest as the bankrupt himself had, and could himself claim and assert, at the time of his bankruptcy; and they are affected with all the liens and equities which would affect the bankrupt himself, if he were asserting those rights and interests.—Mitchell v. Winslow, Case No. 9,673; Ex parte Newhall, Id. 10,159; Fletcher v. Morey, Id. 4,864; Winsor v. McLellan, Id. 17,887; Winsor v. Kendall, Id. 17,886; Ex parte Dalby, Id. 3,540; Potter v. Coggeshall, Id. 11,322, affirmed in Case No. 2,955; Williamson v. Colcord, Case No. 17,752.

The assignee takes only the bankrupt's interest, and he has no control over the interest of others except as expressly given by law to protect the bankrupt's interest for the benefit of the general creditors.—Goddard v. Weaver, Case No. 5,495.

The assignee is estopped where the bankrupt would be estopped, except in cases of fraud, or of attachments of less than four months' standing.—In re Rockford, R. I. & St. L. R. Co., Case No. 11,978.

Property in the possession of the bankrupt after the appointment of the assignee is considered as in the possession of the assignee, and it cannot be taken therefrom by a mortgagee under a valid mortgage.—In re Rosenberg, Case No. 12,055.

An assignee in bankruptcy is not bound to take property which may be onerous to the estate, or burden instead of benefit it. If he does not take it, it remains in the bankrupt, and the latter's title is good as against all the world.—Smith v. Gordon, Case No. 13,052; Amory v. Lawrence, Id. 336.

The right to recover back usurious interest paid given by the Vermont law is a "right of property" which passes to the assignee.—Moore v. Jones, Case No. 9,768.

A right of action in tort for fraud and deceit is not an asset which will pass to the assignee. Act 1867, § 14.—In re Crockett, Case No. 3,402.

§ 185. As affected by date of bankruptcy.

The fact that a petition in bankruptcy was attested "nine days before presented" affords no bar to its presentation; and the decree dates back to the application, and property acquired after verification, and before presentation, passes as assets to the assignee.—In re Abrahams, Case No. 20.

An adjudication relates back to the time of filing the petition, and carries to the assignee title to all property which the bankrupt then had.—Ex parte General Assignee, Case No. 5,305; McLean v. Lafayette Bank, Id. 8,885; McLean v. Rockey, Id. 8,891; In re Rust, Id. 12,171; In re Lake, Id. 7,992; Sicard v. Buffalo, N. Y. & P. R. Co., Id. 12,831.

The assignment relates back to the date of filing the petition, and property subsequently acquired does not pass thereunder, regardless of amendments to the petition or schedules afterwards attached. Act 1867, § 14.—In re Patterson, Case No. 10,815.

Crops planted by a bankrupt after the filing of a petition in bankruptcy, under Act 1867 (14 Stat. 517, c. 176), do not pass to the assignee as assets for the use of creditors.—In re Barnett, Case No. 1,024.

A divorce obtained by a wife prior to the discharge in bankruptcy of her husband gives his assignee no claim in land held by the husband and wife in entirety at the time of the adjudication.—In re Benson, Case No. 1,328.

§ 186. Property in hands of assignee under assignment for creditors.

Where a person made a voluntary assignment with preferences, and subsequently took the benefit of the insolvent laws of Pennsylvania and made another assignment to the previous assignee, as required thereby, and afterwards was declared a bankrupt on his own motion, by the bankruptcy court, *held*, that the assignee in bankruptcy could not recover from the assignee, who had acquired the property by the previous assignments.—Sullivan v. Hieskill, Case No. 13,594.

An assignee under a general assignment under a state law which is avoided by proceedings in bankruptcy must turn over all the property and proceeds to the assignee in bankruptcy, and cannot deduct compensation for his services or his expenses.—In re Stubbs, Case No. 13,557.

An assignee is not vested, by mere force of the adjudication in bankruptcy and his appointment, with title to the property assigned by the bankrupt for the benefit of creditors.—Belden v. Smith, Case No. 1,242.

§ 187. Claims for spoliation.

A claim of a bankrupt against Spain for spoliation of his property does not pass to his assignee, and where they have received the amount of such claim awarded to them, since the assignment in bankruptcy, by commissioners, under the treaty of February 22, 1819, between Spain and the United States, they will be held liable to the bankrupt therefor in an action for money had and received.—Vasse v. Comegys, Case No. 16,893.

A claim for the destruction of a vessel for which an allowance is made under the Geneva award will pass to the assignee.—Williamson v. Colcord, Case No. 17,752.

§ 188. Conditional title.

A conveyance of land on condition of the payment of an annual sum to the grantor during life gives the grantee a title which will pass to his assignee.—Atwood v. Kittell, Case No. 641.

An agreement that the seller shall have possession of the property, so that he may apply its rent to the reduction of the purchase money, does not prevent full title vesting in the purchaser's assignee.—Hall v. Scovel, Case No. 5,945.

A bankrupt holding a bond for a deed of land, the condition of which he had broken, acquired no title to timber he had cut thereon without the consent of the owner of the land, and none passed to his assignee in bankruptcy.—In re Gregg, Case No. 5,796.

The purchaser of land by deed will take a fee as against the assignee of a bankrupt, who held before his bankruptcy a bond for a deed of the same from the purchaser's grantor, the conditions of which the bankrupt had violated, unless the owner of the land, who gave the bond, had so conducted and dealt with the bankrupt as to have waived the breach of the bond.—In re Gregg, Case No. 5,796.

The fee-simple title in a street, subject to the public easement, is "property," which vests in the assignee under the act of 1841; and where the street terminates in a lake, the right to subsequent accretions passes with the title, to such assignee's grantees.—Kinzie v. Winston, Case No. 7,835.

A usufruct in property, not capable of being transferred by sale, except with the owner's permission, does not pass to the assignee on the bankruptcy of one who has such usufruct.—In re O'Dowd, Case No. 10,439.

Chattels do not pass to the assignee, where they may be recovered from the bankrupt by their vendor for nonperformance of the contract of sale; the assignee will be ordered to deliver the same to the vendor upon the latter's petition.—In re Pusey, Case No. 11,477.

The assignee may, if he deem it to the interest of creditors, pay a balance due from the bankrupt under a conditional sale, and thereby acquire the title.—In re Lyon, Case No. 8,644.

§ 189. Interest under contract.

Where, under contract for a speculation in real estate, the bankrupt is to have a certain per cent. interest and a division of the profits, his interest in the assets growing out of the operation will pass to the assignee.—Sherman v. International Bank, Case No. 12,765.

Compensation for services rendered by the bankrupt under a contract will be apportioned between the assignee and the bankrupt, in proportion to the value of the services rendered before and after the bankruptcy, where payment was not contingent upon full performance of the services.—In re Jones, Case No. 7,448.

§ 190. Deposits in bank.

Where the bankrupt bank acts as agent of another bank for clearing-house purposes, the deposits made by the latter from time to time on its account are not a trust fund, and will pass to the assignee.—Phelan v. Iron Mountain Bank, Case No. 11,069.

The relation between a bank and its depositors is that of debtor and creditor only, and is not fiduciary, and a note deposited for collection, if passed to the credit of the depositor in his general account, and then withdrawn, becomes the property of the bank, which becomes indebted to him for the proceeds, and upon the bankruptcy of the bank the proceeds are assets available to the general creditors, and the fact that the account was made good by other deposits, before collection of the note, makes no difference.—In re Bank of Madison, Case No. 890.

A check deposited with a bank for collection, against which the depositor is not allowed to draw until payment, does not become the property of the bank, where it suspended before payment; and where the owner of such check brings suit against the assignee in bankruptcy in a state court, and recovers judgment for the amount of the check and costs, the bankruptcy court will, upon petition of the plaintiff in such suit, order the assignee to pay the amount of such check, but not the interest, or costs in the state court, the loss of which was the result of plaintiff's misfortune in having his funds mingled with the insolvent bank and his delay in applying to the bankruptcy court for relief.—In re Havens, Case No. 6,230.

§ 191. Dower.

The widow of a bankrupt dying after the issuing of the warrant is entitled to dower in land owned by him at the time the petition was filed, where the state statute theretofore passed restored the common-law right of dower on repealing the statutory provision.—In re Hester, Case No. 6,437.

The wife of a bankrupt is not entitled (in North Carolina) to claim dower in land owned by the bankrupt when he filed his petition, he being still alive.—Kelly v. Strange, Case No. 7,676.

The right to dower in land revives where a conveyance of such land is set aside as an illegal preference under the bankrupt law, or is surrendered by the creditor under Act 1867, § 23.—In re Detert, Case No. 3,829.

The wife is not estopped to claim dower by having joined in the execution of the deed. Case No. 3,309 reversed.—Cox v. Wilder, Case No. 3,308.

The bankruptcy court will allow the wife a reasonable support, in preference to the husband's creditors, out of rents and profits of realty conveyed by her husband to her through a third person, without consideration, where they are her only means of support.—In re Brandt, Case No. 1,811.

§ 192. Interest in life policy.

Under Rev. St. § 5045, and Rev. St. Me. 1871, c. 40, § 65, a paid-up policy of life insurance is not exempt to the assured, but passes to his assignee in bankruptcy.—In re Sawyer, Case No. 12,393.

In Maine the assignee has a lien on a life policy of the bankrupt for so much of two years' premiums as exceeds a certain sum, even though the assured borrowed the money to pay such premiums by pledging the policy therefor.—In re Sawyer, Case No. 12,393.

A claim against the wife of a bankrupt for payments made by him when insolvent, on a policy for the benefit of his wife, may be sold by the assignee, and will pass to the purchaser a contingent right in the proceeds of the policy.—In re Bear, Case No. 1,178.

Where the husband insures his life for the benefit of his wife, the legal title to the policy is in her; so that, upon his becoming bankrupt, it is not necessary that he should surrender such

policy or list it in his schedule of assets.—In re Bear, Case No. 1,178.

The assignee has no right to the proceeds of a policy taken out by the wife of the bankrupt on her life for the benefit of the husband, where she pays the premiums out of her separate estate, and dies after the adjudication in bankruptcy.— In re Murrin, Case No. 9,968.

The lapsing of a life policy for nonpayment of premiums due after the commencement of bankrupt proceedings does not defeat the title of the assignee.—In re Sawyer, Case No. 12,393.

§ 193. Leased property.

The assignee is entitled to the exclusive possession of the property of the bankrupt, though a part is held by the bankrupt as lease for years. —Wildman v. Taylor, Case No. 17,654.

Rights of joint occupants of leased premises on the bankruptcy of one of them, who was in debt to the others for his share of the rent.— In re Hotchkiss, Case No. 6,715.

The right of bankrupt tenants to the removal of machinery from the leased building passes to the bankruptcy court.—In re Breck, Case No. 1,822.

§ 194. Membership in exchange or board of trade.

Where a seat in a stock exchange can be transferred only on approval of the board, subject to payment of the claims of other members on the bankruptcy of the holder, his assignee has a right only to the surplus after paying such claims.—Hyde v. Woods, Case No. 6,975.

A certificate of membership in a board of trade is not an asset which would pass to the assignee.—In re Sutherland, Case No. 13,637.

§ 195. Mortgaged lands.

A bona fide deed of trust to secure a debt devests title, so that an assignee in bankruptcy cannot maintain ejectment. He is entitled only to the surplus, and purchasers from him can claim nothing more.—Lyall v. Miller, Case No. 8,613.

A mortgage of personal property being (in Wisconsin) ineffectual to pass after-acquired property, the assignee in bankruptcy is entitled to such property as against the mortgagee.—In re Eldridge, Case No. 4,330.

Under Act S. C. 1791, relating to the rights of mortgagees in lands of which the mortgagors are out of possession, the register's assignment to an assignee in bankruptcy of mortgaged lands places the mortgagee out of possession, and gives him the same rights, as to rents and profits, which he could have acquired by actual entry. —In re Bennett, Case No. 1,313.

After the appointment of an assignee, a receiver will not be appointed of a bankrupt's mortgaged land, as the assignee is clothed with like functions to those of a receiver.—In re Bennett, Case No. 1,313.

The assignee in bankruptcy of a mortgagor, under the Indiana law, is entitled to rents of the property, for the benefit of the unsecured creditors, until the mortgagee takes steps to have them applied to his debt, for insufficiency of the security.—Hunter v. Hays, Case No. 6,906.

§ 196. Partnership and individual assets.

Where a decree of bankruptcy is awarded against a member of a firm under Act 1841, the partnership is thereby dissolved and the partnership effects are vested in the assignee and the solvent partner as tenants in common.—Ex parte Norcross, Case No. 10,293; Forsaith v. Merritt, Id. 4,946.

In the case of the bankruptcy of an individual partner the bankruptcy court will not take possession of the firm property unless necessary to make a final settlement of all claims.—Parker v. Muggridge, Case No. 10,743.

Where one partner becomes bankrupt, his assignee can take that portion of the partnership assets, only, which would belong to the bankrupt after payment of all the partnership debts. —Parker v. Muggridge, Case No. 10,743.

Where a member of an insolvent firm has been adjudicated a bankrupt, under Act 1841, his assignee takes all the effects of the firm.—McLean v. Johnson, Case No. 8,883.

In a separate bankruptcy of one member of a partnership, under Act 1841, where the firm or the other partners are solvent, the bankruptcy court will order an account to be taken, and leave the property in the possession of the solvent partners; but where such partnership is insolvent, and also all the partners, although some may not be in bankruptcy, such court will order the joint property to be placed in the hands of the assignee of the bankrupt partner to be administered.—Ayer v. Brastow, Case No. 682.

All members of a co-partnership must be adjudged bankrupt, under Act 1867, to enable the assignee to deal with the joint property. An assignee appointed upon the adjudication of a member of a firm upon his individual petition, whether the firm be existing or dissolved, acquires no title to its property.—In re Shepard, Case No. 12,754; Hudgins v. Lane, Id. 6,827; Crompton v. Conkling, Id. 3,407. CONTRA, see In re Shanahan, Case No. 12,701; Wilkins v. Davis, Id. 17,664.

Where a continuing partner agreed to pay the debts of the firm and has so mingled the new stock with the old that they cannot be separated, the entire stock will be considered his individual assets on his bankruptcy.—In re Montgomery, Case No. 9,727.

An agreement of dissolution between partners is ineffectual where no notice is given thereof, and the business is continued under the old firm name, and the assets will be held to be firm assets.—In re Tomes, Case No. 14,084.

Oral evidence is admissible to show that the factory building in which the bankrupt firm carried on its business was a part of the capital stock contributed to the business.—In re Farmer, Case No. 4,650.

§ 197. Payments.

Payments made mala fide to a debtor after petition in bankruptcy filed against him are void as against assignee.—Babbitt v. Burgess, Case No. 693.

One who pays a debt to the bankrupt, in the usual course of business, after the petition is filed, but before the adjudication, and without actual notice or knowledge of the pendency of the proceedings, is liable to the assignee therefor. Act 1867.—Howard v. Crompton, Case No. 6,758.

An executor and trustee, who is chargeable with notice of bankruptcy proceedings against remainder-man, is liable to the assignee for money paid over to such remainder-man.—Beecher v. Gillespie, Case No. 1,224.

The assignee is entitled to the money on a judgment recovered by the bankrupt or a third person in his right for a debt or claim due the bankrupt, and belonging to his assignee; and a court of equity will prevent its diversion.—Moore v. Jones, Case No. 9,768.

The payment to private bankers, after they have suspended business, made in good faith, without reasonable cause on the part of the one paying to believe that the bankers intended to make therewith any fraudulent payments or preferences, is valid, and he is not liable to the assignee in bankruptcy, under Act 1867, § 35.— Borland v. Phillips, Case No. 1,661.

§ 198. Powers.

A power of revocation and a power of appointment by deed or will, reserved to the grantor in a deed of realty to his wife, does not pass to his assignee.—Jones v. Clifton, Case No. 7,457.

§ 199. Property acquired by fraud.

The property of a bankrupt in his actual possession at the time of filing the petition passes to his assignee, and a person who has sold property to the bankrupt cannot recover the same by process in replevin in a state court on the ground that, because of fraud, the title to it has not passed.—In re Vogel, Cases Nos. 16,982, 16,983.

The seller of goods purchased by an insolvent without intent to pay therefor may recover them as against the purchaser's assignee, if he can identify them, and exercises his right within a reasonable time.—Donaldson v. Farwell, Case No. 3,983.

A loan made to a bankrupt, through his agent, after his failure, but without notice thereof, where the money never came to his possession, and it appeared that he never intended to pay the note given as evidence thereof, will not vest title in the bankrupt.—Purviance v. Union Nat. Bank, Case No. 11,475.

§ 200. Property fraudulently conveyed.

A bill of sale, with a lease back to the seller, containing an agreement by him to buy back the property at a fixed price, being unrecorded, *held* fraudulent as to creditors of the seller, and the property will pass to his assignee in bankruptcy.—In re Gurney, Case No. 5,873.

§ 201. Property passing by succession or will.

A legacy to the bankrupt's wife dependent on her surviving another person, being a mere possibility, does not pass to the assignees of the husband. Act 1800.—Krumbaar v. Burt, Case No. 7,944.

Property coming to a voluntary bankrupt by descent or distribution between the filing of his petition and the adjudication passes to the assignee as assets. (Act 1841.)—Ex parte Newhall, Case No. 10,159.

Where a devise has been made to a bankrupt, and accepted by him, it is a fraud upon his creditors for him to disclaim or renounce it, and the court will compel him to do all acts necessary to perfect his title to the devised estate.—Ex parte Fuller, Case No. 5,147.

Where an estate is devised unconditionally to two persons, and after the death of the testator, but before the probate of the will, one of such devisees is declared a bankrupt in a voluntary proceeding, the estate so devised becomes the property of the bankrupt's assignee, and the latter may sell and convey the same as part of the estate.—Ex parte Fuller, Case No. 5,147.

§ 202. Property held in trust for bankrupt.

Where a testator gives to his trustees an estate for the benefit of his son, but with the directions that they shall hold it and its accumulations until the son shall reach the age of 26 years, and the latter is adjudged a bankrupt at the age of 24, the assignee in bankruptcy, as against the bankrupt, is entitled to the property held by the trustees.—Sanford v. Lackland, Case No. 12,312.

Where income is devised, to cease on the insolvency or bankruptcy of the devisee, and then to go to his wife or children, or in default thereof to accumulate in augmentation of the principal fund, the devisee, on his bankruptcy, has no interest which the assignee can reach.—Nichols v. Eaton, Case No. 10,241.

Where an income is bequeathed to cease on the insolvency or bankruptcy of the beneficiary, and the will provides that the trustees thereunder may, in their discretion, but without its being obligatory upon them, pay to such beneficiary, upon the incomes being forfeited, so much of the income to which he would have been entitled had the forfeiture not occurred, no right vests in the bankrupt beneficiary to any portion of the income which he cannot enforce in any court, and no right thereto passes to his assignee, in bankruptcy.—Nichols v. Eaton, Case No. 10,241.

The assignee of a bankrupt does not take the income of a trust fund which was to be applied to the support of the bankrupt and his wife and children, nor any part thereof.—Durant v. Hospital Life Ins. Co. of Massachusetts, Case No. 4,188.

Lands held for a bankrupt upon a trust resulting upon the payment of the price by him before Act 1841 was passed belonged to the assignee.—Carr v. Gale, Case No. 2,435.

Lands conveyed to a third person by the bankrupt, without any consideration, upon a secret parol trust in his favor, for the purpose of defrauding creditors, pass to the assignee, although the conveyances were made before the passage of Act 1841.—Carr v. Hilton, Case No. 2,436.

Property on which the bankrupt had carried on business for years, together with the outstanding credits of the business and its good will, are available as assets, though the nominal legal title has for years stood in the names of others, under secret trusts to preserve it for the benefit of the bankrupt.—In re Long, Case No. 8,477.

Where a factor becomes bankrupt his principal may recover from the assignee any goods remaining unsold, or any proceeds of sale of such goods which the assignee has sold, or which can be specifically distinguished from the property of the bankrupt.—Nutter v. Wheeler, Case No. 10,384.

§ 203. Property held in trust by bankrupt.

Property held in trust by a bankrupt passes to the assignee, and is held by him until a new trustee is appointed.—Carr v. Gale, Case No. 2,435.

Where a bankrupt trustee has deposited trust money in his own name, with his own, in a bank, his cestui que trust, or he as representing him, may have a trust declared in the trust moneys.—Ex parte Hobbs, Case No. 6,549.

Money given by a reinsuring company to the original insurer, for delivery to the insured, who had suffered a loss, and retained by the assignee in bankruptcy of the original insurer, may be reached by a bill in equity charging the assignee as the trustee of an express trust.—Hosmer v. Jewett, Case No. 6,713.

Where a husband has, by fraud or mistake, been invested with the title in fee-simple of real estate inherited by his wife, equity will treat him as a trustee of his wife, and a court of bankruptcy will refuse to subject the land to liens of the creditors of the husband, who is a bankrupt.—In re Anderson, Case No. 351.

Where pending change of form of investment of wife's separate estate, the husband becomes bankrupt, with the title of the newly-acquired property in his name, the bankruptcy court will decree a settlement upon the wife of such property.—In re Campbell, Case No. 2,348.

A married woman who consents to the purchase of property with her means, by her husband in his own name, cannot afterwards reclaim the property as against his creditors, whose debts accrued while the property was so held by him.—Keating v. Keefer, Case No. 7,635.

Hides purchased by a tanner with the proceeds of drafts drawn on a person for whom

he contracted, to manufacture them into leather, as well as the manufactured article, are the property of such person, and the title does not pass to the assignee in bankruptcy of the tanner.—Safford v. Burgess, Case No. 12,213.

§ 204. Property of wife.

Under Act 1841 the assignee of the husband cannot claim jewelry given to the wife before marriage, or gifts from the husband of personal ornaments or attire compatible with his circumstances when they were made.—In re Ludlow, Case No. 8,599.

Property accumulated by the skill and energy of the husband, in engaging in real estate transactions in the wife's name, with her money, will pass to his assignee in bankruptcy.—Muirhead v. Aldridge, Case No. 9,904.

The assignee is not entitled to a chose in action of the bankrupt's wife, where there is no evidence to show that the bankrupt ever asserted his marital right thereto, or made any attempt to reduce it into possession.—In re Snow, Case No. 13,142.

The choses in action of the wife not reduced to possession of the husband do not pass to his assignee.—Wickham v. Valle, Case No. 17,613.

§ 205. Stockholders' liability.

The right to enforce the liability of stockholders for unpaid subscriptions passes to the assignee (Act 1867).—Payson v. Stoever, Case No. 10,863.

The individual liability of stockholders for corporate debts to the amount of their shares imposed by a state constitutional provision is not an asset which can be enforced by the assignee of the corporation.—Dutcher v. Marine Nat. Bank, Case No. 4,203.

§ 206. Miscellaneous cases.

A bankrupt's interest in a cemetery vault held by virtue of a certificate from a corporation which had been dedicated to a pious use by a state enactment, does not pass to the assignee.—Ex parte General Assignee, Case No. 5,306.

The franchise of a bankrupt railroad company is property of such company subject to sale in the bankruptcy proceedings.—Sweatt v. Boston, H. & E. R. Co., Case No. 13,684.

Where a private banker, who is prohibited by the state law from establishing another private bank, for the purpose of evading such law forms a joint-stock bank under the agreement with the stockholders that he is to have the only interest therein, and he is subsequently declared a bankrupt, and such bank fails and a receiver is appointed under the state law, the assignee in bankruptcy of the banker cannot sustain a bill in equity against the receiver for the delivery of the assets of the bank for distribution in bankruptcy, as the filing of the certificates of the organization of such bank, and the acts of user under them, are sufficient to establish the existence of the bank as a corporation as against the associates and third persons, whatever may be the right of the state by quo warranto proceedings, founded upon the frauds alleged, to end its corporate existence.—Goodrich v. Remington, Case No. 5,546.

The property of minor children accumulated by their sole exertions with their father's consent which has always stood in their names does not pass to his assignee.—Ex parte Tebbets, Case No. 13,816.

2. Assignment, and Rights and Remedies of Assignee, in General.

See, also, post, §§ 337-367.

§ 207. Assignment.

The adjudication is an essential prerequisite to an assignment of the estate to the assignee (Act 1867, § 14).—Wright v. Johnson, Case No. 18,082.

A register has the right to convey the estate to the assignee when there is "no opposing interest," although the title to the property is in dispute (Act 1867, § 14).—In re Wylie, Case No. 18,109.

Under Act 1867, § 14, the clerk of the bankruptcy court must record the original deed of assignment.—In re Alexander, Case No. 163.

It is not essential to the title of the assignee that the assignment to him by the register should be recorded within six months from its date. His title takes effect by relation from the commencement of the proceedings.—Davis v. Anderson, Case No. 3,623.

An assignee under Act 1800 (2 St. 19) cannot deny the authority of the commissioners under whom he received the property of the bankrupt.—Gulick's Ex'rs v. McIver, Case No. 5,865.

The assignment takes effect by operation of law from the commencement of the proceedings, uncontrolled by any mistake by the register in stating the time from which the deed should operate.—In re Pierson, Case No. 11,153.

An assignment by a register in bankruptcy to an assignee under the bankrupt law is within the meaning of a clause in an insurance policy declaring the same void, if assigned without the consent of the company. Case No. 13,308 reversed.—Starkweather v. Cleveland Ins. Co., Case No. 13,309.

A certificate of a clerk of the federal court to a copy of the deed of assignment in bankruptcy is sufficient to admit it to probate without complying with the state laws in reference to such proof (Act 1867, § 14).—In re Neale, Case No. 10,066.

A copy of the record containing the assignment is admissible in evidence to prove the assignment, although it does not purport to be a copy of the whole record, for bankruptcy proceedings do not constitute an integral record, and a copy of each proceeding may be authenticated separately, and is competent presumptive evidence of the facts therein stated.—Michener v. Payson, Case No. 9,524.

§ 208. Rights and remedies in general.

Where personal property of the bankrupt has been attached, the assignee in bankruptcy can take advantage of any remedy which would have been open to a subsequent attaching creditor, since the assignee represents the creditors of the bankrupt as well as the bankrupt himself.—Beers v. Place, Case No. 1,233.

The assignee may take advantage, in behalf of creditors, of any preference or other acts of the bankrupt, in violation of the bankrupt law.—McLean v. Lafayette Bank, Case No. 8,888.

Under the Wisconsin statute concerning usury (Taylor's Ed. c. 61, § 4), the power to institute proceedings to obtain a forfeiture is a privilege conferred upon the borrower only, and an assignee in bankruptcy is not within the meaning of the statute.—Bromley v. Smith, Case No. 1,922.

The bankrupt act does not grant any power or right to the assignee to institute proceedings by petition for the recovery of a statutory forfeiture not claimed by the bankrupt, either before or after the proceedings in bankruptcy.—Bromley v. Smith, Case No. 1,922.

§ 209. Remedies to recover bankrupt's property.

An assignee in bankruptcy is bound to institute a search in respect to any interest the bankrupt may have in the estate of any of his ancestors, if it is not maintained in the schedules, nor indicated to the assignee or any of the creditors.—In re Mott, Case No. 9,878a.

The assignee must exercise his election in respect to taking possession of property rights within a reasonable time, and unreasonable delay will be considered an election in respect to rights or liens subsequently acquired by others. —Smith v. Gordon, Case No. 13,052.

The lapse of 50 years after an assignment in bankruptcy will be a bar to proceedings to discover assets not disposed of by the assignee. —In re Pintard, Case No. 11,170.

The bankrupt will be required to account for a deficit in his assets shown by his books, or pay the amount to the assignee.—In re Peltasohn, Case No. 10,912.

The assignee may proceed in a summary manner by petition to collect the bankrupt's assets. —In re Marks, Case No. 9,095.

A summary petition by the assignee, and not a plenary suit, is the proper remedy against the bankrupt to recover property illegally withheld by him.—In re Swearinger, Case No. 13,683; In re Thompson, Id. 13,938.

A bankrupt may be compelled, by summary petition, to pay the assignee moneys of the estate collected by him, and not accounted for; and payment of such moneys, after the filing of the petition, for interest on mortgages, will not be allowed him in his account, unless shown to be for the benefit of the estate.—In re Ettinger, Case No. 4,543.

A proceeding to compel the bankrupt to deliver to the assignee a policy of insurance on his life, which he claimed to have transferred to his son before the bankruptcy, must be by plenary bill.—In re Stevens, Case No. 13,390.

A note given to a bankrupt in his own name for rent of a house belonging to his wife cannot be obtained by the assignee upon his application to the court for an order directing the bankrupt to deliver the note, and upon such application the question as to whether the house was fraudulently conveyed to the wife cannot be determined.—In re Westervelt, Case No. 17,445a.

Where a bankrupt, after the decree of bankruptcy, has brought an action in his own name in the state court, without his bankruptcy being pleaded by defendant, the bankruptcy court has power, upon petition of the assignee while the judgment remains unpaid, to order the amount paid to the assignee.—Moore v. Jones, Case No. 9,768.

The bankrupt court has power to order a bankrupt to pay over to the assignee sums which apparently are in his hands.—In re How, Case No. 6,747.

A bankrupt will be committed for contempt in failing to pay over to the assignee money returned in his schedule as "cash on hand."—In re Dresser, Case No. 4,077.

On a petition by the assignee for the possession of property which the bankrupt had given to his wife when insolvent, an affidavit that the property is in possession of the wife is not a sufficient answer.—In re Pierce, Case No. 11,139.

A bankrupt had a permit from the comptroller of a city, which was revocable at the pleasure of the comptroller and could not be transferred without permission, and he placed a certain value on it in a statement of his assets as a basis for credit to a creditor who afterwards became his assignee in bankruptcy, and the bankruptcy court on petition of such assignee ordered that the bankrupt execute a transfer to the assignee of a right to the permit, and a request to the comptroller to consent to such transfer. On petition by the bankrupt for a review, claiming that the permit was not property which passed to his assignee in bankruptcy, *held*, that the bankrupt was estopped from making such assertion, and that the order of the district court was proper.—In re Gallagher, Case No. 5,192.

A petition to compel the payment of the judgment of a state court to the assignee in bankruptcy will be granted only on condition of the payment of the reasonable expenses for obtaining the judgment, but no charges will be required to be paid for services of a bankrupt's attorney in opposing the motion of the assignee to be allowed to enter and prosecute the claim in the original suit.—Moore v. Jones, Case No. 9,768.

Where the assignee petitions that the bankrupt pay to him the proceeds of a mortgage which was fraudulently transferred, the bankrupt will be allowed to retain from the proceeds the amount paid counsel for preparing his petition and schedules, and the amount determined by the assignee for the temporary support of himself and family, but not the probable expenses of procuring his discharge.—In re Thompson, Case No. 13,938.

§ 210. Adverse claims to property.

Where the bankrupt has possession of property claimed by the assignee as part of the assets of the bankruptcy, and the bankrupt claims to hold them, not as a bankrupt, but under an independent title, as the agent of a third person, he is simply a person claiming an adverse interest, and the circuit court has jurisdiction under Act 1841, §§ 6, 8.—Carr v. Gale, Case No. 2,434.

If the assignees are satisfied that property received by them did not belong to the bankrupt, they should return it immediately; but if they are in doubt, the claimant must seek his remedy in the state courts.—In re Noakes, Case No. 10,281.

The assignee represents both the bankrupt and his creditors, and he can contest claims and rights of property which the bankrupt cannot contest.—In re Gurney, Case No. 5,873.

A judgment creditor claiming money adversely to the assignee cannot enforce the same by motion and on notice to the assignee. He must file a petition therefor, setting forth the facts relied on, and asking specific relief.—In re Smith, Case No. 12,984.

A fund in the hands of the bankrupt court will be detained pending suits to determine adverse claims to its ownership.—In re Sabin, Case No. 12,195.

§ 211. Rights as to pending suits.

Where the writ, in an action for use and occupation, was sued out before the bankruptcy of plaintiff, it was not abated by substituting the assignee, on his appointment, as plaintiff in his place.—Wise v. Decker, Case No. 17,907.

A decree in proceedings to which an assignee in bankruptcy is not a party does not bind him. —Atkinson v. Farmers' Bank, Case No. 609.

Where a bill by a creditor against the bankrupt and his trustee for discovery and relief is pending at the appointment of the assignee, the latter may take control of the suit for the benefit of the estate, on indemnifying the complainant for reasonable expenses of the suit, and becoming responsible for costs.—Smith v. Gordon, Case No. 13,052.

If the assignee elect not to take control of a suit, and the complainant procures a decree, this will give him a prior right against the property in question.—Smith v. Gordon, Case No. 13,052.

Where a creditor has proved his debt against the acceptor of a bill of exchange, and also brought suits at law against the drawers and attached their property, and the assignee in bankruptcy has paid the claim of such creditor, he may prosecute such suits at law at the expense and for the benefit of the estate, such

assignee being subrogated to all the rights of the creditor.—In re Babcock, Case No. 696.

Where a homestead is set apart to the family of a debtor, by the judgment of a state court, a few days prior to proceedings in bankruptcy, from which an appeal is taken, which appeal suspends, but does not vacate, the judgment, the assignee will be directed to become a party to the proceedings in the state court, and therein first determine his right to the possession of the property.—In re Moseley, Case No. 9,868.

§ 212. Property in hands of state court officers.

The possession of a sheriff under a levy made before proceedings in bankruptcy were commenced cannot be disturbed by the bankruptcy court, as the possession of the sheriff is the possession of the court of which he is the officer.—Goddard v. Weaver, Case No. 5,495; Townsend v. Leonard, Id. 14,117; In re Shuey, Id. 12,821.

The assignee in bankruptcy cannot maintain an action in the federal court to take from a state sheriff property of the bankrupt which he has taken upon attachment duly issued to him out of the state court before the proceedings in bankruptcy were commenced.—Johnson v. Bishop, Case No. 7,373.

Where the debtor's estate has been conveyed to a receiver appointed on a creditors' bill before the petition in bankruptcy was filed, the assignee in bankruptcy must apply to a court of chancery for delivery over of the property.—Ex parte Waddell, Case No. 17,027.

A receiver in possession of property under a state court decree at the time the bankruptcy proceedings were commenced cannot be deprived of possession by the bankruptcy court, unless for some cause rendering his title impeachable under the bankruptcy act.—In re Clark, Case No. 2,798; Alden v. Boston, H. & E. R. Co., Id. 152; Davis v. Railroad Co., Id. 3,648.

Where, prior to the commencement of the proceedings in bankruptcy, a receiver is appointed, in an action in a state court, to foreclose a mortgage, property in his possession cannot be taken by the assignee without discharging the mortgage debt.—Davis v. Railroad Co., Case No. 3,648.

A receiver appointed on a prior creditors' bill by a state court may be compelled to transfer the property to the assignee in bankruptcy, subject to all prior liens.—In re Whipple, Case No. 17,512.

A decree of bankruptcy overrides all rights sought to be acquired by appointment of a receiver in a state court after the filing of the petition.—Smith v. Buchanan, Case No. 13,016.

Under Act Feb. 13, 1873, only those orders of state courts for the ratable distribution of assets of an insolvent corporation are valid which are passed before the commencement of proceedings in bankruptcy.—Watson v. Citizens' Sav. Bank, Case No. 17,279.

Where the appointment of a receiver in supplemental proceedings was not formally made, as required by law, prior to the filing of the petition in bankruptcy, *held*, that the bankrupt's property was not vested in the receiver.—In re Nolan, Case No. 10,289.

§ 213. Power of state courts.

A state court cannot, by its process, take property surrendered by a bankrupt from the possession of his assignee in bankruptcy.—Hewett v. Norton, Case No. 6,441.

Funds in the hands of an assignee in bankruptcy are not subject to garnishment.—In re Cunningham, Case No. 3,478.

Where property in possession of an assignee as part of the estate is taken in replevin issued by a state court in a proceeding to which he is not a party, the district court will see that his possession is not forcibly displaced.—In re Clark, Case No. 2,802.

Suits in a state court against the marshal and assignee, as trespassers in taking property found to have been transferred by way of preference, will be enjoined.—In re Miller, Case No. 9,551.

(C) PREFERENCES AND TRANSFERS BY BANKRUPT, AND ATTACHMENTS AND OTHER LIENS.

1. Preferences and Transfers in General.

See, also, ante, §§ 62–78; post, §§ 594–601.

§ 214. What transfers are preferences within the bankruptcy acts in general.

Preferences to certain creditors to the exclusion of others are within the prohibition of Act 1841, although the bankrupt originally offered to compromise with all his creditors at a fixed and equal ratio. Case No. 336b affirmed.—Amory v. Leeds, Case No. 336c.

Preferences of certain creditors, to the exclusion of others, are not exempted from the prohibition of Act 1841, because obtained through the urgent demands of such creditors, or by means of threats to bring actions for their claims. Case No. 336b affirmed.—Amory v. Leeds, Case No. 336c.

The preference of a creditor is not the payment of one in the ordinary course of business, or under threats or suits, but voluntarily selecting one, as a friend or relative, or settling with him before due, or on the eve of bankruptcy.—Ashby v. Steere, Case No. 576.

The doctrine of pressure by a creditor to force the giving of security for the payment of a debt is not applicable under Act 1867; and it is no answer, when a debtor mortgages his property to secure such a debt, to say that he was "pressed to do it."—Rison v. Knapp, Case No. 11,861.

Conveyance may be an act of bankruptcy, and yet valid as to grantee.—In re Beck, Case No. 1,205.

A deed of property executed within six months before his adjudication in pursuance of a decree of a state court by the bankrupt, who had misappropriated trust funds, which had been finally invested in such property in his own name, is not avoided by his bankruptcy.—In re Myers, Case No. 9,984.

The transfer of merchandise by warehousemen after their insolvency in place of goods previously abstracted by them is a fraudulent preference.—Sharp v. Philadelphia Warehouse Co., Case No. 12,709a.

It is not giving a preference to a creditor within the meaning of Act 1867, when the debtor, peaceably and for convenience, assents to the doing by the creditor of what the latter, if objection and collusion arose, could lawfully do, notwithstanding the objection.—In re Foot, Case No. 4,907.

Creditors receiving from an insolvent a larger per cent. of their debts than the apparent assets would give to all are bound to be careful that they do not obtain preferences.—Clark v. Skilton, Case No. 2,834.

A creditor releasing the goods of a debtor from an execution, and taking other assets, when the debtor is insolvent, obtains illegal preference under Act 1867.—Clark v. Iselin, Case No. 2,825.

The taking of a bill of sale of logs purchased with money furnished by the creditor is not a preference, unless it appears that such bill of

sale included more than the creditor was entitled to.—In re Bousfield & Poole Mfg. Co., Case No. 1,703.

The taking of sawed lumber, in settlement of a claim on a conditional sale of logs to an insolvent mill owner, in excess of the claim, creates a fraudulent preference.—Bailey v. Henderson, Case No. 737.

A person who furnishes money to the bankrupts for the purchase of stock, the title to which the bankrupts take in their own name without his knowledge, and subsequently hypothecate as security for a loan, is not entitled to the proceeds of securities which were deposited with a third person on the day of their failure to release the hypothecated stock.—Ungewitter v. Von Sachs, Case No. 14,343.

An unrecorded bill of sale of fixtures and furniture given by a tenant as security for past-due rent, within two months prior to the filing of a petition in bankruptcy, is void as an attempt to create a preference, under Rev. St. § 5128.—In re Eckenroth, Case No. 4,265.

Rev. St. § 5084, must be construed in connection with the clause of § 5021 prohibiting certain creditors from proving their debts.—In re Clarke, Case No. 2,843.

Question of insolvency of a Virginia society which was a bank of discount, deposit, and circulation, and had suspended during the Civil War, and thereafter undertook no other business than the liquidation of its affairs, should not be considered as if the society had been a trader, merchant, or bank, but with reference merely to whether its liabilities could meet its assets.—Harmanson v. Bain, Case No. 6,072.

Papers in the form of checks on such bank, bought and sold in the public market, and used for the purpose of set-off, are not checks in the commercial sense, but are mere evidences of the assignment of a chose in action in the form of a deposit.—Harmanson v. Bain, Case No. 6,072.

Persons who sell such papers are not responsible to the assignee of the society for the amounts stated in dollars on their face.—Harmanson v. Bain, Case No. 6,072.

The transfer to creditors of stocks of goods and real estate after the debtors' paper had gone to protest, and some of their establishments were seized for alleged violation of the internal revenue laws, is a fraudulent preference under Act 1867, § 39, as the debtors were insolvent at the time the transfer was made.—In re Louis, Case No. 8,527.

A fraud upon the bankrupt act is not necessarily what is popularly known as a "fraudulent act," but one by which its provisions are evaded or avoided.—Webb v. Sachs, Case No. 17,325.

§ 215. "Insolvency" defined.

The inability to meet engagements and pay debts as they mature in the ordinary course of business, as persons in trade usually do, constitutes insolvency, within the meaning of Act 1867, without reference to the value of the debtor's property.—In re Black, Case No. 1,457; Graham v. Stark, Id. 5,676; Scammon v. Cole, Id. 12,433, affirmed in Case No. 12,432; Wilson v. Brinkman, Case No. 17,794; Driggs v. Moore, Id. 4,083; Martin v. Toof, Id. 9,167; Campbell v. Traders' Nat. Bank, Id. 2,370; Jackson v. McCulloch, Id. 7,140; Sawyer v. Turpin, Id. 12,410, affirmed in Case No. 12,409; Stranahan v. Gregory, Case No. 13,522; Warren v. Tenth Nat. Bank, Id. 17,202, reversing Case No. 17,200; Mayer v. Hermann, Case No. 9,344; Webb v. Sachs, Id. 17,325; In re Hauck, Id. 6,219.

An innkeeper who keeps a bar is a trader, and, when unable to pay his debts as they mature, is insolvent, although his property exceeds in value the amount of his debts.—In re Ryan, Case No. 12,183.

A person will be held insolvent only when he fails to meet his debts according to the general custom of the place of his business.—Hall v. Wager, Case No. 5,951.

Insolvency which renders a transfer void under Act 1867, § 35, is a condition of fact, not of belief.—Hall v. Wager, Case No. 5,951.

The question of insolvency is one of fact, and depends in part upon the usage and understanding which prevail in the locality with reference to which the question arises.—Driggs v. Moore, Case No. 4,083.

The word "insolvency," as used in the currency act of 1864, is synonymous with the same word as used in the bankrupt act, and it is only necessary that insolvency should be in contemplation by the bank making transfers of its assets.—Case v. Citizens' Bank of Louisiana, Case No. 2,489.

See, also, ante, §§ 66, 77.

§ 216. What constitutes "contemplation of bankruptcy."

Under the provision of Act 1841, respecting a transfer by a debtor "in contemplation of bankruptcy," at the time of such transfer, it is sufficient that the insolvent contemplated becoming insolvent and being compelled to wind up his business, and it is not necessary that he contemplated being declared a bankrupt under such act.—Arnold v. Maynard, Case No. 561; Atkinson v. Farmers' Bank, Id. 609; Everett v. Stone, Id. 4,577; Ashby v. Steere, Id. 576; McLean v. Lafayette Bank, Id. 8,888. CONTRA, see Lonergan v. Fenlon, Case No. 8,475.

Payments made, or securities given, by a party knowing himself to be insolvent, are not in contemplation of bankruptcy, if, at the time, he fully expected to continue his business and retrieve his losses.—Atkinson v. Farmers' Bank, Case No. 609.

A mortgage of a stock in trade and of nearly all of the real estate of the debtor on the same day that a petition in bankruptcy was verified is made in contemplation of bankruptcy (Act 1841), and it is immaterial that the grantee did not know that a preference was intended, it having been actually given.—Morse v. Godfrey, Case No. 9,856.

Where an insolvent debtor transfers all of the goods in his store to pay a creditor, such transfer will be regarded as a preference and an act of bankruptcy, where it appears that such goods constitute the greater part of his property, and that he was pressed by execution creditors at the time the assignment was made.—In re House, Case No. 6,735.

See, also, ante, §§ 65, 78.

§ 217. Knowledge and intent of parties in general.

Both an intention to dispose of property in fraud of Act 1867, and a knowledge of such intention by the transferee, are necessary to entitle the assignee to recover personal property transferred on the eve of bankruptcy.—Dickinson v. Adams, Case No. 3,896.

Transfers of property are not void under Rev. St. § 5128, where it is proved affirmatively that the persons who effected them with the debtor had no intention of obtaining a preference, or the debtor of giving it.—Harmanson v. Bain, Case No. 6,072.

The payment by the maker of a promissory note to an indorser, the maker knowing his insolvency at the time, and the indorser receiving such payment having reasonable cause to believe the maker to be insolvent, is a fraudulent preference of such indorser, within the mean-

ing of Act 1867, § 35, and the assignee in bankruptcy may sue for and recover the amount so paid, for the benefit of all the creditors.—Ahl v. Thorner, Case No. 103.

A mortgage of all the bankrupt's property, more than four and less than six months before the filing of the petition, to secure bona fide debts and liabilities, is good as against the assignee, unless it is shown that the mortgagor was insolvent, or in contemplation of insolvency; that the mortgagee had reasonable cause to know his insolvency; and that the mortgagor designed to prevent, delay, or impair the operation of the bankrupt law.—Sidener v. Klier, Case No. 12,843.

Where a party contributes a certain sum and his personal service, at a stipulated price, to the business of another, and holds himself out as a partner, it is a fraud upon the partnership creditors for him, after both parties have become insolvent, to release to his associate all interest in the assets of the business, and receive for such release the notes of the latter for the amount contributed by such party payable to a third person, who, having knowledge of all the facts, had loaned the same to such party to invest in the business, and a part of such notes being indorsed by a fourth person secured therefor by a mortgage upon the firm assets, and the assignee in bankruptcy of the firm may in equity have such transaction set aside as fraudulent and void.—Mattocks v. Rogers, Case No. 9,300.

The intent on the part of an insolvent debtor to give and of a creditor to secure an illegal preference may be inferred from circumstances.—Vanderhoof v. City Bank of St. Paul, Case No. 16,842.

A security given out of the usual course of business is valid where the creditor did not know of the insolvency of the debtor, or have reasonable cause to believe him insolvent.—Lee v. Franklin Ave. German Sav. Inst., Case No. 8,188.

§ 218. Debtor's knowledge of insolvency.

A person, not knowing himself to be insolvent, may pledge his property to another whose money he has unlawfully used, without violating the prohibition against giving preferences, and money paid to redeem such property cannot be recovered by the assignee (Act 1867).—Jenkins v. Mayer, Case No. 7,272.

A merchant knowing that he cannot pay his debts in the ordinary course of business must be *held* to have knowledge of his insolvency.—Martin v. Toof, Case No. 9,167.

Where a trader mortgages his whole stock, of the value of about $5,000, to a creditor to secure him in a certain sum, the debtor owing debts to the amount of $5,000 then overdue, and the whole amount arising from the sale of his stock is less than $5,000, the debtor will be regarded, as a matter of law, to have known at the time of making such mortgage that he was insolvent, and must stop business by reason thereof.—Arnold v. Maynard, Case No. 561.

§ 219. Intent of debtor.

A conveyance of property in contemplation of a state of insolvency is void under the bankrupt law.—McLean v. Lafayette Bank, Case No. 8,885.

Any mortgage or other lien which is intended to give a preference to one or more creditors over others is void. (Act 1841.)—McLean v. Lafayette Bank, Case No. 8,885.

A mortgage by an insolvent corporation to secure a loan is not affected by the fact that it was intended as an unlawful preference, if such intent was not carried out.—Corbett v. Woodward, Case No. 3,223.

An intent to prefer individual creditors over persons who might charge the debtor with the statutory liability for the debts of a corporation is not an intent to defraud creditors.—Cookingham v. Ferguson, Case No. 3,182.

An act which directly tends to defeat the purposes and policy of Act 1867, and which was done in contravention of, and with intent to defeat, such purposes and policy, is fraudulent and void.—Beattie v. Gardner, Case No. 1,195.

If the legal effect of a transfer is to prefer a creditor, as a person is presumed to intend the necessary consequences of his acts, the intent to give a preference will be presumed.—Rison v. Knapp, Case No. 11,861; Driggs v. Moore, Id. 4,083; Martin v. Toof, Id. 9,167; Campbell v. Traders' Nat. Bank, Id. 2,370; Catlin v. Hoffman, Id. 2,521.

Where an insolvent debtor does an act which operates as a preference, he is presumed to have intended the preference, until the contrary appears.—In re Black, Case No. 1,457; Sawyer v. Turpin, Id. 12,410; Webb v. Sachs, Id. 17,325.

A payment made in the establishment of an insolvent firm out of its funds and by their recognized agent, without their objection, which has the effect to produce a preference, will be regarded as having been made by such firm with the intention of giving a preference.—Sedgwick v. Sheffield, Case No. 12,624.

§ 220. Transfers by solvent debtors.

A mortgage given to secure a prior loan by an embarrassed debtor, three months before his assignment, where there is no reason to suppose that the debtor will not meet his liabilities, is not a fraudulent preference.—Nash v. Le Clercq, Case No. 10,021.

A conveyance by a solvent grantor to his wife through a third person, where there was no intention to defraud creditors, will not be set aside on behalf of subsequent creditors.—Sedgwick v. Place, Case No. 12,620.

§ 221. Knowledge of insolvency by creditor.

The pendency of proceedings in bankruptcy is sufficient constructive notice to all grantees of property proceeding from the bankrupt.—Morse v. Godfrey, Case No. 9,856.

The taking of a mortgage by a bank from its debtor does not show that the bank considered him to be insolvent, nor that the mortgagor contemplated bankruptcy.—McLean v. Lafayette Bank, Case No. 8,888.

A request by the bankrupt of a creditor, on the giving of the mortgage in pursuance of a previous agreement to secure a pre-existing debt, to permit him to secure other creditors in such instrument, is notice of the existence of such creditors, and the bankrupt's inability to pay them.—Lloyd v. Strobridge, Case No. 8,435.

A request by a bank of a depositor, who had always before been prompt in his payments, for small demand notes to cover matured paper, and other paper about to mature, which he had made no arrangements to meet, and a further loan, will be regarded as made with a knowledge of the debtor's insolvency.—Loudon v. First Nat. Bank, Case No. 8,525.

Repeated failures by a debtor to fulfill promises to pay a claim of the creditor, with knowledge of other debts, charges such creditor taking a mortgage to secure his claim with notice of insolvency, and that he is receiving a preference.—In re Armstrong, Case No. 539.

Proof that the bankrupt, while insolvent, paid or secured defendant in full, without making adequate compensation to his other creditors, casts upon defendant the burden of showing that he did not know at the time that the bankrupt was insolvent.—Stobaugh v. Mills, Case No. 13,461.

Judgments are not to be set aside as fraudulent and void, as having been procured with knowledge of the debtor's insolvency, merely because the plaintiff has exacted a high rate of interest of the debtor, especially when, at the time of entering of the judgments, valuable collateral securities were surrendered to the debtor by plaintiff for a large part of said judgments.—Shaffer v. Fritchery, Case No. 12,697.

A judgment is fraudulent and void if the plaintiff knew, at the time it was entered up, that the debtor had executed a deed of assignment to said plaintiff and another party.—Shaffer v. Fritchery, Case No. 12,697.

Debtors with knowledge of insolvency are bound to know whether such condition continues, and a mistaken belief that all other creditors have settled will not justify a transfer which in fact operates as a preference.—Curran v. Munger, Case No. 3,487.

Testimony of neighbors as to a person's reputation for solvency is entitled to but little weight to negative the knowledge of a mortgagee who was informed that the mortgagor could not pay his debt, which had long been overdue.—Hurley v. Smith, Case No. 6,920.

§ 222. "Reasonable cause to believe" insolvency or intent.

"Reasonable cause" to believe insolvency means a state of facts which would put a prudent man upon inquiry as to the condition of the person with whom he is dealing.—Rison v. Knapp, Case No. 11,861; In re McDonough, Id. 8,775; Webb v. Sachs, Id. 17,325.

A creditor who has knowledge of transactions by the debtor out of the ordinary course of trade is put upon inquiry as to his solvency.—Scammon v. Hobson, Case No. 12,434.

A creditor who knows that his debtor cannot pay all his debts in the ordinary course of business has reasonable cause to believe the debtor to be insolvent.—Wilson v. Brinkman, Case No. 17,794.

Knowledge of the nonpayment of the commercial paper of a merchant at maturity furnishes reasonable cause to believe that he is insolvent. Case No. 17,200 reversed.—Warren v. Tenth Nat. Bank, Case No. 17,202.

Creditors who have to resort to legal measures for the collection of accounts long overdue will be held to have reasonable cause to believe the debtor insolvent. — Stranahan v. Gregory, Case No. 13,522.

A creditor, who has obtained a mortgage from his debtor as security, has reasonable cause to believe that his debtor is insolvent, where he has knowledge that for two years such debtor has paid only a small portion of an overdue debt, has sold out the stock of goods for which the account of the creditor was made, has transferred a part of the paper received therefor, has applied for extensions and has been refused, has previously declined to execute a mortgage on the ground that it would injure his credit, and that he has been pressed by other creditors.—Hall v. Wager, Case No. 5,951.

When a creditor to whom a preference was given obtained such preference because he suspected the solvency of his debtor, and the latter proves to be insolvent, such creditor has reasonable ground to believe that his debtor was insolvent, within Act 1867, §§ 35, 39.—Campbell v. Traders' Nat. Bank, Case No. 2,370.

The existence of a financial crisis constitutes reasonable cause to believe persons otherwise in doubtful circumstances to be insolvent.—In re Clarke, Case No. 2,843.

Where it appears that overdrafts were made by a merchant in collusion with a defaulting teller, for which a deed of preference is given to the bank one month prior to a default decree in bankruptcy against the merchant, the deed is void, as such facts constitute a reasonable cause for the bank to believe that the bankrupt was insolvent, and made the deed to defeat the bankrupt law. — Alderdice v. State Bank of Virginia, Case No. 154.

That property of a debtor is sold under execution is evidence that the creditor has reasonable cause to believe that the debtor is insolvent and contemplates bankruptcy.—Mayer v. Hermann, Case No. 9,344.

That a merchant, having no defense to debts maturing in his current business, submits to be sued for them, is strong evidence of insolvency.—Mayer v. Hermann, Case No. 9,344.

Knowledge that a party is embarrassed in carrying out his business for want of means is not sufficient to fix on a grantee in a trust deed knowledge of his insolvency, if he fully believed that his property was more than sufficient to pay all his debts.—In re Wynne, Case No. 18,117.

The fact that a person doing business obtains renewals of his commercial paper, or under special circumstances pays a large discount, is not notice of insolvency to a creditor, where it is shown that such commercial paper was selling at equal rates in the market.—Golson v. Niehoff, Case No. 5,524.

A bank which takes the checks of an insolvent firm is put upon inquiry by their nonpayment.—Warren v. Tenth Nat. Bank, Case No. 17,200.

Circumstances which would be reasonable cause for belief in insolvency or fraud in a commercial community may have less significance in a rural district.—Lakin v. First Nat. Bank, Case No. 7,999.

In a rural community the mere nonpayment of a note at maturity is not sufficient evidence of insolvency to put a creditor dealing with him on inquiry.—Shaffer v. Fritchery, Case No. 12,697.

Act 1867, before the amendment of June 22, 1874, did not require the creditor receiving a preference to know that reasonable cause existed for believing the debtor insolvent, in order to render such preference invalid, but only that reasonable cause should exist. — In re Clarke, Case No. 2,843.

It is immaterial what the creditor thought or knew or believed about the debtor's intentions in giving the preference, where he had reasonable cause, at the time of taking it, to believe the debtor insolvent.—Hall v. Wager, Case No. 5,951; Webb v. Sachs, Id. 17,325.

Ignorance of the law cannot avail creditors who, knowing of facts showing insolvency, yet receive from their debtor property in satisfaction of their debts.—Martin v. Toof, Case No. 9,167.

A creditor who, at the time of taking a security, has no reasonable cause to believe the debtor insolvent, will be allowed to hold it, as against the assignee.—Rankin v. Third Nat. Bank, Case No. 11,568.

A seller who, suspecting insolvency of the buyer, induces him to give up goods in greater part purchased from others, in full satisfaction of the buyer's claim, is liable for their amount to the assignee.—Anonymous, Case No. 466.

A creditor accepting a security is conclusively presumed to know what appears upon its face, and to have reasonable cause to believe it was intended to accomplish what must be its ordinary and necessary effect.—Graham v. Stark, Case No. 5,676.

Where it appears that the creditor had a reasonable cause to believe the debtor insol-

vent, and that the debtor knew of his insolvency, it is sufficiently proved that the creditor had a reasonable cause to believe that the debtor intended to prefer him.—Stobaugh v. Mills, Case No. 13,461.

The mere fact that debtors had some time previously compromised with creditors at 45 cents on the dollar is not reasonable cause to believe that they intended, by suffering execution to be levied, to give the creditor a preference. Case No. 17,200, reversed.—Warren v. Tenth Nat. Bank, Case No. 17,202.

§ 223. Knowledge of grantee necessary to defeat transfer.

Act 1841, § 2 (5 Stat. 440), does not render void a contract or conveyance made two months before the bankruptcy, whatever may have been the intention of the bankrupt, if the other party acted fairly and had no notice of his intentions.—McLean v. Lafayette, Case No. 8,888.

A creditor will not be held to be unduly preferred by a bankrupt unless he understands at the time that he is dealing with a bankrupt or with his avowed agent for security or payment out of the funds of the bankrupt.—Winsor v. Kendall, Case No. 17,886.

The payment of a due bill to induce the holder to become a party to a general assignment in favor of creditors which never took effect, made by a person who either did not act as agent for the debtor, or, if he did, concealed such agency from the creditor, is not a fraudulent preference.—Winsor v. Kendall, Case No. 17,886.

A debtor known or believed to be embarrassed is not disabled from making a fair and honest sale of his property with a view to keep out of bankruptcy. Case No. 3,572, affirmed.—Darby v. Lucas, Case No. 3,573.

A payment, conveyance, or security given to a creditor within four months of the bankruptcy proceedings is valid, unless the creditor had reasonable cause to believe that the debtor was insolvent, and that a fraud upon the act was intended.—Wadsworth v. Tyler, Case No. 17,032; Babbitt v. Walburn, Id. 694; Sedgwick v. Sheffield, Id. 12,624; Castle v. Lee, Id. 2,506.

A payment made within four months of the petition in bankruptcy may be recovered back if the creditor had reasonable cause to believe that it was made in contemplation of insolvency and to give him a preference, though he had no reasonable cause to believe the debtor then to be insolvent. (Act 1867, § 35.)—Paige v. Loring, Case No. 10,672.

The word "knowledge" in Act 1867, § 35, as amended (Act June 24, 1874), means actual knowledge, as contradistinguished from constructive knowledge.—In re Hauck, Case No. 6,219.

The insertion of the words "know," etc., in Act 1867, §§ 35, 39, by the amendment of June 22, 1874, was a material change from the words "reasonable cause to believe"; and congress intended thereby to affect only transactions evidently mala fide. Case No. 12,899, affirmed.—Singer v. Sloan, Case No. 12,898.

To defeat a conveyance, since the amendment of 1874, it must be shown that the grantee had reasonable cause to believe the grantor insolvent, and that he knew that a fraud upon the bankruptcy act was intended.—Gattman v. Honea, Case No. 5,271.

A creditor taking security upon all his debtor's property, knowing it to be insufficient to pay his own debt and the other creditors in full, is chargeable with knowledge that the transaction is "in fraud of the bankrupt act." (Act June 22, 1874.)—Robinson v. Tuttle, Case No. 11,968.

Notice of facts sufficient to put mortgagees on inquiry as to an insolvent's condition and intention will charge them with the knowledge which an investigation would have developed.—Burpee v. First Nat. Bank of Janesville, Case No. 2,185.

A person having notice of such a state of facts in regard to the financial affairs of the bankrupt as in law constitute insolvency must be presumed to have actual knowledge that a transfer to him is a fraud upon Act 1867.—In re Hauck, Case No. 6,219.

Mortgages on the stock and real estate of a bankrupt, taken at a time and in a form which must necessarily break up his business, to secure a debt a year and a half overdue, are fraudulent and void. Act 1867.—Graham v. Stark, Case No. 5,676.

A creditor of a banker who receives payment of his debt after knowledge that the debtor has suspended payment and closed his doors secures an illegal preference, and is liable to the assignee for the amount received.—Markson v. Hobson, Case No. 9,099.

Security taken by a creditor on the dismissal of his suit on negotiable paper, in which the debtor made no defense, after knowledge that he was obliged to ask extensions, may be recovered by the assignee if taken within the time designated within the act.—Dunning v. Perkins, Case No. 4,180.

A payment, transfer, or security given by the debtor and accepted by the creditor after knowledge or notice of insolvency is void, under Act 1867, as a fraudulent preference.—In re Palmer, Case No. 10,681; Foster v. Hackley, Id. 4,971; In re Gregg, Id. 5,797; Woodsum v. Bray, Id. 17,998.

A payment, transfer, or security given within the time prescribed by the bankruptcy acts, by a debtor, when insolvent, to a creditor who had reason to believe him to be so, and that a fraud upon the act is intended, is void.—Merchants' Nat. Bank of Hastings v. Truax, Case No. 9,451; In re McDonough, Id. 8,775; Driggs v. Moore, Id. 4,083.

The conveyance of real estate, without consideration, by an insolvent debtor to his wife, she giving a mortgage thereon to creditors who know the debtor to be insolvent, is a preference, under Act 1867, and such conveyance will be set aside at the suit of the assignee.—Gibson v. Dobie, Case No. 5,394.

Money paid to the indorser, or by his procurement or arrangement to the holder, by the maker, with intent to give a preference, the indorser having reasonable cause to believe the maker insolvent, is a fraudulent preference, under Act 1867, if paid within four months of the bankruptcy proceedings.—Thomas v. Woodbury, Case No. 13,916.

A creditor receiving payment, with "cause to believe" his debtor insolvent, is presumed to know that such debtor thereby intended a fraud upon the act.—Brooke v. McCraken, Case No. 1,932.

Under Act 1867, notice to a creditor of an act of bankruptcy does not affect a transfer to him, except as tending to show that he had reason to believe the transfer was in fraud of the bankrupt law.—Catlin v. Hoffman, Case No. 2,521.

A mortgagee who takes a conveyance from the mortgagor under circumstances apparently for the latter's relief must have actual notice that it is in fraud (Act 1867).—Boothe v. Brooks, Case No. 1,650.

§ 224. Effect of knowledge of agent or attorney.

Where the creditor's agent has reasonable cause to believe the debtor insolvent, with knowledge that the transaction is in fraud of

the bankrupt law, the effect is the same as if the creditor himself had taken part therein with the same cause to believe and the same knowledge.—Sage v. Wynkoop, Case No. 12,215.

The knowledge of an attorney, who takes a judgment note in his own name and enters judgment thereon, of the insolvency of the debtor, is imputed to his principal.—Vogel v. Lathrop, Case No. 16,985.

Knowledge by an attorney, who sues to recover a debt, of facts which will make the collection of the debt a preference, is imputable to his client.—Mayer v. Hermann, Case No. 9,344.

The acts, knowledge, and intentions of a husband managing his wife's business, in reference to the business, must be *held* to be her acts, knowledge, and intentions.—Graham v. Stark, Case No. 5,676.

An attorney, with knowledge of the debtor's insolvency, defended a suit on a just debt, and he also obtained, as attorney for another creditor, a judgment by default against such debtor in a suit brought later, before judgment could be obtained in the prior suit. *Held*, that the attorney had reasonable cause to believe that the debtor intended to give a preference to the creditor in the later suit, and his knowledge was to be imputed to his client.—Wight v. Muxlow, Case No. 17,629.

§ 225. Payment of present consideration for transfer.

A bona fide conveyance by an insolvent for an adequate consideration, made more than two months before petition filed, to one who had no notice of a previous act of bankruptcy or of intention to take the benefit of the act, is not void. (Act 1841.)—Dennett v. Mitchell, Case No. 3,789.

The preference of creditors prohibited by Act 1867 is a preference to secure or pay a pre-existing debt.—Casey v. La Société de Credit Mobilier, Case No. 2,496.

The mere giving of security, on a loan of money, is not an illegal preference, under Act 1867.—Clark v. Iselin, Case No. 2,825.

A sale by the bankrupt will not be set aside where the purchaser paid adequate consideration in cash, at the time of the sale.—In re Pusey, Case No. 11,478.

Advances made in good faith to a debtor carrying on business upon security taken at the time do not violate either the terms or the policy of the bankrupt act.—Wadsworth v. Tyler, Case No. 17,032.

A person who is insolvent may borrow money, and give a valid security therefor on his property, if no fraud in fact be intended, and no fraud on Act 1867 is effected.—Gaffney's Assignees v. Signaigo, Case No. 5,169.

The taking of security on making a bona fide loan to an insolvent, if without participation in any intent to defraud creditors or defeat the bankrupt act, is valid.—Darby v. Boatman's Sav. Inst., Case No. 3,571.

A transfer with intent to defraud creditors is void, notwithstanding adequate consideration paid.—Alexander v. Todd, Case No. 175.

A mortgage given to secure a loan of actual value, in good faith, within the periods specified in Act 1867, § 35, and after the amendment of June 22, 1874, § 11, is not invalid, unless the mortgagee knew that it was intended as a preference, and such knowledge will not be presumed.—Campbell v. Waite, Case No. 2,374.

A mortgage given to secure a loan made in good faith, to one who had knowledge of the mortgagor's insolvency, is valid. (Act June 22, 1874, § 11.)—In re Montgomery, Case No. 9,732.

A mortgage given by a retailer on his stock of goods, within four months of bankruptcy, to obtain money with which to prefer a creditor, is void as against the assignee if the mortgagee could, by inquiry, have discovered the purpose.—Ex parte Mendell, Case No. 9,418.

A deed to a purchaser for value will not be avoided unless it is shown that he had reasonable cause to believe that the vendor intended to contravene the bankrupt act. Case No. 3,572 affirmed.—Darby v. Lucas, Case No. 3,573.

A sale by a debtor will not be avoided because the purchaser was aware of the intention of the seller to prefer certain of his creditors by the use of the proceeds of the sale.—Van Kleeck v. Miller, Case No. 16,860.

Where solvent debtors sell a part of their stock of groceries in trade at a low price, to one who is not engaged in the grocery business, about a month before they suspend payment, with an intent to raise sufficient funds to meet their maturing obligations, and not in contemplation of insolvency, such sale is valid, and, upon their becoming bankrupt a few days after suspension of payment, it will not be set aside at the suit of the assignee. Act 1867, § 35.—Sedgwick v. Lynch, Case No. 12,615.

The sale and transfer, by the bankrupt, of property at a fair price, before insolvency, in good faith, and not in contemplation of insolvency, for the purpose of curtailing his business, cannot be impeached on the ground of fraud.—Sedgwick v. Wormser, Case No. 12,626.

A temporary loan at exorbitant interest upon the conveyance of the insolvent borrower's whole assets will be regarded as made to defeat the object and impede the operation and effect of Act 1867.—Brooks v. Davis, Case No. 1,950.

Where a corporation sells the stock of a store, and receives in payment mortgages amounting to $10,000, and the vice president, under the authority of the trustees, effects a sale of such mortgage for $7,000, and the corporation is declared a bankrupt within six months, such transaction will be upheld where it does not appear that the purchasers of such mortgages had reasonable cause to believe that the transfer was made for the purpose of preventing the property from being distributed, under Act 1867.—Judson v. Kelty, Case No. 7,567.

A pledge of part of the assets of a national bank to secure a loan made by one who knows its embarrassed condition is not a preference.—Casey v. La Societe De Credit Mobilier, Case No. 2,496.

Where a mortgage is for money advanced at the time, and the mortgagor assures the mortgagee that the money is to be used in his business, and there is no evidence that these statements were false, the mortgage will be *held* valid, though it was given out of the ordinary course of the trader's business.—Ex parte Packard, Case No. 10,650.

A mortgage given while the debtor was solvent, and not in contemplation of insolvency, and with no intent to defeat Act 1867, within six months of his bankruptcy, to secure credit for supplies and materials used in fitting up an establishment, is not fraudulent, and is valid as against the assignee. Case No. 11,322 affirmed.—Coggeshall v. Potter, Case No. 2,955.

Shipments of cotton, after the insolvency of the shipper, to commission merchants who made advances thereon, are not a preference, but in effect a sale of so much cotton to procure the necessary means to realize upon his assets.—Harrison v. McLaren, Case No. 6,139.

Where the bankrupt sells 6 out of 20 specific bonds of like character and value, in the hands of a bailee, and receives pay therefor before the bankruptcy, the rights of the purchaser of the 6 bonds are superior to those of the assignee

of the vendor, as such assignee takes the property of the bankrupt subject to all rights existing in favor of third persons at the time of the bankruptcy.—Hamilton v. National Loan Bank, Case No. 5,987.

A sale by a bankrupt at a fair price of property to raise money to defray expenses of contemplated bankruptcy proceedings is not invalid, provided the sum so raised is reasonable in amount.—In re Keefer, Case No. 7,636.

The sale of the furniture and fixtures of a business office by the insolvent, and a lease of such office to a person who knew of the insolvency, is voidable at the suit of the assignee upon his being declared a bankrupt, as such sale deprived him of his means of continuing business, and was a sale out of the ordinary course of business.—Brooks v. D'Orville, Case No. 1,951.

See, also, ante, § 68.

§ 226. Payment of part consideration.

A mortgage upon a stock in trade, made within four months of the petition in bankruptcy, may be good in so far as it was given to secure advances then made, and invalid in so far as it was given to secure a pre-existing debt.—In re Stowe, Case No. 13,513.

A mortgage which is in part a preference will be held good in equity as to the valid portion, where the holder thereof is not guilty of actual fraud.—In re Whipple File Co., Case No. 17,522.

Where the legal and the illegal considerations which entered into a mortgage are clearly separable, it will be held void only in part.—Corbett v. Woodward, Case No. 3,223; Cramton v. Tarbell, Id. 3,349.

A mortgage to secure, among other things, a loan to a bankrupt, made to enable the mortgagee to get possession of attached goods, and hold them as a preference over other creditors, is void to the extent of such loan, but will not taint the security as to other advances made in good faith.—Cramton v. Tarbell, Case No. 3,349.

The fact that valid considerations entered into a conveyance will not prevent its being fraudulent, if one of the motives was to hinder and defeat creditors.—Burrill v. Lawry, Case No. 2,199.

A mortgage taken by a creditor with knowledge of the debtor's insolvency, given in part to secure a pre-existing debt and in part for a credit given at the time of its execution, is void in toto.—Tuttle v. Truax, Case No. 14,277.

An assignment of notes and mortgage by an insolvent debtor, with intent to give a preference to a creditor who has reasonable grounds to believe that a preference was intended, about a month before an adjudication of bankruptcy, as assignee for pre-existing indebtedness and a small additional loan, is void under Act 1867, § 35.—Grannis v. Beardsley, Case No. 5,688.

Where a conveyance is made in fraud of the bankrupt act, the fact that a part of the consideration was cash will not prevent the assignee from recovering the entire property.—Scammon v. Hobson, Case No. 12,434.

A mortgage given by an insolvent within four months of the bankruptcy proceedings in payment of a pre-existing debt, and to secure a loan, to be used in giving an unlawful preference, all the parties having knowledge, is void under Act 1867, § 35.—Bucknam v. Goss, Case No. 2,097.

§ 227. Validity of transfer or payment as affected by time—In general.

A conveyance, to be fraudulent within the bankruptcy act (section 29), must be made within four or six months before the filing of the petition by or against the debtor, as required by section 35.—In re Freeman, Case No. 5,082.

Under Act 1867, § 35, where the transaction by the insolvent is with a creditor, the four-months limitation applies, but where the transaction is with a general purchaser the six-months limitation governs.—Babbitt v. Walbrun, Case No. 694; Bean v. Brookmire, Id. 1,168.

All transactions to prefer a bona fide creditor come within the four-months clause Act 1867 (Rev. St. § 5128). The six-months clause applies to other creditors.—In re Bousfield & Poole Mfg. Co., Case No. 1,703.

An action by the assignee of a firm to set aside an assignment by a member for the benefit of his individual creditors is not limited to four months, under Act 1867, § 35.—Barnewall v. Jones, Case No. 1,027.

Act 1867, § 35, does not apply to a bona fide preference by the bankrupt of one of his creditors, made more than four months before the proceedings in bankruptcy. Case No. 11,322 affirmed.—Coggeshall v. Potter, Case No. 2,955.

The preference to a creditor, to be void under either section 35 or section 39, Act 1867, must be made within four months of the filing of the petition.—Collins v. Gray, Case No. 3,013.

Act 1867, § 35, applies to transfers to a creditor or persons having claims against the bankrupt, or who is under a liability for him and receives property by way of preference, and applies also to the purchase of the property of a bankrupt by any person who has no claim against him and is under no liability for him.—Bean v. Brookmire, Case No. 1,168.

A mortgage executed by the bankrupt more than four months before the filing of the petition cannot be set aside at the suit of the assignee, on the ground that it operates as a preference.—Hall v. Hayner, Case No. 5,933.

The payment of a joint debt by joint property is not a voidable preference unless both debtors become bankrupt within the time limited by the statute. This rule applies to partnership transactions.—Forsaith v. Merritt, Case No. 4,946.

The limitation within which a preference may be set aside at a suit of the assignee is four months in voluntary, and two months in involuntary, cases.—In re Schoenenberger, Case No. 12,473.

Where a petition is filed on March 14, 1874, a payment theretofore made on November 14, 1873, will be held to have been made more than four months before the bankruptcy.—Warren v. Garber, Case No. 17,196.

Where the purchaser makes a payment for stock on being notified that it is about to be transferred, and the seller, later in the day, fails, without making the transfer, a subsequent transfer through a debtor of the seller is not in fraud of the bankrupt act. Act 1867.—Sparhawk v. Richards, Case No. 13,205.

A preference to a creditor cannot be set aside unless an adjudication in bankruptcy is had within the time limited by Act 1867.—In re Hamlin, Case No. 5,994.

The rule of the local statute that the limitation does not begin to run till the fraud is discovered has no application to such case.—In re Hamlin, Case No. 5,994.

Several creditors may, with the aid of their debtor, conspire to get an advantage over other creditors by a voluntary preference, if the means used are not unlawful, and the preferences are made more than two months before the filing of a petition in bankruptcy (Act 1874).—Van Kleeck v. Miller, Case No. 16,860.

The assignee cannot recover money paid by the bankrupt to a bona fide creditor more than four months before the filing of the petition in bankruptcy. Act 1867, § 35.—Hubbard v. Al-

laire Works, Case No. 6,814; Shearman v. Bingham, Id. 12,732.

Where a creditor holds notes of a debtor, and exchanges some of them for notes of less amount of a firm in which such debtor was a partner, if made in contemplation of bankruptcy, it is a fraud on joint creditors, but such transaction cannot be set aside, where the bankruptcy of the firm occurs more than four months afterwards. Act 1867, § 35.—In re Lane, Case No. 8,044.

A sale to a creditor 13 months before filing petition, if bona fide and without knowledge of contemplated bankruptcy, though it may prevent the discharge of the bankrupt, is valid as to the creditor.—Ashby v. Steere, Case No. 576.

§ 228. —— Incomplete transfers.

The four-months limitation, in the case of a secret deed of trust intended as a preference, does not begin to run against the assignee until the deed is recorded.—Harris v. Exchange Nat. Bank, Case No. 6,119.

A transfer of property by deed will be held to have taken place at the time of the actual execution and delivery of the deed, and not at its date in determining whether the transfer was within six months of bankruptcy (Act 1867, § 39).—In re Rooney, Case No. 12,032.

Where the security given by a creditor consists of a trust deed executed by an officer of a corporation more than four months before proceedings in bankruptcy, which act was ratified by the corporation within the four months, the validity of the deed must be determined by the circumstances existing at the time of the ratification, and not by those of the time of the original execution.—In re Kansas City Stone & Marble Co., Case No. 7,610.

Where a debtor within one month of his bankruptcy conveys real and personal property that he had previously sold and received payment for, and surrendered to the purchaser, but had not conveyed, such conveyance is valid, although the debtor knew that he was insolvent, as the title to such property was held by him in trust for the purchaser.—Steadman v. Caswell, Case No. 13,330a.

The purchaser of goods previously paid for takes a good title as against the assignee in bankruptcy though they were delivered by the manufacturer after the purchaser knew of his insolvency.—Scammon v. Bowers, Case No. 12,431.

A mortgage given for a loan whose execution the lender has unlawfully delayed stands as if executed at the time agreed.—In re Montgomery, Case No. 9,732.

Where a creditor obtains in good faith as security a receipt for coal in the debtor's yard not separated from the common mass, he may take possession after discovering the insolvency of the debtor.—Sherman v. Traders' Nat. Bank, Case No. 12,770.

The delivery of possession, subsequent to the failure of the bailee, of property, whose title was in the person who made advances thereon, is not invalidated by Act 1867.—Sharp v. Philadelphia Warehouse Co., Case No. 12,709a.

Where the contract of sale is not complete, through the default of the seller, before the bankruptcy of the purchaser, he is entitled to have the goods returned, where they have not been accepted and paid for.—In re Pusey, Case No. 11,477.

Advances made in good faith, which are part of the money agreed to be secured by a mortgage, which is being prepared, will be protected, though there is a change of the debtor's circumstances after the money was advanced and before the mortgage was delivered.—Ex parte Ames, Case No. 323.

§ 229. Effect of prior promise to give security or make transfer.

A transfer in execution of a contract made when there were no circumstances to impeach it as an intended fraud upon the bankrupt law will be protected.—In re Wood, Case No. 17,937.

An advance will be considered a present consideration for a conveyance made within a reasonable time thereafter and in pursuance of the prior agreement.—Gattman v. Honea, Case No. 5,271.

A conveyance made within four months of the bankruptcy, in pursuance of an agreement made when the bankrupt was solvent, and on an adequate consideration, will not be set aside.—Post v. Corbin, Case No. 11,299.

The removal of the debtor's goods in fulfillment of an existing contract, made long before the commencement of the proceedings, is not fraudulent within the meaning of Act 1867.—M. & M. Nat. Bank v. Brady's Bend Iron Co., Case No. 9,018.

Where a mortgage is given by an insolvent in contemplation of bankruptcy, preferring a creditor, it makes no difference as to the character of the act that the mortgage was given voluntarily or upon request of the mortgagee, or in accordance with a verbal agreement made in general terms when the debt was contracted, which such mortgage is given to secure.—Arnold v. Maynard, Case No. 561.

A security given as a preference is none the less void because given in pursuance of a promise made when the debt was contracted.—Graham v. Stark, Case No. 5,676.

A security, given when insolvent, under an agreement made when solvent, and when the debt was contracted, where its execution was omitted by mistake, is not voidable as against creditors.—Stover v. Kennedy, Case No. 13,510.

A promise to give security made at the time of the loan must contemplate the giving of a specific and definite security, such as could be enforced by bill in equity for specific performance to sustain a mortgage otherwise invalid as a preference.—In re Jackson Iron Mfg. Co., Case No. 7,153; Nash v. Le Clercq, Id. 10,021.

An oral promise, made at the time the debt is contracted, to give security, if required, cannot be executed after the debtor has become insolvent.—In re Connor, Case No. 3,118; Lloyd v. Strobridge, Id. 8,435.

A mortgage given in pursuance of a parol agreement to give security, if required, is not valid as against the assignee in bankruptcy, if the act of giving the mortgage would have been a preference at the time it was given, if the agreement had not been made.—Ex parte Ames, Case No. 323.

§ 230. Transfers out of usual and ordinary course of business.

A sale made by a person contemplating bankruptcy is not ipso facto void; but if made without the usual course of trade, or is unusual in the time, or price, or character, or quantity of the goods sold, such facts, as against the vendee, are held to be prima facie evidence of the fraud.—In re Hunt, Case No. 6,881; In re Krum, Id. 7,943.

The presumption of fraud arising out of a transfer made out of the usual and ordinary course of business must be overcome by proof that the purchaser took the proper steps to find out the pecuniary condition of the seller.—Brooks v. Davis, Case No. 1,950.

Regard must be had to the nature of the property sold in determining whether a transfer is made out of the usual and ordinary course of business, under Act 1867, § 35.—Judson v. Kelty, Case No. 7,567.

A sale by a manufacturer of chairs of a large quantity of black walnut logs, which he used in his business, is not one in the usual and ordinary course of business.—Schrenkeisen v. Miller, Case No. 12,480.

A sale of an entire stock of goods is presumably fraudulent, and the purchaser must show that he used all reasonable means to ascertain that the sale was an honest one.—Main v. Glen, Case No. 8,973.

The sale of the debtor's entire stock in trade and notes on hand to a creditor in payment of the indebtedness, the grantee assuming other obligations of the debtor, is a transfer out of the ordinary and usual course of business.—North v. House, Case No. 10,310.

A mortgage of an entire stock in trade to secure a pre-existing indebtedness is not a transfer in the usual and ordinary course of business, and is prima facie evidence of fraud.—Rison v. Knapp, Case No. 11,861; Graham v. Stark, Id. 5,676; Hurley v. Smith, Id. 6,920.

The sale of a stock of goods with the fixtures to a creditor, he giving his notes for the balance above his claim, with notice of the insolvency of the debtors, is not made in the usual and ordinary course of business, and is void. Act 1867, § 35.—In re Kahley, Case No. 7,593.

A sale by a trader of a stock of goods at 10 o'clock at night, without invoice, for cash, is a sale not made in the ordinary course of business, within Act 1867, § 35.—Davis v. Armstrong, Case No. 3,624.

A confession of judgment, which enables the creditor to seize the debtor's stock in trade and close out his business, is not a transaction in the usual and ordinary course of business, and is prima facie evidence of fraud.—Webb v. Sachs, Case No. 17,325.

A mortgage on a stock of goods is only prima facie fraudulent as being out of the usual and ordinary course of business, and its validity may be established by proof.—Moore v. Young, Case No. 9,782.

The knowledge only that the bankrupts were a little short of money on the day in question, and wished the creditor to substitute a note secured by bond and mortgage for a currency check, is not sufficient to show that the creditor had reasonable cause to believe the debtor to be insolvent.—Collins v. Bell, Case No. 3,010.

The prima facie evidence of fraud in the case of a mortgage of an entire stock of goods, except the portion previously mortgaged to another, is not overcome by the testimony of defendant that he did not know of other outstanding indebtedness, where it appears that he was clerk for the debtor and had access to his books of account, and knew of the debtor's inability to pay debts as they matured.—Wilson v. Stoddard, Case No. 17,838.

§ 231. Exchange of property or securities.

For a debtor to make over to a secured creditor property, in fair exchange, for the security, is not contrary to the bankrupt law.—Hallack v. Tritch, Case No. 5,956.

The exchange of goods covered by a warehouse receipt in the warehouse of the vendor for others of equal or less value within four months prior to the filing of a petition in bankruptcy is not contrary to Act 1867.—Sharp v. Philadelphia Warehouse Co., Case No. 12,709a.

An exchange by an insolvent of $500 worth of wheat for a wagon and team, with a view of claiming them as exempt, is void, and the title to the wheat vests in the assignee. Rev. St. §§ 5129, 3046.—In re Parker, Case No. 10,724.

Where, on an exchange of property, the creditor receives property of much greater value than that surrendered by him, the transaction will be deemed a preference if an original transaction would, under the circumstances, be so treated.—Waring v. Buchanan, Case No. 17,176.

A mortgage given within four months in exchange for a deed of the property given more than four months before the petition was filed is valid, as a change of securities. Case No. 12,410 affirmed.—Sawyer v. Turpin, Case No. 12,409.

Where a creditor who has a mechanic's lien upon property of his debtor receives a deed of trust upon the same property, the transaction is merely a change of securities, and is not a fraudulent preference of such creditor.—In re Weaver, Case No. 17,307.

A new bill of sale of a merchant's stock in trade taken by the managers of a bank to secure overdrafts which the cashier had secretly allowed and secured by a prior bill of sale is a valid security, where the prior bill of sale was given four months before the commencement of proceedings, as the transaction took effect by relation to the first bill of sale.—In re Doran, Case No. 4,000.

The substitution and registry of a chattel mortgage, correcting a mistake in a prior unrecorded mortgage, is not an illegal preference, but simply an exchange of securities. Case No. 11,224 affirmed.—Player v. Lippincott, Case No. 11,223.

Where one deed of trust is executed as a substitute for a preceding one, the former will at once cease to have any validity or effect.—In re Wynne, Case No. 18,117.

A conveyance by an insolvent debtor to his creditor, of property on which the creditor had a lien exceeding the value of the property, does not violate Act 1867, § 35.—Catlin v. Hoffman, Case No. 2,521.

See, also, ante, § 69.

§ 232. Payments.

Where a bank, which acts as agent of another bank for clearing-house purposes, pays, upon the day of its failure, to the latter, which had knowledge of its insolvency, deposits which had been made on its general account to meet checks in the clearing house, *held*, that such payment might be recovered by the assignee as an illegal preference.—Phelan v. Iron Mountain Bank, Case No. 11,069.

Payment to depositors by insolvent bankers is not made good by the fact that the debtors acted under advice of counsel to save a criminal prosecution.—Strain v. Gourdin, Case No. 13,521.

Charging notes or other obligations as they become due to a banker against the obligor's deposit account, as customary, may become an unlawful preference on the bankruptcy of the depositor.—In re Warner, Case No. 17,177.

An attorney to whom the insolvent has in good faith paid a fee for necessary services rendered at the time is not liable to refund it.—Triplett v. Hanley, Case No. 14,179.

Fees paid an attorney by a bankrupt for services in opposing a petition in bankruptcy may be recovered back where inconsistent with a due regard for the interests of the general creditors.—Triplett v. Hanley, Case No. 14,179.

Payments by husband on policy on his life for benefit of wife after he becomes insolvent are fraudulent, and may be recovered from wife out of proceeds of policy, when paid, with interest.—In re Bear, Case No. 1,178.

Where a creditor recovers a judgment against a debtor, which became a lien on real estate of sufficient value to satisfy the same, and the debtor subsequently assigns all his property for the benefit of creditors, preferring such judgment creditor, and the trustee upon the assignment makes payments on the judgment out of the per-

sonal property, and the debtor is declared a bankrupt, and his assignee brings action against the judgment creditor to recover the property paid to him, such action cannot be maintained, as no fraudulent preference can be predicated upon the payments made on the judgment, as the lien was saved, and such payments became a matter of legal right.—Livingston v. Bruce, Case No. 8,410.

Creditors who receive warehouse receipts as security, but subsequently turn over the goods to the assignee of the debtor under a general assignment, and receive payment from him as preferred creditors, are liable to the assignee in bankruptcy for the amount of such payments, but not for the property covered by the warehouse receipts.—Jones v. Kinney, Case No. 7,473.

See, also, ante, § 71.

§ 233. Compromises and compositions.

The receipt, by certain creditors of an insolvent partnership, of money and other assets on a composition and compromise of their claims, and in full discharge thereof, is a preference, within the prohibition of Act 1841, § 3 (5 Stat. 440, c. 9), when it appears that other creditors got nothing, and that the settlement was made after January 1, 1841, and prior to the passage of the act, with the general authority and concurrence of both partners, though no particular acts are proved against one of them. Case No. 336b affirmed.—In re Amory & Leeds, Case No. 336c.

Where negotiations are pending between a debtor and his creditors, a note extorted from the debtor by the agent of one of the creditors, by means of a threat to put an end to the compromise, is void in the hands of such agent, the payee.—Bullene v. Blain, Case No. 2,124.

A secret arrangement by one of the creditors entering into a composition for an advantage over other creditors, is fraudulent, and a payment made thereunder may be recovered by the assignee subsequently appointed, though the composition never became binding.—Bean v. Amsinck, Case No. 1,167.

A note and mortgage given to creditors to induce them to come into a composition on apparent equality with other creditors is a fraudulent preference and may be avoided by the assignee. —Howell v. Todd, Case No. 6,783.

See, also, ante, § 76.

§ 234. Persons under liability for debt.

Where partners in embarrassed circumstances make an assignment of all their property to certain of their creditors, to secure them against certain debts and liabilities as sureties, and previous to their bankruptcy the personal property assigned is sold, and the proceeds applied to the payment of such debts, such assignment is void, under Act 1841, as having been made in contemplation of bankruptcy and as a preference of creditors, and the proceeds of the personal property sold and applied to the payment of such debts may be followed by the assignee, and made assets in bankruptcy.—Everett v. Stone, Case No. 4,577.

Under section 35, Act 1867, the liability contemplated is absolute, and not contingent, and a surety on a bond for performance, prior to its forfeiture, is under no liability for his principal, within said act.—Corbett v. Woodward, Case No. 3,223.

Where a note is paid by one who guarantied it after maturity, it is not a payment for the benefit of the indorser as a creditor, within section 35, Act 1867.—Corbett v. Woodward, Case No. 3,223.

The payment of a note at maturity by an insolvent maker, without knowledge or procurement of accommodation indorsers, is not fraudulent, under Act 1867, § 35.—Bean v. Laflin, Case No. 1,172.

Where an indorser receives from the maker of a note an amount sufficient to pay part thereof, and loans him the balance sufficient to pay it, he will not be chargeable with taking a preference beyond the amount actually paid to him by the maker.—Thomas v. Woodbury, Case No. 13,916.

The payee and indorser of a note paid by the maker in the usual course of business to the holder within four months of the bankruptcy proceedings against the maker is not chargeable with taking a preference where he had nothing to do with the payment, although he knew of the maker's insolvency.—Thomas v. Woodbury, Case No. 13,916.

Where the obligor on a bond, in order to indemnify his sureties, obtains securities from one of his debtors, and turns them over to his sureties, the transaction is a preference and the four months limitation applies. (Act 1867, § 35).—Smith v. Little, Case No. 13,072.

A mortgage given to secure a surety or indorser as to pre-existing debts, made within four months of the petition, for the express purpose of giving a preference, where the mortgagee had reasonable cause to believe that the mortgagors were insolvent, is void (Act 1867, § 35). Case No. 12,433 affirmed.—Scammon v. Cole, Case No. 12,432.

§ 235. Equitable assignments.

An agreement that a bank, as security for a loan to a company, should collect the calls for unpaid subscriptions to stock, partly executed, is an equitable assignment of the calls, which was not defeated by the subsequent bankruptcy of the company.—Farmers' & Drovers' Sav. Bank v. Kansas City Pub. Co., Case No. 4,652.

Where a bankrupt, nearly a year before the petition is filed, places a note with his attorney for collection, and draws orders on him for the proceeds, the holders of the orders are entitled to payment out of such proceeds in preference to the assignee.—In re Smith, Case No. 12,992.

A draft drawn by the bankrupt, not payable out of any particular fund, is not an assignment of the money in the hands of the drawee before acceptance.—Dickey v. Harmon, Case No. 3,894.

The fact that the drawee had funds of the drawer when he refused to accept the draft will not give the holder priority over other creditors of bankrupt drawer.—Bank of Commerce v. Russell, Case No. 884.

A purchaser of the check of one bank upon another who fails to present it until the drawer has been adjudged a bankrupt is not entitled to priority, although the drawee had sufficient funds at the time the check was presented.—In re Smith, Case No. 12,990.

§ 236. Transfers fraudulent at common law—In general.

See, also, ante, § 70.

The federal court will follow the state law and the precedents of the state courts in determining the validity of a transfer of property alleged to be fraudulent as against the creditors of the bankrupt for want of a transfer of possession to the purchaser.—Howard v. Prince, Case No. 6,762.

Any lien or incumbrance which would be void for fraud as against creditors if no petition had been filed or assignee appointed will be equally void against creditors represented by the assignee.—In re Wynne, Case No. 18,117; In re Morrill, Id. 9,821; Smith v. Ely, Id. 13,044.

A security otherwise valid is not avoided because taken in the form of an absolute deed instead of a mortgage (Act 1867).—Gaffney's Assignee v. Signaigo, Case No. 5,169.

The fact that a conveyance by the bankrupt was made more than six months before the com-

mencement of the proceedings in bankruptcy will not prevent its being set aside where it was fraudulently made and intended to cheat and hinder creditors (Act 1867).—Hyde v. Sontag, Case No. 6,974; Cady v. Whaling, Id. 2,285.

A transfer according to the vote of directors by an insolvent corporation to a partnership of which one of the directors is a member, made more than six months prior to bankruptcy proceedings against the corporation, as a payment of or security for a debt due the partnership from the corporation, will be set aside, and the assignee in bankruptcy of the corporation may recover the property so transferred.—Bradley v. Farwell, Case No. 1,779.

Where a firm is insolvent, and the silent partner conveys all his interest in the joint property to the active partner, who, on the same day mortgages the whole stock in trade to secure pre-existing debts of separate creditors of each, the transaction is fraudulent under Act 1867.—In re Waite, Case No. 17,044.

A mortgage given by a firm is not fraudulent as to creditors because it, in terms, adopts a debt incurred by one of the partners in behalf of the firm, and includes that in the mortgage.—Wait v. Bull's Head Bank, Case No. 17,043.

A conveyance by a solvent grantor of his entire property, on an agreement that the grantee shall pay his debts and support him for life, is not, per se, fraudulent and void as to creditors. Case No. 3,250 affirmed.—In re Cornwall, Case No. 3,251.

A transfer of "all the goods and merchandise" in a certain store does not render the conveyance per se fraudulent as to creditors, and is a sufficient description to transfer the title where immediate possession is given.—Jones v. Sleeper, Case No. 7,496.

A chattel mortgage of machinery and other things which are trade fixtures, as between landlord and tenant, will give the mortgagee a valid lien as against the assignee in bankruptcy, although as to a prior mortgagee of the realty the fixtures would be real estate, if it appears that such prior mortgagee makes no claim to the fixtures.—Ex parte Ames, Case No. 323.

A chattel mortgage of a stock of goods, which allows the mortgagor to retain possession and sell the goods, and buy others, is void as an illegal hindrance to creditors.—In re Forbes. Case No. 4,922; Smith v. Ely, Case No. 13,044.

A parol gift, of a claim bona fide made prior to the Geneva Award, for the destruction of a vessel by a Confederate cruiser, is good as against subsequent creditors.—Williamson v. Colcord, Case No. 17,752.

A mortgage given by a railroad company to an association of which its president and vice president were secret members, considering the trust relation between the parties, is constructively fraudulent; but the mortgagee will be allowed to prove its advance to the railroad company as an unsecured debt.—Kappner v. St. Louis & St. Joe R. Ass'n, Case No. 7,612.

§ 237. —— Transfers to relatives.

Notes given by a father-in-law on a sale of a stock in trade of his insolvent son-in-law were cashed by the father-in-law, and the proceeds paid to his son, as mortgagee, in discharge of a mortgage on the property of the wife of the insolvent. *Held* a fraudulent transfer.—Lawrence v. Graves, Case No. 8,138.

An insolvent's transfer of his property to his sister, who had lived with him for many years, upon the consideration of her services, which were rendered gratuitously at the time, and were the foundation of no indebtedness, and upon the further consideration of her money, which he had several years before invested in his own name, she having regarded him as absolute owner of the same, no books of account having been kept between them, will be regarded as fraudulent, and will be set aside at the suit of the insolvent's assignee in bankruptcy.—Bartlett v. Mercer, Case No. 1,078.

A gift by an insolvent debtor to his wife, living with him, of furniture and other personal property in the house, is void as against creditors.—In re Pierce, Case No. 11,139.

Where the bankrupt, in building a house on land which he had within six months before his bankruptcy fraudulently conveyed to his wife, procures lumber on the representation that it is his property, from one who, after discovering the true condition, takes a mortgage thereon, such mortgage is void as to the assignee in bankruptcy, as the mortgagee does not occupy the position of a bona fide purchaser without notice.—Odell v. Flood, Case No. 10,428.

Where a husband residing in Mississippi gives a promissory note to the trustee of his wife, for an alleged balance of account stated between them, growing out of the use of the separate estate of the wife, both real and personal, and executes a deed of trust on his lands to secure payment of the note, before the filing of his petition in bankruptcy, such conveyance will be regarded as fraudulent upon a suit by the assignee as to creditors existing at the time it was made, where it appears that the husband had used such property of the wife for seven years without a previous accounting, and the creditors' debts were contracted upon the faith of such usage.—Gillespie v. McKnight, Case No. 5,435.

A conveyance by a debtor, when in embarrassed circumstances, in trust for his wife, in alleged consideration of indebtedness for lands and personal property belonging to her, will be held fraudulent, where sole power was reserved to the debtor to sell the land.—Fisher v. Henderson, Case No. 4,820.

Where a bankrupt free from debt, and not contemplating bankruptcy, conveys to his wife for her separate use, and free from his control, without intervention of a trustee, real property, reserving to himself full powers of revocation and appointment, the settlement will be upheld as against the assignee, and neither the property itself nor the powers pass to him.—Jones v. Clifton, Case No. 7,457.

A voluntary settlement in favor of an illegitimate child, made by a father, while in trade and indebted, but clearly solvent at the time, is valid against subsequent creditors, the settlement having been made without a fraudulent intent.—Anonymous, Case No. 474.

A voluntary settlement upon his wife and children, made by a member of a firm financially embarrassed, may be set aside as fraudulent, although the debts of the firm existing at the time were subsequently paid in due course of business, where they were met by contracting other obligations, which resulted in bankruptcy.—Antrim v. Kelly, Case No. 494

Conveyances to a wife under articles of separation, subsequently rescinded, except as to a provision for a separate estate in the wife, on the parties again living together, are void as voluntary, as against creditors, and the subsequent as well as antecedent creditors may share pro rata in the proceeds of the property conveyed.—Smith v. Kehr, Case No. 13,071.

Where a voluntary settlement by one who is indebted results in the payment of the debts and contingent liabilities existing at the time of the conveyance, by means of contracting other obligations, which afterwards result in insolvency, such settlement is fraudulent and void.—Spaulding v. McGovern, Case No. 13,218.

Where an insolvent, more than four months before the commencement of proceedings against him, furnishes from his own property, towards

building a homestead upon premises which his wife had contracted to purchase and which were subsequently conveyed to her, a sum greatly in excess of the amount of property allowed as a homestead under the state law, such transaction is a fraud upon his creditors, and the assignee is entitled to a conveyance of the husband's interest in such homestead, less the amount he was authorized by law to invest in it.—Johnson v. May, Case No. 7,397.

§ 238. Mortgages to secure future advances or claims for services.

A mortgage made in good faith to secure future sales of goods to the mortgagor is valid to the extent of the advances actually made, and to such extent is protected by Act 1867.—Marvin v. Chambers, Case No. 9,179.

A mortgage to secure future advances is operative as to all advances made in good faith more than two months before the filing of a petition in bankruptcy, and as to those made in good faith within that time.—Cramton v. Tarbell, Case No. 3,349; Schulze v. Bolting, Id. 12,489.

An insolvent trader may mortgage his stock and tools for present and future advances to continue his business, and also past advances already, though inadequately, secured.—Ex parte Ames, Case No. 323.

A mortgage will not be considered for future advances because the notes secured by it are delivered to the mortgagor temporarily to prove in a partnership accounting in a state court.—In re Freyvogel, Case No. 5,115.

A mortgage purporting to be given to secure existing indebtedness, but in fact given to secure possible future loans and debts already secured by other mortgages, as to which no definite agreement is made, is fraudulent and void as to creditors, and will be set aside at the suit of the assignee in bankruptcy of the mortgagor.—Todd v. Townsend, Case No. 14,075.

A mortgage given to lawyers to secure their fees for preparing a petition and schedules in bankruptcy is invalid, under Act 1867, § 35, but the claim may be proved as unsecured.—In re Evans, Case No. 4,552.

A mistake in the description of the premises in a mortgage may be corrected as against the assignee to the same extent as would have been allowed against the mortgagor.—Schulze v. Bolting, Case No. 12,489.

§ 239. Mortgage of after-acquired property.

A mortgage of all the property of a railroad company, then in its possession or thereafter acquired, includes another railroad subsequently leased to the mortgagor, and the title to such leased roads is good in the hands of the trustees under the mortgage, as against the subsequent assignees in bankruptcy of the mortgagor.—Barnard v. Norwich & W. R. Co., Case No. 1,007.

An indorsement by the mortgagor upon a chattel mortgage, subjecting chattels acquired after the date of the mortgage to its operation, such indorsement, being made in fraud of the bankrupt act, is invalid, but it does not invalidate the mortgage.—In re Baker, Case No. 762.

§ 240. Conveyances fraudulent or void under state laws.

Transfers of personal property, void as to creditors under the statute of frauds of the state where the transactions occur, are void as to the assignee.—Edmondson v. Hyde, Case No. 4,285.

The district court in bankruptcy will follow the state decisions declaring a mortgage void as to creditors becoming such between the giving and filing of the mortgage.—In re Oliver, Case No. 10,492.

If a mortgage given by the debtor is void under the state law, the property passes to the debtor's assignee in bankruptcy.—Platt v. Preston, Case No. 11,219; Wait v. Bull's Head Bank, Id. 17,043.

Creditors who have not, by judgment and execution, obtained a specific lien, cannot attack a chattel mortgage as not accompanied by delivery and change of possession of the property mortgaged (3 Rev. St. N. Y. p. 222, § 9), and the assignee in bankruptcy has no greater right.—In re Collins, Case No. 3,007.

A trust deed of land in another state, made by a bankrupt who remained in possession thereof until filing his petition in bankruptcy, will not be set aside on petition of the assignee, unless the petition states that the lands were conveyed by the bankrupt in fraud of creditors, under the laws of such state, or facts showing that they were so conveyed and passed to the assignee under Act 1867, § 14.—In re Broome, Case No. 1,966.

An agreement to give a chattel mortgage to secure rent, and to renew it, and that it shall be a continuing lien, gives the mortgagee no priority over other creditors, where the mortgage is void for failure to observe technical requirements.—Platt v. Stewart, Case No. 11,220.

§ 241. Effect of failure to record conveyance.

An assignee has the rights of a judgment creditor as against a chattel mortgage not properly recorded.—Miller v. Jones, Case No. 9,576.

The assignee in bankruptcy will receive the benefit of the state statute avoiding all deeds of trust as to creditors except from the time of recording them.—In re Wynne, Case No. 18,117.

Where, under the local law, a deed does not take effect as to creditors and subsequent purchasers until it is recorded, a deed recorded within six months of the commencement of bankruptcy proceedings, irrespective of the time when it was executed, is a transfer within six months.—Thornhill v. Link, Case No. 13,993.

A mortgage is not fully made in Vermont as against the assignee in bankruptcy until it is recorded, and the fact that it was executed more than two months before the petition was filed does not render it valid.—Bostwick v. Foster, Case No. 1,682.

Where a bill of sale is recorded in the clerk's office at one place under Laws Vt. 1872, upon a representation of the bankrupt that he resided there, it will bind the assignee as against the holder of the bill of sale, although the bankrupt actually resided at another place.—Allen v. Whittemore, Case No. 241.

In the absence of actual fraud, a chattel mortgage made by a resident of Massachusetts is good against the assignee in bankruptcy, though it had not been duly recorded at the date of the bankruptcy.—In re Dalby, Case No. 3,540.

If a deed of trust is actually delivered to the trustee, with power to record it when he deems proper, it is valid as against the assignee in bankruptcy, although it is not recorded until after the grantor's failure.—National Bank of Fredericksburg v. Conway, Case No. 10,037.

A chattel mortgage, though not recorded, as required by the state law, is good against the assignee in bankruptcy, in the absence of actual fraud.—Ex parte Dalby, Case No. 3,540; Coggeshall v. Potter, Id. 2,955, affirming Case No. 11,322; In re Collins, Case No. 3,004.

A chattel mortgage, made in good faith and for a present and valid consideration though not filed for record until the day before the petition is filed, is a valid lien as against the assignee in absence of other proof to show that

a fraud on Act 1867 was intended.—In re Perrin, Case No. 10,995.

A chattel mortgage not filed, as required by the state law, before filing of the petition, but filed prior to the appointment of an assignee, there being no judgments against the bankrupt, is sufficient to give a lien upon the mortgaged property which will be recognized by the bankruptcy court.—In re Collins, Case No. 3,004.

A chattel mortgage given for the purchase price of property, when not refiled within 12 months, as required by the New York law, is void as against creditors, and as against the assignee in bankruptcy of the mortgagor.—In re Leland, Case No. 8,234.

Such refiling is necessary, though the title of the mortgagee became absolute, as between the parties, by forfeiture on default of payment of the mortgage debt.—In re Leland, Case No. 8,234.

Chattel mortgage for a present consideration, made more than 60 days prior to bankruptcy, but not filed for record until within that time, is valid, as against the claim of the assignee in bankruptcy.—In re Barman, Case No. 999.

A chattel mortgage taken by a retiring partner on all the firm goods in stock or to be acquired, by agreement kept from the record, is fraudulent and void as to subsequent creditors.—In re Stephens, Case No. 13,365.

In Iowa an unrecorded chattel mortgage, where the mortgagor retains possession, is valid as against attaching creditors with notice of its existence any time before levy; and, as the assignee in bankruptcy has the same right as such creditors to defeat a mortgage on record when the bankruptcy proceedings were commenced, he must show that debts were created, without notice of it, before it was recorded.—Cragin v. Carmichael, Case No. 3,319.

§ 242. Effect of taking possession by chattel mortgage.

A chattel mortgage which embraces subsequently acquired property constitutes a lien on such property protected by section 2, Act 1841, where possession is taken of the same under the mortgage before a petition in bankruptcy is filed.—Mitchell v. Winslow, Case No. 9,673.

Where a chattel mortgage contains an authority for the mortgagee to take possession of after-acquired property, and possession is so taken within four months before proceedings were commenced against the mortgagor, the time that possession was taken of the after-acquired property will be regarded as the date of its transfer. Act 1867, § 35.—In re Eldridge, Case No. 4,330.

A delay on the part of the mortgagee in a chattel mortgage in taking possession after maturity is fatal to his rights, as against an assignee in bankruptcy.—In re Forbes, Case No. 4,922.

The assignee cannot maintain trover to recover the value of mortgaged personal property which the mortgagee has taken possession of, and appropriated to his own use, before the commencement of the bankruptcy proceedings.—Jones v. Miller, Case No. 7,482.

An assignee cannot recover the value of mortgaged chattels where the mortgagee took possession before the bankruptcy, although the mortgage was invalid against creditors because not properly recorded.—Miller v. Jones, Case No. 9,576.

A chattel mortgage invalid as against creditors, under the state law, under which the mortgagee took possession within the time limited by Act 1867 and at a time when he had reasonable cause to believe the debtor insolvent, is invalid as against the assignee.—Harvey v. Crane, Case No. 6,178; Kane v. Rice, Id. 7,609.

Where goods were sold under a bill of sale, the price payable in installments, with a reservation that if a default is made in payment of any installment the seller may take possession of the goods and satisfy the whole debt by a sale thereof, and at the same time the purchaser gives a mortgage on such goods containing the same terms, which is not filed according to the state law, and where the purchaser makes a default in payment, and the seller takes possession under the reservation in the bill of sale, seven days before a petition was filed against the purchaser, who is afterwards declared a bankrupt, no fraud being alleged in the transaction, or that the purchaser was insolvent when he received the bill of sale and gave the mortgage, such transaction is valid as against the assignee, upon a suit brought by the assignee against the seller and mortgagee.—Field v. Baker, Case No. 4,762.

§ 243. Suffering or procuring property to be taken on legal process—In general.

See, also, ante, § 75; post, §§ 260–264.

Where a bankrupt suffered his property to be taken on legal process in favor of one of his creditors, under an execution issued against him, the bankrupt intending thereby to give a preference to such creditor, and the creditor having reasonable cause to believe, at the time, that the bankrupt was insolvent, the transaction was void under Act 1867, and no valid lien was acquired in favor of the creditor under the execution.—In re Ballou, Case No. 818.

A preference will be adjudged void, and will be annulled, where the proofs show, although by circumstantial evidence, that the creditor, who was a brother of the bankrupt, obtained it by means of a seizure by execution, apparently hostile, but in fact conducted through collusion of the bankrupt.—In re Baker, Case No. 763.

Procurement to take in execution may be inferred from such relationship and apparent concert of action between the debtor and creditor as would ordinarily be incompatible with any other intention than to give a preference.—In re Dunkle, Case No. 4,160.

The purchase of goods, in order that they may be taken on execution on judgments on notes given by the bankrupt, subjects the bankrupt to the penalty of suffering his property to be seized on execution.—Sage v. Wynkoop, Case No. 12,215.

Where the debtor and another person, between whom suits are pending in the state court, the day before a petition is filed against the debtor, enter into an agreement, the effect of which is to enable such person to enforce a lien by attachment, such agreement is in fraud of Act 1867.—Samson v. Burton, Case No. 12,285.

§ 244. —— Taking judgment by default.

A judgment entered after the adjudication, on a default entered before petition filed, without surprise, mistake, or fraud, where the bankrupt had no defense, will not be set aside. Act 1841.—Fiske v. Hunt, Case No. 4,831.

Where the holder of notes exacts small demand notes in substitution for older and larger ones, some of which have matured, as a condition for a further loan, but with knowledge of the maker's insolvency, upon which the payee is enabled more easily to obtain judgment and seize and sell the debtor's property, such transaction is fraudulent and void. (Act 1867).—Loudon v. First Nat. Bank, Case No. 8,525.

Judgments obtained against a debtor, at the time insolvent, by creditors having no reason

so to believe him, are enforceable in the bankruptcy court.—In re Wright, Case No. 18,071.

A preference obtained by inaction of the debtor in permitting a judgment and levy of execution, where the debtor contributed nothing to the success or completion of the creditor's act, is not fraudulent, though the debtor was insolvent at the time the suit was brought, and the creditor then had reasonable cause to believe it, and knew that the debtor had committed an act of bankruptcy.—In re Schnepf, Case No. 12,471; Partridge v. Dearborn, Id. 10,785; Britton v. Payen, Id. 1,906; In re Price, Id. 11,412. CONTRA, see Haskell v. Ingalls, Case No. 6,193; Smith v. Buchanan, Id. 13,016; Vanderhoof v. City Bank of St. Paul, Id. 16,842; Warren v. Delaware, L. & W. Ry. Co., Id. 17,194; Anderson v. Strassburger, Id. 364; Warren v. Tenth Nat. Bank, Id. 17,202, reversing Id. 17,200; Catlin v. Hoffman, Id. 2,521.

A fraudulent transfer takes place when an insolvent debtor suffers property to be taken on legal process, with intent to give a preference, and the creditor takes the same with reasonable cause to believe that the debtor was insolvent and intended a preference. (Act 1867).—Kohlsaat v. Hoguet, Case No. 7,919.

Where a debtor utterly insolvent, and without reasonable prospects of being able to pay his debts, passively permits certain creditors to appropriate all his assets to their debts, an action will lie by the assignee against the creditors to recover the amounts received.—Hyde v. Corrigan, Case No. 6,968.

Judgments obtained by service of process on absconding bankrupt, who secretly returned to permit such service, are void under Act 1867, § 35.—Beattie v. Gardner, Case No. 1,195.

Where it appeared that an insolvent firm wished to secure a brother of one of the partners, and the brothers went to an attorney for advice, who declined to advise both of them, but sent away the partner and brought suit against the firm, the summons being served upon the brother alone, and judgment by default was entered, such constituted an act of bankruptcy by the firm, under Act 1867, §§ 35, 39.—In re Black, Case No. 1,457.

Where a debtor is sued for a just debt, and interposes a groundless defense in such manner that another creditor, who brings suit later, is enabled to obtain a prior judgment and the appointment of a receiver, an intent to give a preference to the creditor in the latter suit must be inferred.—Wight v. Muxlow, Case No. 17,629.

§ 245. —— Judgments by confession.

The bankrupt act, being within the powers of congress, is superior to state laws on the subject; and judgments confessed in contravention of such bankrupt law are void.—Atkinson v. Purdy, Case No. 616.

A warrant of attorney to confess judgment, executed by an insolvent within 60 days of filing a petition in bankruptcy, is void, and proceedings founded thereon are of no effect (Act 1841).—McLean v. Lafayette Bank, Case No. 8,885.

A judgment entered on a judgment bond given more than two months before bankruptcy cannot be assailed unless the judgment creditors, at the time the judgment bond was given by the debtor, had notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of the act of 1841.—Lonergan v. Fenlon, Case No. 8,475.

The giving of a note payable one day after date, with cognovit to confess judgment, to a creditor, with knowledge of insolvency, to secure an antecedent debt, is a fraudulent preference, and the judgment and all proceedings thereunder are nullities. (Act 1867, § 35).—Fitch v. McGie, Case No. 4,835; Haughey v. Albin, Id. 6,222; Zahm v. Fry, Id. 18,198.

A judgment obtained against the bankrupt within four months before the filing of a petition in bankruptcy is void, where the judgment debtor was insolvent and confessed judgment with intent to give a preference, and the judgment creditor had reasonable cause to believe that such confession of judgment was made in fraud of Act 1867; and where the judgment creditor has received the fund, less the costs of his action, he is liable for the whole amount.—Street v. Dawson, Case No. 13,533.

A judgment confessed within two months before filing the petition, where the bankrupts had broken up their business, and all proceedings under it, are void.—McLean v. Lafayette Bank, Case No. 8,888.

Proper procedure to restrain proceedings under an execution issued on a judgment by confession, which operates as a fraudulent preference.—Irving v. Hughes, Case No. 7,076.

A creditor who, with reasonable cause to believe the debtor insolvent, takes a judgment note more than six months before the petition is filed to secure an antecedent indebtedness cannot obtain a preference by the entry of a judgment and the levy of an execution on the debtor's stock of goods within such time.—In re Terry, Case No. 13,835.

Warrants of attorney given to a creditor for antecedent debts with knowledge that the debtor is insolvent are fraudulent, though given more than two months before petition filed. (Act 1874.)—In re Herpich, Case No. 6,418.

The fact that the judgment was entered upon a warrant of attorney does not invalidate the lien if the creditor did not know of the failing circumstances of the debtor, and if it was not entered up "in contemplation of bankruptcy or insolvency."—In re Weeks, Case No. 17,350.

A judgment taken contrary to Act 1867 is not void unless a petition in bankruptcy is filed by or against the debtor within six months from its entry.—In re Fuller, Case No. 5,148.

Where a warrant of attorney to confess judgment or a judgment note is given for full consideration, and not for an antecedent debt, to one who had no knowledge of the debtor's insolvency, the creditor may enter judgment and enforce the same after knowledge of the debtor's insolvency if not assisted by the debtor, irrespective of the time when the warrant or judgment note was given.—Armstrong v. Rickey, Case No. 546; In re Wright, Id. 18,071; Vogel v. Lathrop, Id. 16,985; Piper v. Baldy, Id. 11,179; Stern v. Schonfield, Id. 13,377; Blabon v. Hunt, Id. 1,455; Shimer v. Huber, Id. 12,787. CONTRA, see Golson v. Niehoff, Case No. 5,524; Hood v. Karper, Id. 6,664; In re Lord, Id. 8,503; Clark v. Iselin, Id. 2,825; Ford v. Keys, Id. 4,933; Zahm v. Fry, Id. 18,198.

The time to be taken at which to test the condition of the bankrupt, and the knowledge of the creditor, is the time when a confession of judgment was issued to enforce the claim; and where it does not appear that the bankrupt was insolvent at the time the judgment was entered, the execution will be upheld, notwithstanding the debtor's insolvency at the time it was issued, and the creditor's knowledge thereof.—Field v. Baker, Case No. 4,762.

A judgment confessed within four months of the filing of the petition by an insolvent debtor to a creditor having reason to believe him insolvent, though in consideration of a pre-existing debt, is in fraud of the act. Act 1867, § 35.—Vogel v. Lathrop, Case No. 16,985.

A confession of judgment, followed by a seizure of the debtor's property upon execution, if made by an insolvent with a view to prefer the creditor, is an unlawful preference.—Webb v. Sachs, Case No. 17,325.

The taking of a judgment upon a power of attorney is not the confession of a judgment, within the meaning of Act 1867.—Stern v. Schonfield, Case No. 13,377.

See, also, ante, § 74.

§ 246. Adjustment of mutual debts.

A deposit of goods under a contract which will result in a debt brings the goods within the mutual credit laws of Act 1867 so that the bailee can set off his debt against the value of the goods.—Ex parte Caylus, Case No. 2,534.

Where a bank holding the note of the bankrupt received from him, in payment, with knowledge of his insolvency, a check on the bank, covering the amount of his deposit and a payment in cash, only the payment in cash is a fraudulent preference, as the transaction as to the check was a mere adjustment of mutual debts.—Hough v. First Nat. Bank, Case No. 6,721.

Where a bank holding a note against the bankrupt, and also a deposit account in his favor, receives a check against the account to pay the note, with knowledge of the depositor's insolvency, it is not a fraudulent preference, but an adjustment of mutual debts, within Rev. St. § 5073.—Robinson v. Wisconsin Marine & Fire Ins. Co. Bank, Case No. 11,969.

If a bank, after the commencement of proceedings in bankruptcy, collects money upon drafts deposited with it by the bankrupt before that time, it may apply the money towards the payment of a note of the bankrupt held by it.—In re Farnsworth, Case No. 4,673.

A deposit of securities by a customer of a bank, who had overdrawn his account, for the purpose of a loan from the bank to keep the account good, made a few days before bankruptcy proceedings were commenced against such customer, *held* not in violation of the act.—French v. First Nat. Bank, Case No. 5,100.

Where a new account is opened with a debtor by a creditor knowing the debtor to be in failing circumstances, under an agreement to account for goods sent for sale by turning over cash or notes received therefor, the creditor cannot set off the amount due by him under such account against the amount due him on the old account.—In re Troy Woolen Co., Case No. 14,203.

§ 247. Transfer of partner's interest.

A transfer of assets of an insolvent firm to one member will not be sustained under Act 1841, § 2, where its effect is to give a preference to one class of creditors.—Collins v. Hood, Case No. 3,015.

A bona fide transfer of partnership effects by one member of the partnership to another vests the title in the transferee as his separate estate.—In re Byrne, Case No. 2,270.

Where one partner transfers his interest in the partnership effects to his co-partner, upon the promise of the transferee to pay the firm debts, and the latter buys no new stock or makes no effort to continue business, and files his petition in bankruptcy five days after such transfer, it will be regarded as having been accepted in contemplation of the transferee filing his petition, and is void as a fraud on the creditors of the partnership.—In re Byrne, Case No. 2,270.

Under Act 1867, the conveyance of the joint assets of an insolvent firm to a continuing partner is a fraudulent preference, and if made within four months of a petition in bankruptcy it may be set aside by the joint creditors; but, where the continuing partner has assumed the joint debts, such creditors may assent to the conveyance after petition, and come in with the separate creditors, and prove their debts against his estate.—In re Johnson, Case No. 7,369.

A sale by one partner to his copartner when the firm is insolvent and on the eve of bankruptcy will be set aside in favor of firm creditors. Act 1867, § 35.—In re Cook, Case No. 3,150.

Where property of an insolvent firm is sold within a month of the commencement of the proceedings, and the proceeds divided, and one partner, with his share, purchases property exempt by the state laws, such property is not exempt, but will be regarded as partnership assets.—In re Melvin, Case No. 9,406.

Where one partner was sued by a creditor, and the other partner procured a delay of execution, and bought his partner's interest in the firm, without taking account of stock or debts, and the money paid therefor was returned to the buyer, who put it in the safe, from which it was drawn by the seller from time to time, such sale is invalid, and will be set aside at the instance of the assignee in bankruptcy, although such buyer claims that his purpose was to discontinue business with his partner and protect himself.—Burrill v. Lawry, Case No. 2,199.

Where partners, more than four months before the commencement of the proceedings, transfer in good faith all their separate and joint property to one partner, who undertook to pay the firm debts, all the assets will be treated as the separate assets of that partner.—In re Collier, Case No. 3,002.

§ 248. Sale or mortgage by fraudulent vendee.

A sale out of the usual course of business of all one's stock in trade to a person with knowledge of the seller's insolvency is prima facie void, and a second purchaser with knowledge has no better title.—Babbitt v. Walbrun, Case No. 695.

A second purchaser, who had knowledge of the bankrupt's failure, and that the seller held the goods under mortgage from the bankrupt, does not get a good title.—Rison v. Knapp, Case No. 11,861.

A bona fide purchaser, without notice, from a fraudulent vendee of the bankrupt, takes a good title as against his assignee.—Jarrell v. Harrell, Case No. 7,222.

When it is sought to affect a second vendee with fraud, such fraud must be shown, and the mere fact, without more, that he knew that the sale by the bankrupt to the first vendee embraced all of the stock of the seller, will not make the purchase of the second vendee fraudulent in law.—Babbitt v. Walbrun, Case No. 694.

The mortgagee of a fraudulent transferee, in possession without notice, will be protected to the extent of his mortgage.—Brooks v. D'Orville, Case No. 1,951.

§ 249. Assignments for benefit of creditors—In general.

See, also, ante, § 73; post, § 599.

An assignment by an insolvent for the benefit of such creditors only as should sign a compromise agreement is void as against the assignee.—In re Broome, Case No. 1,967.

An assignment in trust, by an insolvent, with power to sell within two years for the benefit of creditors who will accept 60 per cent. of their claims, with a reservation in favor of the grantor of all property remaining after such settlement, is void at common law, and under Act 1867, as having been made with intent to

hinder, delay, and defraud creditors.—In re Beadle, Case No. 1,155.

An assignment by an insolvent for benefit of certain creditors is void where the assignee has good reason to believe that the assignor is insolvent, and in contemplation of bankruptcy.—In re Meyer, Case No. 9,515.

A general assignment for creditors with preferences, if made within the prescribed time, is void under the bankruptcy acts.—Jackson v. McCulloch, Case No. 7,140; Stobaugh v. Mills, Case No. 13,461.

A general assignment for creditors, though without preferences, free from moral fraud, and valid under the state law, if made within the prescribed time, is void under the bankruptcy acts.—Barton v. Tower, Case No. 1,085; McLean v. Johnson, Id. 8,883; Same v. Meline, Id. 8,890; Windsor v. Whiting, Id. 17,868; Hobson v. Markson, Id. 6,555; Barnewall v. Jones, Id. 1,027; Globe Ins. Co. v. Cleveland Ins. Co., Id. 5,486; MacDonald v. Moore, Id. 8,763; In re Temple, Id. 13,825; In re Beisenthal, Id. 1,236; Harding v. Crosby, Id. 6,050; Platt v. Preston, Id. 11,219. CONTRA, see Anonymous, Case No. 467; Sedgwick v. Place, Id. 12,622; Farrin v. Crawford, Id. 4,686; In re Kintzing, Id. 7,833; Langley v. Perry, Id. 8,067; Barnes v. Rettew, Id. 1,019; In re Wells, Id. 17,387; In re Marter, Id. 9,143.

A general assignment for creditors, either with or without preferences, if valid under the state law, and made beyond the prescribed time, is not avoided by the bankruptcy acts.—In re Arledge, Case No. 533; In re Kimball, Id. 7,770.

§ 250. —— Rights and liabilities of general assignee.

Moneys received under a voluntary assignment adjudged to be valid, by a receiver appointed by the bankruptcy court, should be distributed by him, and not by the assignees.—Sedgwick v. Place, Case No. 12,623.

Where a trustee under a general assignment for creditors is chosen as assignee in subsequent bankruptcy proceedings, his acts as trustee, performed in accordance with the deed of assignment before the bankruptcy, must be approved.—In re Walker, Case No. 17,063.

The assignee under a general assignment for creditors with preferences is not liable to the assignee in bankruptcy for money paid out in good faith by him under the assignment.—Jones v. Kinney, Case No. 7,473.

An assignee for creditors who receives the assigned property before proceedings in bankruptcy is not liable in trover where he sells the same, and pays over the proceeds under order of the state court, before suit brought against him by the assignee in bankruptcy.—Cragin v. Thompson, Case No. 3,320.

Where an assignee for the benefit of creditors notifies a sheriff, who has levied upon the property, of his claim, he has done all that he was bound to do to protect the property and is not liable to account for the property sold on execution to a subsequent assignee in bankruptcy, where the assignment to him is subsequently set aside as in contravention of Act 1867.—Linder v. Lewis, Case No. 8,362.

Upon setting aside, in bankruptcy proceedings, an assignment for creditors made in good faith, the assignee may be allowed reimbursement of his expenses; but he cannot be awarded compensation for services, except so far as the bankruptcy court can see that the estate will not be subjected to a double charge.—In re Kurth, Case No. 7,948.

An assignee under a general assignment under a state law, which is avoided by proceedings in bankruptcy, will not be allowed compensation or expenses out of the fund.—In re Stubbs, Case No. 13,557; In re Cohn, Id. 2,966. CONTRA, see Clark v. Marx, Case No. 2,830; MacDonald v. Moore, Id. 8,763; In re Lains, Id. 7,989; In re Kurth, Id. 7,948.

Such assignee is entitled to expenses incurred in making sales of the property under orders of the bankruptcy court.—Clark v. Marx, Case No. 2,830.

2. Liens.

See, also, post, §§ 300–303.

§ 251. Liens in general.

The proviso in Act 1841, § 2, embraces all liens, equitable and legal, which are valid by the lex loci contractus, and is not restricted to such as can be enforced by state laws.—Fletcher v. Morey, Case No. 4,864.

The word "lien" (Act 1841, § 2) embraces equitable as well as legal liens, and its meaning and application are to be ascertained by the laws of the several states.—Ex parte General Assignee, Case No. 5,305.

The assignee's title relates back to the date of filing the petition, and no creditor can thereafter acquire a lien by attachment, judgment, levy, or otherwise on the property of the debtor belonging to him at the time of filing the petition.—McLean v. Rockey, Case No. 8,891; In re Dey, Id. 3,870; Sicard v. Buffalo, N. Y. & P. Ry. Co., Id. 12,831; In re Tifft, Id. 14,034.

Where, in the case of a statutory lien, the statutory requisites are not complied with until after the filing of a petition in bankruptcy, it is not valid as against the assignee.—In re Sabin, Case No. 12,194.

A lien which derives its existence from a state statute, a continuance of which is dependent upon the institution of a suit within a prescribed period in the state court, is not preserved by proceedings in bankruptcy, no suit having been commenced in the state court, and no steps having been taken in the bankruptcy court equivalent to a suit within the time limited by the statute.—In re Brunguest, Case No. 2,055.

The claim of a broader lien than the facts warrant will not affect the actual lien of the creditor.—McKinsey v. Harding, Case No. 8,866.

§ 252. Amount of lien.

The federal court will not take jurisdiction where the liens on the bankrupt's property will more than absorb it.—McLean v. Rockey, Case No. 8,891.

The assignee need take no proceedings in respect to personal property of the bankrupt mortgaged beyond its value, and he has nothing to do but designate the exempt property.—In re Lambert, Case No. 8,026.

When a parcel of the bankrupt's land is wholly absorbed by the first lien, the assignee is under no duty to ascertain the validity of subsequent liens.—Mattocks v. Farrington, Case No. 9,298.

§ 253. Lien by creditors' suit.

A creditors' bill to subject to plaintiff's judgment property of defendant not liable to execution at law creates a lien, where process was served before petition was filed to declare defendant a bankrupt.—Ex parte General Assignee, Case No. 5,305; Clarke v. Rist, Id. 2,861. CONTRA, see Ex parte Waddell, Case No. 17,027; Smith v. Gordon, Id. 13,052.

The mere filing of a creditors' bill against a bankrupt, without the service of an injunction, gives the complainant no such lien as will prevail over the rights of the assignee.—Case of Smith, Case No. 12,997.

Until a receiver is appointed in a creditors' suit, there is no lien as against chattels which are subject to levy and sale on execution, which

can be upheld as against an assignee in bankruptcy.—Johnson v. Rogers, Case No. 7,408.

§ 254. Lien for rent.

The lien given a landlord for rent already due by the law of South Carolina is undisturbed by a decree declaring the tenant a bankrupt.—Watson v. Lemar, Case No. 17,287.

The creditors cannot object to the enforcement of such a lien on the ground that it will sacrifice the tenant's goods.—Watson v. Lemar, Case No. 17,287.

The landlord's right to enforce the lien is not affected by the fact that he was preferred in a voluntary assignment by the tenant, and that he has expressed a willingness that the assignee should sell, and pay him his rent.—Watson v. Lemar, Case No. 17,287.

Chattels of a bankrupt remaining, after the decree, on the premises which the bankrupt occupied, are liable to distress, even though the rent fall due after the decree.—In re Leppein, Case No. 8,265.

The landlord's lien given by Code Va. c. 128, § 12, is independent of proceedings by distress warrant or attachment, and such lien is not made void by Act 1867 upon the bankruptcy of the tenant.—In re Wynne, Case No. 18,117.

An agreement to pay in crops for rent of land and property purchased of the landlord will not give him a lien as against general creditors of the tenant.—Brock v. Terrell, Case No. 1,914.

Where the bankrupts, before petition filed, rented a storehouse, and the lessor, as each quarter's rent became due, demanded the same, and forebore to distrain upon the request of the lessees, and with the understanding that the goods of the lessees should be kept upon the premises so as at all times to be liable to distress, the lessor's claim for such rent is entitled to preference, where it appears that he has in no manner waived his right to have his lien enforced.—In re Rose, Case No. 12,043.

A lien for rent due, or which may have accrued to the landlord, under the state law, is enforceable in bankruptcy (Act 1867).—In re Dunham, Case No. 4,145.

The granting of the certificate of amount due, and not the levying of the distress warrant, before the commencement of the bankruptcy proceedings, gives the landlord a perfected lien. (Gross' St. Ill. 1871, p. 412.)—In re Joslyn, Case No. 7,550.

A landlord has no lien or preference over other creditors of the bankrupt in Pennsylvania, unless there has been before petition filed a seizure for rent, as required by the statute of such state. Act 1867.—In re Butler, Case No. 2,236.

The right to distrain for rent is a "lien," within Act 1867; and in Mississippi the landlord is entitled to a preference for rent out of proceeds of sale of property on demised premises, subject to his attachment made after the tenant became a bankrupt. Case No. 664 reversed.—Austin v. O'Reilly, Case No. 665.

A landlord has a lien, in South Carolina, on the personal property of the tenant, which is good for one year as against execution and other creditors and as against an assignee in bankruptcy.—In re Trim, Case No. 14,174.

A landlord has no authority under a lease containing a covenant, constituting the rent a lien or mortgage upon all goods, etc., on the premises, where such lease is void as to the creditors of the tenant, it not having been filed pursuant to the state law regulating chattel mortgages.—In re Dyke, Case No. 4,227.

A lien given by an express provision in a lease on specified property on the demised premises is valid against the lessee's assignee in bankruptcy.—McLean v. Klein, Case No. 8,884.

Where the state law gives a landlord a lien upon the goods and chattels upon the demised premises for rent, he can have no lien upon the assets of a bankrupt for rent to accrue after an adjudication and the surrender of the premises by an assignee, and such a claim cannot be proven against the estate. Act 1867.—Bailey v. Loeb, Case No. 739.

A stipulation in an unrecorded lease for a lien for rent upon all the fixtures and furniture in the store is binding as against the lessee's assignee only as to the goods, etc., in the store at the time the lease was made.—In re Eckenroth, Case No. 4,265.

§ 255. Lien on pledged property.

Persons paying drafts drawn for the price of goods shipped to the drawer, under an agreement that the goods should be pledged as security therefor, have a lien as against the assignee in bankruptcy of the purchaser.—Fletcher v. Morey, Case No. 4,864.

The assignment, transfer, and delivery of a lease by the lessor, to secure a debt created at such time, is valid as against the lessor's assignee in bankruptcy.—Meador v. Everett, Case No. 9,376.

Where the pledge of property to secure a debt is not prohibited by Act 1867, § 35, the rights of the parties will be determined under the general rules in equity.—In re Peebles, Case No. 10,902.

The lien of a factor for his advancements and commissions is protected by the amendment to Rev. St. § 5128, which provides that nothing in that section shall be construed to invalidate securities taken in good faith upon the making of a loan.—In re Roseberry, Case No. 12,052.

A creditor having two distinct debts, and holding property in pledge for one of them with power of sale existing at the date of the bankruptcy, may apply the surplus proceeds after paying the first debt to the payment of the second.—Ex parte Whiting, Case No. 17,573.

The creditor who, without fraud, receives as security a policy of insurance, and pays premiums thereon, is entitled to a pro rata value of the policy.—In re Shoenberger, Case No. 12,802.

Where the assignee has received or collected securities pledged, the bankruptcy court may, on petition by the pledgee, direct the assignee to apply the proceeds for the benefit of the pledgee.—In re Wiley, Case No. 17,655.

A creditor holding security has not an absolute power over his securities, and the court will, on application of the assignee, restrain the creditor from selling them.—The Skylark, Case No. 12,929.

A creditor applying to the bankruptcy court for an order to sell collaterals need not ascertain their value before proving his claim, but must prove his claim before the order to sell will be granted.—In re Bigelow, Case No. 1,396.

The assignee is bound by the bankrupt's acquiescence in a sale of stocks by a secured creditor only where made before the commencement of the proceedings in bankruptcy.—Sparhawk v. Drexel, Case No. 13,204.

A sale by a lien holder of property in his possession, belonging to the bankrupt, with knowledge that bankruptcy is imminent, will not be disturbed, if untainted by fraud, and a fair price is obtained.—In re Roseberry, Case No. 12,052.

A bailee who agrees with the bailor that he will hold the goods for a certain time, and afterwards sell, and pay his claim against the bailor, has a right to sell after such time, though the bailor had in the meanwhile become bankrupt.—Ex parte Caylus, Case No. 2,534.

One to whom stock is pledged to secure call loans need not upon the bankruptcy of the

pledgor obtain leave of court to sell the same, but he acts at his own risk.—In re Grinnell, Case No. 5,829; Id. 5,830.

The bailee of an insolvent debtor's goods, who bestows labor upon them, knowing that the debtor has committed an act of bankruptcy in making the bailment, is entitled to a credit for the value of such services as against the claim of the assignee in bankruptcy for the goods or their value.—Catlin v. Foster, Case No. 2,519.

§ 256. Maritime liens.

The assignee takes the bankrupt's property subject to a maritime lien existing when the petition was filed, and such lien may be enforced by process in admiralty against the vessel after the filing of a petition in bankruptcy by its owner, and the bankruptcy court will accept the determination of the admiralty court as to the validity and amount of the lien.—The Ironsides, Case No. 7,069. CONTRA, see In re People's Mail S. S. Co., Case No. 10,970.

§ 257. Liens on bank stock.

A bank whose by-laws provide that stock of stockholders shall be liable for their debts to the bank, has a lien upon the stock of a member of a bankrupt firm for either individual or firm indebtedness.—In re Bigelow, Case No. 1,395.

A bank, under a by-law prohibiting a transfer of stock by one indebted thereto, has a lien on stock to secure notes and general indebtedness of a stockholder.—In re Morrison, Case No. 9,839.

Where a national bank has a lien under its by-laws on stock for the liabilities of the stockholder to the bank, it need not transfer the stock to his assignee in bankruptcy, as such lien was not defeated by the adjudication.—In re Dunkerson, Case No. 4,156.

§ 258. Mechanic's lien.

The lien given by the local act to mechanics or material men is not opposed to the terms or policy of Act 1867, as it in no way prefers one creditor at the expense of another, or diminishes the general assets of the debtor otherwise applicable to the payment of his general creditors.—In re Coulter, Case No. 3,276.

A mechanic's lien given by the state law will be protected by the bankruptcy court, but only after discontinuance of proceedings in the state court.—In re Cook, Case No. 3,151.

A lien attaches, under the New Jersey mechanic's lien law, as of the time the labor is performed or materials furnished, which will be enforced by a court of bankruptcy, though the claim therefor is not filed until after the bankruptcy proceedings were commenced. Case No. 3,870 reversed.—In re Dey, Case No. 3,871.

A mechanic's lien, under the Oregon statute, attaches from the time the work is done, or materials are furnished, conditioned upon filing the notice of such lien within three months from the completion of the building, and the commencement of bankruptcy proceedings between the time the work is done or materials are furnished and the filing of such notice does not affect the right of the lien creditor.—In re Coulter, Case No. 3,276.

A mechanic's lien given by law, though not perfected by the filing of the account when the petition in bankruptcy was filed, may thereafter be enforced as provided by law.—Sabin v. Connor, Case No. 12,197.

§ 259. Equitable liens.

A covenant in a mortgage to keep the mortgaged premises insured for the benefit of the mortgagee creates a specific equitable lien upon the insurance money, which is valid as against the assignee.—In re Sands Ale Brewing Co., Case No. 12,307.

A written agreement for the entry of judgment, filed in court, in a suit in which defendant's property was attached, constitutes an equitable lien against the property in the hands of his assignee, on his subsequent bankruptcy.—Parker v. Muggridge, Case No. 10,743.

§ 260. Attachment liens — Under Act 1841.

All attachments of the property of the bankrupt upon mesne process, after the commencement of the proceedings in bankruptcy, are avoided by the decree of bankruptcy; the property of the bankrupt being devested out of him, and vested in the assignee, when appointed, by mere operation of law.—In re Cheney, Case No. 2,636.

A lien by attachment is preserved by the act of 1841, equally with the lien by judgment.—Downer v. Brackett, Case No. 4,043.

Pending proceedings in bankruptcy, either before or after the decree, a prior attaching creditor cannot proceed in his suit to trial and judgment.—Ex parte Foster, Case No. 4,960; Everett v. Stone, Case No. 4,577.

Where an attaching creditor, who knows that the proceedings in bankruptcy have been instituted, proceeds in his suit against the bankrupt to judgment before an assignee is appointed, it is a fraud upon the law, and, if such creditor obtains satisfaction of his judgment, he will not be allowed to retain the proceeds.—Ex parte Foster, Case No. 4,960.

Pending proceedings in bankruptcy, the bankruptcy court will enjoin further proceedings by an attachment creditor, but will allow such proceedings to be continued until the discharge is obtained.—Ex parte Foster, Case No. 4,960.

An attachment on mesne process, before commencement of bankruptcy proceedings, is ineffectual to control the bankruptcy court, and further proceedings in the suit will be enjoined.—In re Bellows, Case No. 1,278.

An attachment of property on mesne process, bona fide made, before a petition filed in bankruptcy by the debtor, is not a lien or security upon the property, within the intendment of Act 1841, § 2, c. 9.—In re Bellows, Case No. 1,278.

The lien given by an attachment on mesne process, if perfected by judgment and levy, is protected, though the judgment was not obtained before the bankruptcy proceedings. (Act 1841).—In re Reed, Case No. 11,640. CONTRA, see Ex parte Foster, Case No. 4,960.

An attachment on mesne process, made before petition filed, where judgment was recovered and execution issued after petition filed, but before the decree in bankruptcy, constitutes a valid lien. (Act 1841).—Haughton v. Eustis, Case No. 6,224.

The lien of an attachment in Massachusetts is not an absolute lien, entitled to protection, but is contingent upon the creditor obtaining a judgment in the suit. (Act 1841).—In re Cook, Case No. 3,152.

In the absence of fraud or collusion, a sale on execution of property seized before the filing of the petition which had been attached before the alleged acts of bankruptcy by mesne process will not be restrained. (Act 1841).—Downer v. Brackett, Case No. 4,043.

Whether, if the bankrupt fail to obtain his discharge, the attachment would be gone by the mere operation of the bankrupt act, or whether a judgment in personam may be rendered against him, quære.—Ex parte Foster, Case No. 4,960.

§ 261. —— Under Act 1867.

To constitute an attachment of personal property, the officer must actually take it into his custody and control; the mere taking of a receipt for certain property, followed by a return that he had attached it more than four months

before the bankruptcy proceedings, though it would estop the receiptors from denying that there was an attachment, is not enough to create a lien as against the assignee in bankruptcy.—In re Ashley, Case No. 581.

A creditor attaching lands of the bankrupt in a state court over four months before commencement of the proceedings may proceed to judgment and execution unless the assignee intervenes.—Mattocks v. Farrington, Case No. 9,298.

Where a garnishment in a state court of defendant's credits in a bank is discharged by his giving a bond required therefor by statute to satisfy the judgment, and the money is drawn by him from the bank, and deposited with a third person as indemnity to the sureties of his bond, the assignee appointed in proceedings in bankruptcy commenced against him more than a year after the garnishment is not entitled to an injunction against further proceedings in the suit in the state court, nor to the money so deposited, as assets of the estate; as the lien of the attaching creditor, acquired more than four months before the bankruptcy proceedings, was not destroyed by the giving of the bond.—In re Albrecht, Case No. 145.

Attachments in state courts of the property of the bankrupt, brought within four months of the commencement of proceedings in bankruptcy, are dissolved by the decree in bankruptcy as from the date of the petition.—In re Ellis, Case No. 4,400; In re Housberger, Id. 6,734; Pennington v. Lowenstein, Id. 10,938; In re Davis, Id. 3,616; Beers v. Place, Id. 1,233; Zeiber v. Hill, Id. 18,206; In re Preston, Id. 11,394; Bracken v. Johnston, Id. 1,761; Robinson v. Tuttle, Id. 11,968; McCord v. McNeil, Id. 8,714; In re Peck, Id. 10,886.

An attachment by trustee process, being a lien, under the Vermont laws, on the funds in the hands of the trustee, although without notice to the principal debtor, is a lien under mesne process, saved by Act 1867.—In re Peck, Case No. 10,886.

Attachment execution in Pennsylvania is final process, and, as such, is not dissolved by section 14, Act 1867.—Wilbur v. Wilson, Case No. 17,637.

A sale of property under an attachment brought within four months before the commencement of proceedings in bankruptcy gives the creditors no greater interest than if the property remained in specie, and money arising from the sale of household furniture belongs to the bankrupt, such property being exempt.—In re Ellis, Case No. 4,400.

The creditor is liable to the assignee in such case for the proceeds of the attachment sale, though the assignee did not appear or defend the suit, or make any attempt to arrest the attachment proceedings.—Bracken v. Johnston, Case No. 1,761.

In such case the assignee's right is superior to that of the attaching creditor, although the property was sold before commencement of the proceedings, and the proceeds paid over after the adjudication, but prior to the deed of assignment.—McCord v. McNeil, Case No. 8,714.

A sheriff who, after the filing of an involuntary petition, sells, as perishable, goods of the bankrupt attached in an action in the state court, before the filing of the petition, is liable for conversion, though he had no notice of the bankruptcy proceedings, and sold under order of court.—Long v. Conner, Case No. 8,479.

A sheriff who, in good faith, pays over the proceeds of an attachment sale, after proceedings in bankruptcy are commenced, is not liable to the assignee in trover.—Bradley v. Frost, Case No. 1,780.

Prior attachments are not discharged by Act 1867, in favor of a subsequent judgment and levy on the property already subject to the attachment to its full value, and such judgment creditors have no security.—In re Klancke, Case No. 7,864; In re Steele, Id. 13,345.

The dissolution of an attachment by an adjudication does not affect the priority of the attaching creditor who has prosecuted the suit to judgment and made an execution levy, and his lien thereunder will be considered as prior in time to that of creditors who have levied attachments intermediate the attachment and execution levy.—In re Steele, Case No. 13,345.

The lien of process issued upon a judgment obtained in attachment proceedings relates back to the service of the process, as between judgment creditors, and Rev. St. § 5044, has no application thereto.—Hudson v. Adams, Case No. 6,832.

In case of attachment of the bankrupt's property, the assignee can take advantage of any remedy open to subsequent attachment creditors.—Beers v. Place, Case No. 1,233.

As against attaching creditors assignee has no right to attach moneys, released on giving bond and deposited to indemnify bondsmen.—In re Albrecht, Case No. 145.

Attachments are dissolved by the proceedings without reference to the property on which they are levied, and an officer in possession under the attachment cannot retain the property until payment of his fees.—In re Stevens, Case No. 13,392.

In the case of an attachment dissolved by the bankruptcy law there is no lien for the costs or disbursements.—In re Davis, Case No. 3,616; In re Preston, Id. 11,394; In re Ward, Id. 17,145.

The sheriff who has attached goods of the bankrupt has a lien for fees accruing up to the time of the filing of the petition in bankruptcy.—In re Housberger, Case No. 6,734.

§ 262. Judgments—Validity in general.

See, also, ante, §§ 243–245.

A judgment obtained bona fide before the petition is filed is a valid lien. (Act 1841, § 2).—McLean v. Rockey, Case No. 8,891.

A judgment upon property attached in Massachusetts is a lien (Act 1841, § 2), wholly unaffected by the proceedings in bankruptcy when regularly obtained before petition, decree, or discharge in bankruptcy.—In re Cook, Case No. 3,152.

Where, according to a state law, a judgment becomes a lien on real estate by docketing the same, and the judgment is so docketed before petition is filed against the judgment debtor, the lien thereby acquired is within the saving clauses of Act 1867, §§ 14, 20.—In re Smith, Case No. 12,973.

A judgment obtained by default by a creditor, on a debt not yet payable, will be set aside at the suit of the assignee, though the circumstances do not prove a prohibited preference.—Partridge v. Dearborn, Case No. 10,785.

A lien on real estate lawfully obtained under a valid judgment by a creditor before the commencement of the proceedings against the judgment creditor is good against the assignee.—Webster v. Woolbridge, Case No. 17,340.

Execution liens under judgments for just debts, obtained against the active and unjustifiable opposition of the debtor, before his bankruptcy, will be upheld against the assignee.—Platt v. Stewart, Case No. 11,220.

A judgment obtained against a debtor after an active contest and a levy upon his entire stock in trade, where the creditor has knowledge or reasonable cause to believe that the

debtor was insolvent, is a fraudulent preference.—Linkman v. Wilcox, Case No. 8,374.

A judgment, which is in fraud of Act 1867, taken by confession as collateral for the aggregate of several other valid judgments, does not affect their validity.—Vogel v. Lathrop, Case No. 16,985.

The assignee is not bound by the amount found due the ward of the bankrupt in a suit in the chancery court commenced after the adjudication, to which he was not a party.—Bourne v. Maybin, Case No. 1,700.

§ 263. —— Of state courts.

The federal court, in a suit by the assignee of a bankrupt, will not examine into the validity of a judgment confessed by the bankrupt in a state court, the jurisdiction of which is not denied.—Atkinson v. Purdy, Case No. 636.

A judgment of a state court cannot be assailed in the bankrupt court, but the assignee and creditors must resort to the state court, to test its validity.—In re Burns, Case No. 2,182.

Judgments rendered in a state court cannot be corrected or annulled on petition in the bankruptcy court.—In re Dunn, Case No. 4,172.

The district court cannot go behind a judgment of a state court and inquire into the consideration of the debt upon which it was founded.—McKinsey v. Harding, Case No. 8,866.

The district court in bankruptcy may declare the lien of a judgment of a state court void as against general creditors if it is an unlawful preference under Act 1867.—In re Mallory, Case No. 8,991.

The district court in bankruptcy has no jurisdiction on petition to set aside, as procured by fraud and collusion, a judgment against the bankrupt rendered by a court having jurisdiction of the parties and subject-matter.—In re Lodi Land & Lumber Co., Case No. 8,461.

Sufficiency of evidence to show fraud or collusion in the obtaining of a judgment under which execution was levied before the commencement of the bankruptcy proceedings.—In re Moulton, Case No. 9,885.

§ 264. —— Property subject to lien.

Property held by purchasers from the bankrupts in fraud of Act 1867 (14 Stat. 517), at the time of the judgment, is subject to the judgment lien, for the legal title has not passed, and the proceeds of such property in the hands of the assignee are alike liable.—In re Badenheim, Case No. 716.

Property which the bankrupt held after the rendition of the judgment, and before the commencement of proceedings in bankruptcy, and which might at the time have been levied upon and sold for the payment of the judgment, is subject to the judgment lien.—In re Badenheim, Case No. 716.

A lien obtained by a judgment or levy of execution on property fraudulently assigned is valid as against the assignee in bankruptcy of the debtor where they are obtained before the commencement of the proceeding.—Johnson v. Rogers, Case No. 7,408.

An assignee taking property from a trustee, who held under a void assignment for creditors, takes subject to the liens of judgment creditors accruing subsequently to the assignment, and before the commencement of bankruptcy proceedings.—In re Beadle, Case No. 1,155.

Liens of judgments obtained after the execution of a general assignment, valid by the state laws or at common law, which is set aside at the instance of the assignee in bankruptcy as in contravention of the bankruptcy act, are not valid against him where they would not have attached had the assignment been allowed to stand.—In re Beisenthal, Case No. 1,236; In re Walker, Id. 17,063; Belden v. Smith, Id. 1,242; In re Temple, Id. 13,826; In re Croughwell, Case No. 3,440.

An assignee in bankruptcy who procures an assignment to be set aside as in contravention of the bankruptcy statutes takes title from the assignee under the general assignment, and an adjudication in favor of a sheriff at the suit of such general assignee, that an assignment of property, levied on by the sheriff under execution, was fraudulent and void, binds also the assignee in bankruptcy appointed on petition of the creditors of the assignor, and the sheriff is entitled to enforce his lien as against the assignee in bankruptcy.—In re Beisenthal, Case No. 1,235.

The commencement of proceedings in bankruptcy does not, of itself, dissolve an attachment granted within the time prohibited by law. The adjudication alone has that effect, and the deed of assignment relates back and vests the title of the property in the assignee, as of the date of filing the petition, and there is no time at which the lien of a judgment, rendered subsequent to the attachment, can attach to such property.—In re Badenheim, Case No. 716.

Where, in a suit commenced by attachment, a judgment and an order of sale have been obtained before petition filed in bankruptcy, the judgment lien is not invalidated, though no execution has issued.—Shelley v. Elliston, Case No. 12,750.

The dissolution of an attachment on the property of the bankrupt, by proceedings in bankruptcy, does not enlarge the liens of judgments or change their place as to the order in which they are to be satisfied.—In re Nelson, Case No. 10,100.

Where judgments have been obtained against each of two partners in trade, by a separate creditor of each, before the commencement of bankruptcy proceedings, and the firm property is sold under execution issued on the separate judgments and purchased by an agent of the plaintiff in the separate suits, neither he nor his assignee is entitled to hold the property as against the assignee in bankruptcy of the firm.—Osborn v. McBride, Case No. 10,593.

A creditor who is precluded from assailing an assignment as fraudulent cannot obtain a lien on the property which will be valid as against the assignee in bankruptcy.—Johnson v. Rogers, Case No. 7,408.

§ 265. Lien under execution—Validity in general.

An execution levied previous to an act of bankruptcy, if real and bona fide, gives a lien.—Barnes v. Billington, Case No. 1,015.

A bona fide entry of judgment and levy of execution before proceedings in bankruptcy are instituted is not affected thereby. (Act 1867).—In re Bernstein, Case No. 1,350.

Judgment creditors, obtaining an advantage by execution and levy, will be protected, although at the time they may have had doubts as to the debtor's solvency.—In re Kerr, Case No. 7,728.

An honest execution, levied before petition is filed in bankruptcy, is unaffected thereby, and the sheriff may proceed thereunder.—Goddard v. Weaver, Case No. 5,495.

A fraudulent preference is created where an insolvent debtor suffers his property to be seized on execution by a creditor who has reasonable cause to believe the debtor to be insolvent at the time, with intent to give a preference, and the assignee may recover the value of the property seized.—In re Ballou, Case

No. 818; Haskell v. Ingalls, Id. 6,193; Christman v. Haynes, Id. 2,703.

Executions are valid if the creditor had no reasonable cause to believe the debtor insolvent when they were taken out.—In re Black, Case No. 1,458.

A lien acquired by judgment, execution, and levy before the bankruptcy is enforceable against the proceeds of the property, where an appeal taken by the bankrupt did not operate as a stay, the bankrupt not having executed the necessary bond.—In re Gold Mountain Min. Co., Case No. 5,515.

The right of an execution creditor or a landlord, upon a warrant of distress, is paramount to that of the assignee, where the execution or warrant of distress was issued before the commencement of proceedings in bankruptcy.—Wilson v. Childs, Case No. 17,796.

§ 266. —— What property subject to levy.

Where a mortgagee takes possession of chattels on a default in payment of the mortgage, the mortgagor has no interest therein subject to levy on execution.—In re Wrisley, Case No. 18,103.

Upon the avoidance of a general assignment as in violation of the bankrupt law which was valid under the state law, the title of the assignee in bankruptcy dates back to the time of the voluntary assignment, and cuts off the levies of judgment creditors after such time.—In re Beisenthal, Case No. 1,236; In re Walker, Id. 17,063; Linder v. Lewis, Id. 8,362; Waring v. Buchanan, Id. 17,176. CONTRA, see McLean v. Meline, Case No. 8,890; MacDonald v. Moore, Id. 8,763.

A judgment creditor is entitled to take on execution only what belongs to his debtor, and the property in his hands is subject to all the equities to which it was liable in the hands of the debtor.—Everett v. Stone, Case No. 4,577.

§ 267. —— Necessity of levy.

Where, before an involuntary petition is filed, a sheriff has levied one execution, and receives another for levy, there is a constructive levy under the second, so that a valid lien is acquired under each.—In re Smith, Case No. 12,974.

Where, under the local law, an execution in the hands of the sheriff is a lien on the debtor's personal property for 90 days, if a petition is filed within such time the lien is transferred to the property in the hands of the assignee.—In re Weeks, Case No. 17,350.

A direction by the execution to the sheriff "to hold the execution, but not to levy for a few days, or until further orders," does not impair the lien.—In re Weeks, Case No. 17,350.

An execution in the hands of the sheriff in New York before voluntary petition filed, though not levied, binds leviable personal property as against the assignee.—In re Paine, Case No. 10,673; In re Stockwell, Id. 13,464; In re Wheeler, Id. 17,490. CONTRA, see In re Rust, Case No. 12,171.

Where the goods of a debtor are in the possession of the sheriff under an attachment, an execution in favor of another is a lien thereon from its delivery to the sheriff as against the assignee in a subsequent bankruptcy, though the attachment be vacated by the bankruptcy proceedings.—In re Hull, Case No. 6,857.

The lien of a prior unlevied execution is devested by a seizure of goods by a marshal under warrant in bankruptcy proceedings.—In re Tills, Case No. 14,052.

§ 268. —— Time of levy.

The petitioner's property in a voluntary proceeding remains subject to execution until the adjudication. (Act 1841).—Ex parte Bennet, Case No. 1,309; Dudley's Case, Id. 4,114.

A sale of the debtor's land on an execution levied after, though the judgment was entered before, the filing of the petition in bankruptcy, will not pass title as against the assignee under Act 1867.—Pennington v. Sale, Case No. 10,939; Davis v. Anderson, Id. 3,623; Russell v. McCord, Id. 12,157.

The issuing of a writ of fi. fa. upon a judgment recorded against the defendant in 1861 does not create such a lien upon his real estate in North Carolina as will be enforced by the bankruptcy court, when the defendant has been subsequently declared a bankrupt so late as 1868.—In re McIntosh, Case No. 8,826.

On the question of priority between a petition in bankruptcy and an execution, both marked as filed at the same hour, *held*, that the actual time of filing might be shown by parol.—In re Roberts, Case No. 11,896.

The fact that plaintiff sued out his execution immediately upon the rendering of the judgment, and defendant filed his bankruptcy on the same day, will not affect the lien of the execution where there was no collusion.—Witt v. Hereth, Case No. 17,921.

§ 269. —— Validity of levy.

The validity of a levy which is valid under the state law, being a matter of record, is conclusive, and cannot be inquired into in bankruptcy proceedings, and, if it is false, the officer must answer for the same in an action by the proper party.—Armstrong v. Rickey, Case No. 546.

Levy of execution on bankrupt's personalty will be declared void on petition of assignee where not in conformity to state laws under which it was made.—Beers v. Place, Case No. 1,233.

A levy upon the stock of goods in the bankrupt's store, where the sheriff puts a custodian in charge, but does not close the store, is valid.—In re Hughes, Case No. 6,843.

§ 270. —— Waiver of levy.

A levy which has been relinquished before the filing of the petition creates no lien upon the property, as against the assignee.—Sage v. Wynkoop, Case No. 12,215.

§ 271. Supplementary proceedings.

A judgment creditor does not acquire a lien protected under the bankrupt law by commencing proceedings supplementary to execution. Until the appointment of a receiver, his right is not a lien, within the meaning of the bankrupt law.—In re Wheeler, Case No. 17,490.

§ 272. Miscellaneous cases.

Where the bankrupt, after filing his petition and before adjudication, became entitled to property as heir of one to whom he was indebted, the assignee should receive the same diminished by the amount of such debt. (Act 1841).—Ex parte Newhall, Case No. 10,159.

Where contractors for prison labor file a petition in bankruptcy, owing a debt to the prison agent under a contract containing a provision, in accordance with the state law, that any debt which may become due shall be a lien in favor of the state upon the machinery used in the performance of the contract upon the prison premises, and that such lien shall continue during the contract, and until any debt owing thereunder shall be paid, the claim of the prison agent to such a lien is valid.—In re Burt, Case No. 2,209.

A creditor who has advanced money to raise a valid attachment, made more than four months prior to the bankruptcy proceedings, retains a lien therefor, although such advances were a part of a consideration for a conveyance which was a fraudulent preference.—Robinson v. Tuttle, Case No. 11,968.

An assignment of a permit to cut timber, and a conveyance of the timber by the bankrupt, to secure advances made before petition filed, gives a valid lien.—In re Gregg, Case No. 5,796.

Otherwise as to advances made after the petition was filed, but in ignorance thereof.—In re Gregg, Case No. 5,796.

One who advances money to drive the logs to market on the security of the assignment is entitled to be subrogated to the rights of the assignee under such assignment.—In re Gregg, Case No. 5,796.

3. Remedies of Parties.

§ 273. Waiver of lien.

A creditor, by filing a petition for an adjudication in bankruptcy without reference to a lien held by him, waives such lien.—In re Bloss, Case No. 1,562.

A lien on land is not affected by the taking of a mortgage on personal property to secure the same claim.—In re Hutto, Case No. 6,960.

A person's rights as mortgagee of a stock of goods are not impaired by a sale to him which is void under section 35, Act 1867.—In re Kahley, Case No. 7,593.

The fact that an attorney, in drawing the bankrupt's inventory, includes certain notes in his possession, does not estop him from claiming a lien thereon for legal services.—In re Brown, Case No. 1,984.

Where a creditor to whom the fraudulent preference has been made by a default judgment submits himself to the jurisdiction of the bankruptcy court, the court will control the proceeds of sale on execution by summary process.—In re Black, Case No. 1,457.

§ 274. Remedies of general creditors.

A creditor has a right to sue to set aside a fraudulent conveyance by the bankrupt only where the assignee refuses to do so.—Freelander v. Holloman, Case No. 5,081.

Creditors may impeach for fraud or irregularity a judgment obtained against the bankrupt before petition filed, where the judgment debt is offered for proof.—Ex parte O'Neil, Case No. 10,527.

A bill by creditors to restrain defendant from disposing of goods charged to have been fraudulently transferred to him by the bankrupt may be sworn to by an agent.—In re Fendley, Case No. 4,728.

§ 275. Reimbursement of fraudulent transferee.

One compelled to surrender to the assignee property purchased with knowledge that it was fraudulently conveyed is not entitled to reimbursement for improvements, or for money advanced to reduce incumbrances.—In re Mead, Case No. 9,365.

§ 276. Remedies of lien creditors in general.

Where a lien, or equitable claim, constituting a charge in rem, is a matter of agreement, it will be enforced in equity, not only upon real estate, but also upon personal estate, or money, in the hands of a third person; and against the party himself, or his personal representatives, or persons claiming under him, or assignees in bankruptcy.—Fletcher v. Morey, Case No. 4,864.

A creditor holding security cannot enforce his security after the commencement of the proceedings, until he first prove his debt, and receive permission of the bankruptcy court; and where he proceeds without authority of court the sale will be set aside, or, upon application, for good cause, the court may confirm the sale upon terms after the debt is properly proved.—Lee v. Franklin Ave. German Sav. Inst., Case No. 8,188.

A lien creditor cannot be required to surrender the property pledged until his liability or debt is discharged.—In re Buse, Case No. 2,221; Cadmus v. Beman, Id. 2,281.

A creditor secured by mortgage may apply to the bankruptcy court to have the property sold and the proceeds applied on his debt. If insufficient to extinguish it, he may prove for the unpaid part.—In re Stewart, Case No. 13,418.

A mechanic's lienor cannot proceed in the state court, after petition in bankruptcy is filed, without leave of the bankruptcy court.—In re Cook, Case No. 3,151.

§ 277. Power of state court.

Where the creditor commences suit in the state court to foreclose the mortgage before the assignee files a suit to set it aside as a fraud upon the law, the state court will have the right to decide the matter, to the exclusion of the federal courts.—Yeadon v. Planters' & Mechanics' Bank, Case No. 18,130.

A lien under the state law may be enforced by the state court, but the state court has no jurisdiction of a suit by the assignee in bankruptcy to set aside such a lien for fraud in its creation.—McLean v. Lafayette Bank, Case No. 8,885.

The state court out of which an attachment has issued is not bound to take judicial notice that the debtor has been adjudicated a bankrupt.—Johnson v. Bishop, Case No. 7,373.

§ 278. Ascertainment, adjustment, and liquidation of liens.

A receiver will be appointed for property incumbered by liens before the court for adjustment, although the bankrupt has relinquished possession to a prior incumbrancer.—McLean v. Lafayette Bank, Case No. 8,887.

A prior lien gives a prior claim, and the district court in bankruptcy may ascertain and liquidate such a lien.—In re Winn, Case No. 17,876.

Where, under an agreement of the execution creditor, the property levied on passes into the hands of the assignee in bankruptcy without prejudice to such prior lien, under the levy, as may be sustainable, the assignee and the register will, at the instance of the execution creditor, expedite the proceedings for such a decision, but such proceedings cannot be conducted on ex parte affidavits.—In re Beck, Case No. 1,205.

The bankruptcy court has jurisdiction to determine the question of lien, on petition by a chattel mortgagee, though he has not proved his debt in bankruptcy.—In re High, Case No. 6,473.

Property levied on under execution was, by order of the bankruptcy court, delivered to the assignee, and by him sold subject to the determination as to the validity of the lien claimed by the creditor, and the assignee filed a petition praying that the lien be declared void, and the creditor's answer prayed that it might be held valid. *Held* that, as the matter was brought up by petition instead of by bill in equity, the proceedings were irregular and void.—In re Ballou, Case No. 818.

In the case of vendor's liens on the bankrupt's real estate and liens attaching prior to the title of the vendor, resort must be had to a proceeding in equity to determine the title and rights of the parties.—Ex parte Drewry, Case No. 4,081.

When incumbrances have been paid upon a particular parcel of land for the benefit of subsequent grantees of different interests in the same, the sum so paid is chargeable, in the inverse order of alienation, to the most recently

acquired interest.—In re Longfellow, Case No. 8,486.

The remedy to have an unrecorded mortgage of the bankrupt's property declared and enforced as a prior lien is by action or suit, and not by petition.—Barstow v. Peckham, Case No. 1,064.

§ 279. Marshaling of assets and securities.

A mortgage given on both land and personalty will be enforced as to the land first, where there are other liens on the personalty.—McLean v. Lafayette Bank, Case No. 8,889.

An assignment of a fund deposited by a foreign insurance company as required by the statute of Mississippi, though made within four months of an adjudication in bankruptcy, *held* not void as to foreign creditors.—Firemen's Ins. Co. v. Hemingway, Case No. 4,797.

A lien which is attached to the proceeds of sale of two classes of debtors' property, and which is superior to all other liens, will be paid as far as possible out of the fund on which it is the only lien.—In re Bowler, Case No. 1,735.

In the case of a creditor having several securities, the bankruptcy court may so marshal the assets as to require such creditor to foreclose a mortgage, which was one of the securities, before resorting to the general fund.—In re Sauthoff, Case No. 12,379.

§ 280. Foreclosure of mortgage—In general.

On the bankruptcy of the mortgagor, where the mortgagee was given a power to sell, the bankruptcy court has exclusive jurisdiction to determine the rights of the parties.—Lockett v. Hill, Case No. 8,443.

The bankruptcy of the mortgagor will not devest the state court of the jurisdiction of a foreclosure suit already at issue, and it may proceed to decree a sale; and where the property is clearly of less value than the lien the federal court will order the assignee to sell the same.—In re Irving, Case No. 7,073; Getz v. First Nat. Bank of Washington, Id. 5,374.

A suit in the state court to foreclose a mortgage given by the bankrupt, commenced after the adjudication, without permission of the bankruptcy court, is not a contempt of its authority, and the proceedings are not void.—In re Moller, Case No. 9,700, affirming Case No. 9,699; In re O'Malley, Id. 10,507a.

The foreclosure of a mortgage on bankrupt's estate is not within summary jurisdiction of the bankruptcy court, under Act 1867, § 1.—In re Casey, Case No. 2,495.

A bankrupt court, which first takes jurisdiction by ordering a sale of mortgage premises discharged of liens, thereby ousts the state courts of jurisdiction to foreclose the mortgage.—In re Devore, Case No. 3,847.

A junior mortgagee, purchasing at a foreclosure sale, is not entitled to rents collected by the assignee of the mortgagor pending the foreclosure, or to reimbursement of the amount paid by him for taxes. In re Foster, Case No. 4,963, affirmed.—Foster v. Rhodes, Case No. 4,981.

A decree of foreclosure against one adjudicated a bankrupt, where his assignee was not made a party, will not extinguish the right of redemption, and a purchaser under sale by order of the bankruptcy court is entitled to redeem, notwithstanding title by possession and payment of taxes under state law.—Barron v. Newberry, Case No. 1,056.

Where a foreclosure suit is commenced in the state court after petition in bankruptcy is filed, and proceeds to a decree before the assignee is appointed, the assignee's right of redemption is cut off.—Sedgwick v. Grinnell, Case No. 12,612.

The lien of a mortgage creditor on the real property of a bankrupt is not lost by his failure to prove his debt, so that after the end of the proceedings in bankruptcy he cannot enforce his lien.—Wicks v. Perkins, Case No. 17,615.

§ 281. —— Leave to foreclose.

After proceedings in bankruptcy commenced, a mortgagee cannot take possession of property under his mortgage, or foreclose the same in the state court, where the assignee objects.—Hutchings v. Muzzy Iron Works, Case No. 6,952.

Though notes secured by a deed of trust mature before the adjudication, the bankruptcy court has custody of the estate, and the trustees cannot foreclose or sell without its consent.—Dooley v. Virginia Fire & Marine Ins. Co., Case No. 3,998.

A sale of the bankrupt's property in proceedings to foreclose a mortgage commenced in the state court after petition in voluntary proceedings was filed, with knowledge thereof, and without obtaining permission of the bankrupt court, is a nullity.—Phelps v. Sellick, Case No. 11,079.

A sale by the trustee under a trust deed of property of the bankrupt on direction of the creditor, without permission of the bankruptcy court, will be set aside on application of the assignee.—In re Davis, Case No. 3,618.

A mortgagee cannot apply for leave to foreclose his mortgage in another court without proving his debt in bankruptcy as a secured claim.—In re Sabin, Case No. 12,193.

The petition in such case must be full and explicit, and signed and verified in the manner usual in other cases.—In re Sabin, Case No. 12,193.

A petition for leave to foreclose a mortgage will be dismissed where it is not shown that the assignee was given notice, and the debt has not been proved.—In re Frizelle, Case No. 5,133.

A mortgagee will not generally be permitted to foreclose in a state court, but should invoke the summary power of the bankrupt court to sell the property, or, where the validity of the mortgage is denied, should proceed by bill in the district or circuit court.—In re Sacchi, Case No. 12,200.

Where the validity of a mortgage given by the bankrupt is not questioned, and the premises are worth less than its amount, the bankruptcy court may properly allow the mortgagee to foreclose.—In re Iron Mountain Co., Case No. 7,065.

Where the value of the bankrupt's property mortgaged exceeds the mortgage, or where its validity or amount is disputed, the bankrupt court will refuse to permit foreclosure in the state court.—In re Iron Mountain Co., Case No. 7,065.

§ 282. —— Restraining foreclosure and sale.

Proceedings in a foreclosure suit begun in a state court after adjudication of the bankruptcy of the mortgagor, and the appointment of an assignee, are void, and a final injunction will be granted by the bankruptcy court restraining the same.—In re Brinkman, Case No. 1,884.

An assignee cannot have an injunction against foreclosure in a state court of a mortgage against the bankrupt where he appeared, and permitted the proceedings to final adjudication, and no injury is done thereby to the bankrupt estate.—Augustine v. McFarland, Case No. 648.

Foreclosure suits in the state court will be enjoined by the bankruptcy court at the suit of the assignee, who denies the right of a national bank, the mortgagee, to make the loan in question, though the expenses of litigating the question will be greatly increased.—In re Duryea, Case No. 4,196.

In a bankruptcy proceeding an injunction was issued staying the foreclosure of a mortgage

given by the bankrupt, and the mortgagee applied to set aside the stay, that the property might be sold under decree in the foreclosure suit. *Held*, that the register would be appointed special custodian of the property to sell the same, and receive the proceeds, subject to the order of the court.—In re Hanna, Case No. 6,026.

The circuit court of one district, in a suit by an assignee appointed by a district court in another state, cannot enjoin a suit to foreclose a mortgage in the state court of a third state.—Markson v. Heaney, Case No. 9,098.

On petition by mortgagees in a foreclosure proceeding to set aside an injunction issued by the bankruptcy court, the register will be authorized to sell the property free of incumbrances, and receive the proceeds subject to order of court.—In re Hanna, Case No. 6,026.

A suit commenced in a state court, after adjudication, to enforce mortgages on property in possession of the assignee, may be enjoined. Case No. 7,725 affirmed.—In re Kerosene Oil Co., Case No. 7,726.

An injunction issued to stay a mortgage foreclosure in the state court will be dissolved where it appears that the property is of no value beyond the admitted incumbrances.—In re O'Malley, Case No. 10,507a.

Where the purchaser of property of the bankrupt under a power of sale in a mortgage before the adjudication refuses to complete the purchase, and the property is thereafter, and after the adjudication, offered for sale, the bankruptcy court may enjoin the sale.—Whitman v. Butler, Case No. 17,579.

§ 283. Sale on execution.

A sale by an execution creditor, without leave of court, after the filing of a petition in bankruptcy, passes no title.—The Skylark, Case No. 12,929.

A sale of the bankrupt's property made after the petition was filed, but under an execution levied before the petition was filed, may be set aside or confirmed, in the discretion of the bankruptcy court.—In re Hufnagel, Case No. 6,837.

A purchaser at sheriff's sale, after proceedings commenced in bankruptcy, where the levy was made prior thereto, will acquire a good title, notwithstanding that the judgments under which the sale took place are afterwards declared void as in fraud of the act.—Zahm v. Fry, Case No. 18,198.

A sheriff who levies an execution upon and sells property of the bankrupt after petition filed is liable to the assignee for the proceeds, though he pay them over to the creditor before receiving notice of the bankruptcy.—Miller v. O'Brien, Case No. 9,586.

The fact that the sheriff had seized the property, and held it, or its proceeds, under an attachment made a few days before the proceedings were instituted, will make no difference in the rule to be applied, as the attachment was dissolved by Act 1867, and the assignee's title vested as of the time of the commencement of the bankruptcy proceedings.—Miller v. O'Brien, Case No. 9,586.

A party holding a judgment entered in an action for tort after commencement of the proceedings need not apply to the bankruptcy court for leave to enter execution.—Black v. McClelland, Case No. 1,462.

Where a person mortgaged his property, waiving all his homestead rights and his right to a discharge in bankruptcy, and his assignee in voluntary bankruptcy left the property in such person's hands as custodian until he could procure the schedules and administer, but before getting actual possession the mortgages were foreclosed and executions levied, the waiver could not be enforced until the property was designated and allotted to the bankrupt by the assignee; and such levy is a contempt of court, and is not justified by the ignorance of the mortgagees and the sheriff, it appearing that they could have easily obtained knowledge of the bankruptcy.—Byrd v. Harrold, Case No. 2,269.

A sheriff, where not restrained by the bankruptcy court, may proceed to sell after the adjudication under a levy and advertisement of sale made before the adjudication.—Thames v. Miller, Case No. 13,860.

§ 284. Restraining enforcement of liens —In general.

Where a lien has been acquired before petition in bankruptcy was filed, enforcement of such lien in state court will not be enjoined, unless fraud is charged.—Clarke v. Rist, Case No. 2,861.

Where the enforcement of a lien in the state court will have the effect to draw to its jurisdiction the administration of the bankrupt law, the federal circuit court will interpose by injunction.—McLean v. Lafayette Bank, Case No. 8,885.

Where other courts have taken full jurisdiction of property on which liens are asserted, the bankruptcy court will not in general interfere.—In re Taliafero, Case No. 13,736.

A district court has, under Act 1867, power to prohibit any proceeding in a state court by a creditor to enforce a lien on the property of a bankrupt, who has been adjudged a bankrupt by such court. Samson v. Burton, Case No. 12,286, affirmed.—In re Clark, Case No. 2,801.

Where the property affected by a lien has passed to the assignee, summary proceedings in the bankruptcy court to restrain the enforcement of the lien are proper. Samson v. Burton, Case No. 12,286, affirmed.—In re Clark, Case No. 2,801.

The plenary proceeding common to suits in equity is not necessary in the exercise of the equity power of the district court in bankruptcy.—In re Wallace, Case No. 17,094.

The district courts in bankruptcy are authorized by summary proceedings to administer all the relief which a court of equity could administer under the like circumstances upon regular proceedings. (Act 1867).—In re Wallace, Case No. 17,094.

The enforcement in a state court of a valid lien attaching before the commencement of the proceedings in bankruptcy will not be restrained by the bankruptcy court on the ground of a probable sacrifice of the property under judicial proceedings for its enforcement in the state court.—Ex parte Donaldson, Case No. 3,981.

Creditors holding an order obtained before bankruptcy on a general fund will be restrained, after bankruptcy, from prosecuting their suit in the state court against the managers of the fund.—Walker v. Seigel, Case No. 17,085.

§ 285. —— Execution and attachment liens.

In the absence of fraud or collusion, a sale on execution of property seized before the filing of the petition, which had been attached before the alleged acts of bankruptcy by mesne process, will not be restrained. (Act 1841).—Downer v. Brackett, Case No. 4,043.

The levy of an execution on property mentioned in the schedule will be restrained at any time after the petition is filed, unless it be shown that the petition was not bona fide. (Act 1841).—In re Mellor, Case No. 9,402.

A federal district court in bankruptcy may restrain the sale of the bankrupt's property on the process of a state court levied before the bankruptcy proceedings.—In re Lady Bryan Min.

Co., Case No. 7,980; Beattie v. Gardner, Id. 1,195; In re Mallory, Id. 8,991.

A creditor levying on personalty under a judgment recovered more than six months before the filing of a voluntary petition on bill by a creditor in the circuit court may be enjoined from selling until the assignee is appointed.—Eastburn v. Yardley, Case No. 4,252.

A petition to enjoin enforcement of a judgment against the bankrupt's property can be filed, before the appointment of assignees, only by the bankrupt, and, after such appointment, only by the assignees.—In re Bowie, Case No. 1,728.

A sheriff has no right to make a levy under process of the state court after commencement of proceedings in bankruptcy until the question of bankruptcy is disposed of.—Jones v. Leach, Case No. 7,475.

The bankruptcy court may prohibit creditors of the bankrupt from taking out execution in a state court, and levying it on attached property, until the assignee shall have time to discharge the attachment liens.—Samson v. Burton, Case No. 12,285.

Where a sheriff has made a bona fide levy under an execution before proceedings were commenced, the bankruptcy court will interfere only where the interest of the general creditors will be materially affected, or the validity of the judgment is questioned.—Goddard v. Weaver, Case No. 5,495.

Where an execution creditor, under a levy prior to proceedings in involuntary bankruptcy, has been delayed by an injunction under such proceedings, he is entitled to a summary hearing at any stage, after the execution of the assignment.—In re Hafer, Case No. 5,897.

An injunction against a sale on execution on levies made prior to the petition in bankruptcy, where the judgments were valid, will be dissolved, where it does not appear that any advantage would result to the bankrupt estate by continuing them.—In re Wilbur, Case No. 17,633.

An injunction restraining proceedings on execution under a judgment against the bankrupt will be dissolved, where the assignee has taken no measures to recover the property levied upon and the bankrupt declares that the property does not belong to him.—In re Olcott, Case No. 10,478.

Creditors of a bankrupt cannot purge themselves of contempt in violating an injunction restraining attachment proceedings in state courts by showing that the proceedings were continued by assignees of their firm, unless they show that the assignment was prior to the injunction, or that they endeavored to stop the suit.—United States v. Bancroft, Case No. 14,513.

In such a case, a fine to the amount of the value of the attached property, with interest, and the expense of the contempt proceedings, including a proper counsel fee, will be imposed upon such creditors.—United States v. Bancroft, Case No. 14,513.

Pending proceedings in bankruptcy, either before or after the decree, a prior attaching creditor cannot proceed in his suit to trial and judgment.—Ex parte Foster, Case No. 4,960.

In such case, the bankruptcy court will enjoin further proceedings in the attachment suit, but will allow it to be continued until the discharge is obtained.—Ex parte Foster, Case No. 4,960.

A creditor enforcing an execution on a state court judgment, in defiance of an injunction of the bankruptcy court, in which the debtor has filed a voluntary petition, is guilty of contempt.—In re Atkinson, Case No. 606.

§ 286. Restraining suit by fraudulent vendee.

A bill by a sheriff to restrain an action of trover by the fraudulent vendee of a debtor for attached property, which he had delivered to the assignee in bankruptcy, must be filed in the district court as a distinct suit, and not as a petition in the bankruptcy proceedings.—In re Evans, Case No. 4,551.

A sheriff who delivers, to the assignee in bankruptcy, property attached before the bankruptcy, as that of the debtor, has a good defense at law in an action in trover by the fraudulent vendee of the debtor, and the district court will not enjoin the suit on his petition.—In re Evans, Case No. 4,551.

The bankruptcy court will retain the bill as against the fraudulent vendee for an account of the property converted by him, though it refuse to enjoin the suit against the officer, on the ground that he has an adequate remedy at law.—In re Evans, Case No. 4,551.

Where a suit is brought by the assignee in the federal court to set aside a conveyance as fraudulent, the bankruptcy court may restrain the prosecution of a suit in the state court against a marshal by the alleged fraudulent transferee for seizing property as that of the bankrupt pending the suit by the assignee.—Kellogg v. Russell, Case No. 7,666.

(D) ADMINISTRATION OF ESTATE.

1. In General.

§ 287. Powers of assignees in general.

The assignee in bankruptcy of an insurance company has no power to waive the performance of conditions by the insured.—In re Firemen's Ins. Co., Case No. 4,796.

The assignee, without authority of court, cannot employ an attorney to conduct a suit, for a contingent compensation.—In re Brinker, Case No. 1,882.

An agreement by two of three assignees is not binding upon the absent assignee in the absence of previous authority or ratification.—Blight v. Ashley, Case No. 1,541.

Suppression of material facts by the assignee while obtaining authority from the court to make a contract to pay counsel one-half the gross recovery in a cause makes the contract invalid, but a reasonable sum will be allowed.—Maybin v. Raymond, Case No. 9,338.

An assignee is in contempt if he takes any steps in a state court without authority from the bankruptcy court.—In re Smith, Case No. 12,978.

§ 288. Instructions of court or register.

Where no question of disputable right exists, assignees cannot obtain the instruction of the bankruptcy court whether to do a proposed act, which, if proper on their part, would be within their own discretion and power on the administration of their trust.—Estate of Franklin Sav. Fund Soc., Case No. 5,058.

An assignee will be held to the strictest account where he fails to attend a reference ordered to obtain the necessary information upon which to base directions which have been applied for by the assignee.—In re Schapter, Case No. 12,438.

Neither the court nor register is the general adviser of the assignee in his dealings with the assets.—In re Sturgeon, Case No. 13,564.

§ 289. Care and custody of property.

The court may order the assignee to expend money in finishing goods for sale, where beneficial to the estate.—Foster v. Ames, Case No. 4,965.

The assignee is liable for proper charges for the care and custody of the bankrupt's property from the commencement of the proceedings.—Gardner v. Cook, Case No. 5,226.

If the assignee has taken possession of packing-boxes, policies of insurance, &c., procured by the sheriff, he must pay for the cost of them.—In re Fortune, Case No. 4,955.

Where an assignee of the mortgagor takes possession of harvested crops and timber which had been removed from the premises with notice from the mortgagee, after condition broken, that he claimed such property under his mortgage, the expenses of securing the property will be allowed the assignee which must be paid by the mortgagee, as the assignee is considered as having taken possession in behalf of the mortgagee.—In re Bruce, Case No. 2,045.

Property in the hands of the assignee, subject to a lien, is chargeable with the cost of keeping and selling it, and the assignee's fees, but not for attorney's fees in contesting the lien.—In re Peabody, Case No. 10,866.

An assignee in bankruptcy who refuses to deliver mortgaged chattels to the mortgagee has no lien for rent, thereafter accruing, of the place in which they were kept.—In re Pierce, Case No. 11,140.

§ 290. Compromise of claims.

The assignee is not empowered to compound all doubtful debts with the consent and approbation of a committee of creditors.—In re Dibblee, Case No. 3,885.

An assignee, jointly interested with others in certain judgments for a lien upon a building, is allowed to compromise his claim upon receiving a pro rata share, and not otherwise.—In re Furbish, Case No. 5,159.

Where the proof of loss was not submitted until after petition filed by an insolvent insurance company, the assignee cannot make an adjustment or agreement upon which an action can be maintained.—In re Firemen's Ins. Co., Case No. 4,796.

§ 291. Redemption of property.

The assignee may redeem property of the bankrupt sold on execution without discharging the claim of the judgment creditor, who has purchased at the sale, for the unsatisfied balance of his judgment.—Lloyd v. Hoo Sue, Case No. 8,432.

The assignee in bankruptcy may redeem a chattel mortgage made in Massachusetts.—Foster v. Ames, Case No. 4,965.

§ 292. Assessments on corporate stock.

Upon the bankruptcy of a corporation the court is vested with all the powers belonging to the officers and stockholders as to the making of assessments or calls.—Upton v. Hansbrough, Case No. 16,801.

The district court in bankruptcy has power to make a call and assessment against the stockholders in a bankrupt insurance company, on unpaid stock held by them.—In re Republic Ins. Co., Case No. 11,704.

The court has power to make such an assessment, to return unearned premiums and all claims properly provable against the company, and to pay the expense of closing up its affairs.—In re Republic Ins. Co., Case No. 11,704.

The court also has jurisdiction of the equalization of payments between stockholders, and it may also allow interest on claims proven.—In re Republic Ins. Co., Case No. 11,704.

The assignee of a bankrupt corporation has no power of his own motion, and without order of court, to make an assessment of unpaid balances or installments on the corporate stock.—Payson v. Brooke, Case No. 10,857. CONTRA, see Myers v. Seeley, Case No. 9,994.

An order of the court requiring each stockholder of a bankrupt corporation to pay a call on his stock within a specified time is binding upon all the stockholders, whether they receive actual notice or not.—Upton v. Burnham, Case No. 16,799.

The failure of the company to make assessments regularly from month to month, as provided in the policy, cannot be retrieved by an assessment by the court on the bankruptcy of the company.—In re Protection Life Ins. Co., Case No. 11,444.

The word "nonassessable," written across the face of a stock certificate, is not binding as against the assignee in bankruptcy of the company.—Upton v. Burnham, Case No. 16,799.

§ 293. Liability for rent.

Where a lease of premises made by the bankrupt is not accepted by the assignee, he is not liable thereunder; but if he continues to use the premises the estate will be held liable for the value of such use as part of the expense of administration.—In re Brown, Case No. 1,973a; In re Appold, Id. 499; In re Rose, Id. 12,043; In re Butler, Id. 2,236; In re Walton, Id. 17,131; In re Hamburger, Id. 5,975; In re Fowler, Id. 4,997; In re Wheeler, Id. 17,490; In re Ives, Id. 7,116.

Where the rate named in the lease is reasonable, such rate will be allowed.—In re Breck, Case No. 1,822.

Where the assignee removes the bankrupt's goods from a leased store without making any sales therein, and without having actual or constructive possession thereof, the estate is liable only for use and occupation as a place of storage.—In re Lucius Hart Mfg. Co., Case No. 8,592.

The assignee is liable for full rent of premises occupied by him under an unexpired lease by the bankrupt, and the landlord has a lien on the goods on the premises.—In re Commercial Bulletin Co., Case No. 3,060.

The assignee is liable for the payment of expenses incurred in the settlement of the bankrupt's estate after the commencement of the proceedings, and the use and occupation of the rented premises by the marshal for storage and sale of the bankrupt's property is such an expense.—In re Dunham, Case No. 4,145.

A landlord's claim for use and occupation of premises used by the marshal for keeping and storing the goods, and costs on reference to adjust the amount, are to be paid as expenses of administration.—In re Hoagland, Case No. 6,545.

If the assignee occupy leased premises after the day of adjudication, he, and not the estate, is liable for the rent. When, however, his occupancy is for the benefit of the estate, he will be credited by the rent he is obliged to pay.—In re Webb, Case No. 17,315.

The assignee is not bound for the rent in a lease of premises used for the storage of the bankrupt's goods of which he had no knowledge.—In re Washburn, Case No. 17,211.

An assignee does not accept the premises and become responsible for rent merely by leaving some goods thereon, mingled with some other goods which had been mortgaged by the bankrupt to the lessor.—In re Yeaton, Case No. 18,133.

The assignee is not liable for rent accruing after the adjudication unless he elects to accept a lease, and occupation of leased premises by the assignee independently of the lease, where he pays for such occupation, is not evidence of such an election.—In re Ten Eyck, Case No. 13,829.

There must be some positive and unequivocal act of acceptance by the assignee before he

will be held liable on a lease of the bankrupt, as the mere acceptance of the trust by the assignee does not make him the assignee of such lease.—In re Washburn, Case No. 17,211.

An assignee taking charge of a stock of goods in a store occupied by the bankrupt under a verbal lease for a certain period can be required to pay rent only at the contract rate, and for the time he actually used the store.—In re Merrifield, Case No. 9,465.

Where the marshal takes possession of the bankrupt's goods in a rented store, the landlord is not entitled to the price stipulated in the lease to the bankrupt, but only to reasonable compensation for use and occupation, though he had demanded rent of the marshal, and asked him to vacate.—In re Metz, Case No. 9,509.

Where a marshal, under a warrant, takes possession of the bankrupt's goods on premises occupied by the latter under a lease, and they remain in the possession of the marshal until the appointment of an assignee, and the landlord testifies that he leased the premises to another party, who was to take possession at a time subsequent to the removal of the goods from his premises, and he makes no application for rent until they are removed, he is not entitled to be paid for such occupation out of the estate.—In re McGrath, Case No. 8,808.

The assignee should pay from the assets the rent of a store occupied by him, from the filing of the petition to the date of surrendering possession.—In re Hufnagel, Case No. 6,837.

Rent for a store occupied by the bankrupt, and subsequently by his assignee, will be paid in full, up to the surrender of the property, where there were sufficient goods to satisfy the rent on distress.—Longstreth v. Pennock, Case No. 8,488.

Where the assignee elects to take a term belonging to the bankrupt under a lease, he must pay the accrued rent.—Ex parte Faxon, Case No. 4,704.

§ 294. Liability for torts of assignee.

The estate of the bankrupt is not liable for torts of the assignee.—Adams v. Meyers, Case No. 62.

§ 295. Superseding bankruptcy proceedings by arrangement (Act 1867, § 43).

It is a substantial objection to the approval of a resolution of creditors, under section 43, Act 1867, appointing a trustee and committee to supervise his action, that the committee is composed of only two, one of whom is the trustee.—In re Stillwell, Case No. 13,447.

Creditors desiring confirmation of resolution appointing trustees are the moving parties and should serve their papers on opposing parties.—In re American Water-Proof Cloth Co., Case No. 318.

A resolution appointing a trustee, under the terms of which, and by prior agreements, the interests of the nonsigning creditor were to be sacrificed for the benefit of the signers and the bankrupt, will not be approved.—In re Vetterlein, Case No. 16,928.

The creditors at a meeting held after the appointment of an assignee may make an arrangement by trust deed to have him removed, and a trustee appointed.—In re Jones, Case No. 7,447.

After the resolution of creditors for the appointment of a trustee has gone into effect, a creditor cannot prove his claim before the register, under § 22.—In re Trowbridge, Case No. 14,191.

A person is not disqualified as trustee, or as a member of a committee of creditors, because related to the bankrupt or a creditor or a proposed member of the committee of creditors.—In re Zinn, Case No. 18,215.

The president of a bank, which claimed to be entitled to a preference, is not a proper person to be a member of the committee of creditors.—In re Stuyvesant Bank, Case No. 13,581.

A receiver appointed in proceedings in a state court, which were one of the grounds upon which the adjudication was made, is not a proper person for trustee.—In re Stuyvesant Bank, Case No. 13,581.

The trustees, under direction of the committee, can wind up the estate, or they may be restricted to the more limited powers and duties of ordinary assignees.—In re Darby, Case No. 3,570.

The trustees as well as the creditors and court, are bound to accept the direction of the committee as conclusive, in the absence of fraud.—In re Cooke, Case No. 3,169; Id. 3,171.

When a committee is appointed to assist the trustee in the management of the bankrupt's estate, unanimity of action by them is not required, but the act of a majority, where all have the right to be heard, is the act of the committee.—In re Baxter, Case No. 1,122.

Amount of payment to counsel for services is discretionary with committee.—In re Baxter, Case No. 1,122.

A member of the committee appointed under Rev. St. § 5103, is not entitled to compensation for preparing the bankrupt's stock for sale, and in effect settlement of litigation, as such services were not such as the trustee could not call on the committee to perform in the ordinary course of their duty.—In re Bonnett, Case No. 1,634.

The approval of the committee cannot affect or cure positively unlawful applications of the fund, nor inequality of distribution.—In re Baxter, Case No. 1,122.

Equity will entertain a bill by trustees in bankruptcy to recover an excess of interest paid on a contract stipulating for a greater rate of interest than allowed by law.—Darby v. Boatman's Sav. Inst., Case No. 3,571.

A petition to the bankruptcy court by trustees of the estate against a co-trustee for the recovery of securities belonging to the estate is not a proper remedy, but the petitioners must proceed by a bill in equity.—In re Grambo, Case No. 5,680.

The committee of creditors are entitled to reasonable compensation for their services although the statute makes no provision for it.—In re Treat, Case No. 14,160.

2. Sale of Property.

See, also, ante, § 159.

§ 296. Jurisdiction and power.

The bankruptcy court possesses no power under Act 1867, § 25, to summarily order a sale of property claimed for the bankrupt, but in the actual possession of a third person claiming absolute title.—Knight v. Cheney, Case No. 7,883.

Disputed interests of the bankrupt cannot be sold under Act 1867, § 25, except upon a public sale by an order of the court, after personal notice to the adverse claimants. Such order cannot be made by the register.—Ex parte Bryan, Case No. 2,061.

The bankruptcy court cannot order the sale of an entire tract on the ground that the title is in dispute, when the title to an undivided half only is disputed. Rev. St. § 5063.—In re Ludwigson, Case No. 8,601.

The jurisdiction of the district court in bankruptcy to sell real estate and pay off liens is not exclusive.—In re Bowie, Case No. 1,728.

No order of court is necessary to authorize the assignee to sell unincumbered assets of the bankrupt.—In re White, Case No. 17,531.

An assignee who fails or refuses to sell real estate of the bankrupts for the benefit of creditors is personally responsible.—In re Jackson, Case No. 7,127.

§ 297. Power to sell incumbered property.

Where a creditor is secured by a mortgage which is valid under the state law and the bankrupt act, the court has no jurisdiction to order a sale of the property, unless the creditor comes into the bankruptcy proceeding.—Yeadon v. Planters' & Mechanics' Bank, Case No. 18,130.

The court has full power to order the sale of incumbered assets in such manner as it chooses to direct.—In re Columbian Metal Works, Case No. 3,039.

The assignee may sell incumbered property without an order of the court. Act 1867, § 20. —In re McClellan, Case No. 8,694.

But if the debt of the secured creditor is not admitted by the assignee, and cannot be agreed between them, then the assignee should resort to the proper court to ascertain it, and for a sale of the property.—In re McClellan, Case No. 8,694.

The district court will not restrain trover in the state court by the mortgagee of property sold by the assignee without an order of court. —In re Cooper, Case No. 3,190.

A sale by the assignee without an order of court is subject to all lawful incumbrances.—In re Mebane, Case No. 9,380.

It is not the duty of the assignee to petition the court respecting the sale of incumbered property, unless he believes it will produce a fund in excess of the incumbrances.—In re Mebane, Case No. 9,380.

Where it appears that property subject to valid liens will bring more at a private sale by the assignee, he may sell it, with leave to the lien creditors to apply for an order for the direction of the application of the proceeds.—In re Schnepf, Case No. 12,471.

The provision of Rev. St. § 5075, that mortgaged property shall be sold in such manner as the bankruptcy court shall direct, is for the benefit of the unsecured creditors represented by the assignee, and he may waive it. Case No. 9,699, affirmed.—In re Moller, Case No. 9,700.

§ 298. When sale of incumbered property ordered in general.

The court will not order the assignee to sell property incumbered for more than its value.—In re Bowie, Case No. 1,728.

Application to sell real estate incumbered to its full value refused, with liberty to renew it if a sale was not effected, in a reasonable time, in a suit pending in the state court on a prior lien.—In re Hahnlen, Case No. 5,901.

The bankruptcy court should not order the sale of land because the title is in dispute, when the liens thereon exceed its value.—In re Ludwigson, Case No. 8,601.

An order for the sale of chattels covered by a mortgage will not be made where the mortgagee's rights will be injuriously affected, as where the goods have no market value, or not more than the amount of the mortgage.—Foster v. Ames, Case No. 4,965

§ 299. Notice of sale.

A mistake in judgment by the assignee as to the proper place and notices of a sale will not invalidate the sale, in the absence of fraud or collusion.—Hills v. Alden, Case No. 6,507.

Under Act June 22, 1874, notices of all public sales must be published for three consecutive weeks, whether the assignee or other officer proceeds under the power given him by statute or under special order of the bankruptcy court, and such court or judge thereof has no power to change this requirement.—In re Hunter, Case No. 6,903.

The register has authority, under Act 1867 (14 Stat. 517), as amended by Act 1874 (18 Stat. 178), to designate the newspaper that shall contain notices of sales, by the assignee, of the unincumbered real estate of the bankrupt.—In re Burke, Case No. 2,157; Hills v. Alden, Id. 6,507.

§ 300. Notice to incumbrancers.

An order should not be made authorizing a private sale of land on credit, or for less than the amount claimed by an incumbrancer, without the latter's consent, or a submission of the terms of sale to the bankruptcy court, on notice to him.—In re Kirtland, Case No. 7,851.

A sale of real estate under an order of the bankruptcy court is void, as to the creditors who had a lien on the property, and to whom no personal notice of the sale was given, and where it appears that no inquiry and report of liens and their priorities was made before the sale. —Ex parte Drewry, Case No. 4,081.

A sale of incumbered land free of the incumbrances, without notice to the lien creditors, may be set aside by the court on petition of such creditors and notice to the purchasers.—In re Major, Case No. 8,981.

A sale, free of incumbrances, of the bankrupt's real estate, subject to the lien of valid judgments, made on the ex parte petition of the assignee, is absolutely void, and will be set aside on subsequent petition of the lien creditors.—In re Rowland, Case No. 12,096.

Lien creditors are not bound by the sale of lands which were subject to their liens, where their priorities were not first definitely ascertained on personal notice to them.—In re Taliafero, Case No. 13,736.

A sale by the assignee of property free from incumbrances, without notice to the holder of a mortgage thereon, or of the application for the order of sale, will be sustained, where the mortgagee was present at the sale, and had ample opportunity to apply to the courts for redress, but does not do so, and it appears that the court has retained a sufficient sum from the proceeds of the sale to discharge the mortgage on application.—Giveen v. Smith, Case No. 5,467.

§ 301. Manner and conduct of sale.

The court will authorize a private sale of land, with power to make good title, but will hold the assignee responsible for negligence in not obtaining the best value.—In re Knott, Case No. 7,893.

An assignee need not adjourn a sale to give a bidder time to search the title.—Hills v. Alden, Case No. 6,507.

§ 302. Sales subject to liens.

A lien creditor, after sale of the property in bankruptcy, subject to the lien, may have relief in equity in the district court to enforce the lien against the purchaser.—Bucknam v. Dunn, Case No. 2,096.

§ 303. Sales free from incumbrances.

An assignee in bankruptcy has no power to sell real estate which is subject to liens, free of incumbrances, without a special order of the bankruptcy court.—In re Addison, Case No. 76.

Under Act 1867, § 20, the bankruptcy court may order a sale of the bankrupt's lands free from incumbrances, irrespective of their amount, and the proceeds will stand as a substitute for the lands for the benefit of those holding liens thereon, and the surplus will be held for the

benefit of the general creditors.—In re Barrow, Case No. 1,057; In re Salmons, Id. 12,268; Foster v. Ames, Id. 4,965; In re Kahley, Id. 7,593; Giveen v. Smith, Id. 5,467; Anonymous, Id. 456; Davis v. Anderson, Id. 3,623; In re Rhodes, Id. 11,746; In re Dillard, Id. 3,912; In re Kirtland, Id. 7,851; In re National Iron Co., Id. 10,045.

The power of the bankruptcy court to order chattels in the hands of the assignee, upon which there is a mortgage, to be sold free from incumbrances, may be exercised notwithstanding the mortgagee has, by his contract, a right of immediate possession of the goods, and desires to avail himself of that right.—Foster v. Ames, Case No. 4,965.

An order for a sale free from incumbrances will be denied when it does not appear who are the incumbrancers, and whether they have had notice of the application.—Anonymous, Case No. 456.

On review of an order for the sale of the bankrupt's property incumbered by valid liens exceeding its value, such order will not be set aside as void for want of jurisdiction, although it may be vacated as an improper exercise of the court's discretion.—In re Dillard, Case No. 3,912.

Where property is sold free from mortgage lien, the bankruptcy court has no authority to adjust the rights between the trustee under the mortgage and his cestui que trust.—In re Blue Ridge R. Co., Case No. 1,570.

A sale by the assignee free from all liens will not devest liens of judgments not specified in the petition of the assignee or the order of sale.—In re McGilton, Case No. 8,798.

Nor does the presence of the judgment creditor at the sale estop him, where there was no authority to sell clear of his judgment.—In re McGilton, Case No. 8,798.

Where the assignee has sold real estate discharged of liens, he should allow interest on the liens to the date of making up his report of distribution.—In re Devore, Case No. 3,847.

Persons holding mechanics' liens on property of the bankrupt are not bound to renew or continue them to preserve their rights against the proceeds of the property, after a sale by the bankruptcy court, free of liens.—Moran v. Schnugg, Case No. 9,786.

§ 304. Execution of transfers.

A motion of assignee and creditors to order bankrupt to execute release deeds should be made to the judge, and not to the register.—In re A. B., Case No. 3.

Trustees, to whom the assignee is directed to make conveyances under the register's direction, "subject to the approval of the court," have no standing in court until such approval is obtained. —Potter v. Wright, Case No. 11,343.

A special order for leave to execute assignments of certain mortgages sold under order of court will be granted, though the court considers it unnecessary.—In re Franklin Sav. Fund Soc., Case No. 5,059.

§ 305. Confirmation.

An order for the sale of disputed interests of the bankrupt, made by the register, being void, a sale thereunder cannot be affirmed or validated.—Ex parte Bryan, Case No. 2,061.

Where a public sale of the real property has been made by the assignee under order of court, the sale is subject to the approval of the court, which has a discretion to refuse to confirm it for mere inadequacy of price, and it is not necessary that there should be fraud, or such gross inadequacy of price as to be evidence of fraud. —In re O'Fallon, Case No. 10,445.

It is not the practice in the first circuit to confirm sales by assignees, as the rights of third parties are liable to be compromised thereby.—Case of Donnell, Case No. 3,986a.

A simple confirmation by the court is not a ratification of the act of the assignee in excess of his authority, where it does not appear that the excess of power exercised was brought to the knowledge of the court.—In re McGilton, Case No. 8,798.

An ex parte order approving a report of sales, made on the day it is filed, is irregular, and will be set aside at any time during the pendency of the proceedings, if the creditor acts with reasonable diligence after notice.—In re Peabody, Case No. 10,866.

A mere indorsement of the report of sale "Approved," signed by the judge, *held* not an order of confirmation.—Ex parte Bryan, Case No. 2,061.

§ 306. Vacating and setting aside.

The district court has jurisdiction to summarily set aside a conveyance by the assignee, where made improvidently, irregularly, or without due authority, where rights of third persons have not intervened.—In re Mott, Case No. 9,878.

A sale of a bankrupt's estate made to a solicitor of the assignee, retained generally in the bankruptcy, will be set aside as against public policy.—Citizens' Bank v. Ober, Case No. 2,731.

Where the assignee has not obtained the highest price offered, as required by the order directing the sale, the sale will be set aside, and a resale ordered.—In re Ryan, Case No. 12,182.

A sale of stock held by a creditor as collateral security at two-fifths of its value set aside, and a resale ordered.—In re Bousfield, Case No. 1,702.

Where the bankruptcy court, under a mistake of facts, has ordered a sale of land as being without value, and to clear the title, such court, on petition of the injured owners, will direct a sale to be set aside and the deeds canceled.—In re Conant, Case No. 3,085.

Creditors who have full notice cannot complain, where they failed to exercise proper diligence to protect their interest.—Hills v. Alden, Case No. 6,507.

Where property is unlawfully taken from the possession of a state court receiver, a sale by the assignee will be set aside as against one having notice of the illegality, and the purchase money ordered refunded.—Davis v. Railroad Co., Case No. 3,648.

A petition to have the amount paid on a contract of conveyance refunded will be denied where the contract was not delivered up to be canceled, and it did not appear that it was made in good faith.—In re Mott, Case No. 9,879.

Where a person intends to bid at a cash sale of a bankrupt's estate, he may agree to sell on credit to another, when he has no notice that such person has an intent to bid at the sale or has the means to make his bid good.—Citizens' Bank v. Ober, Case No. 2,731.

A sale at auction by the assignee of a large amount of property will be set aside where the purchase was made by a combination of creditors, and other creditors were ignorant of the fact of sale.—In re Troy Woolen Co., Case No. 14,201.

A creditor who, with full knowledge of the circumstances of a sale, accepts a dividend from the proceeds, and silently allows the purchaser to sell the property, cannot avoid the sale for fraud and collusion.—Hills v. Alden, Case No. 6,507.

On a petition by a subsequent assignee for the purpose of annulling an order of sale made by the register, the same being null and void, the bankruptcy court has jurisdiction to so declare it against the purchaser from the for-

mer assignee, and persons to whom such purchaser has assigned his interest, if they have been brought in by petition.—Ex parte Bryan, Case No. 2,061.

Creditors, upon whose application and offer to bid a larger sum a sale by the assignee was set aside, *held* would be required to fulfill their offer.—In re Troy Woolen Co., Case No. 14,201.

§ 307. Expenses of sale.

Creditors who failed to obtain a review of an order directing a private sale of the bankrupt's property cannot object to the incidental expenses attending the sale.—In re Johnston, Case No. 7,424.

§ 308. Rights and remedies of purchasers.

The federal district court for the district of Maine does not confirm sales of assignees in bankruptcy, but leaves the purchaser to establish his title where occasion may require it.—In re Alden, Case No. 151.

A person claiming title under a deed from commissioners under the bankrupt law (Act 1800) must show their authority, and that their proceedings were regular.—Thomas v. Cruttenden, Case No. 13,895.

The bankruptcy court will not interfere to vindicate the title of a purchaser under an assignee's sale.—Briggs v. Stephens, Case No. 1,873.

The sale of a fraudulent judgment at an auction sale of the effects of the bankrupt debtor does not confer upon the innocent purchaser the right to enforce it.—Noyes v. Willard, Case No. 10,374.

The purchaser of property on a sale by the assignee without order of court is entitled to rents and profits from the day of sale, and not from the date of its confirmation.—Hall v. Scovel, Case No. 5,945.

A sale of land free from incumbrances does not pass to the purchaser the bankrupt's right to any portion of the growing crops stipulated to be paid him as rent.—In re Bledsoe, Case No. 1,533.

Where a wife's right of dower is established by the decisions of the court against the assignee, an exception to the confirmation of the sale of certain real estate, by the purchaser, on the ground that such sale was subject to the dower right, will be sustained, when it was stated at the sale that the property would be conveyed free from all incumbrances.—In re Angier, Case No. 388.

Where the homestead of the bankrupt has been sold, pursuant to an order of the bankruptcy court, to satisfy a debt secured upon it by a deed of trust or mortgage, such court has jurisdiction to order the bankrupt to deliver up possession of the property to the purchaser.—In re Betts, Case No. 1,371.

After the lapse of 16 years a sale under a judgment will not be set aside at the instance of the vendee of the assignee in bankruptcy.—Lonergan v. Fenlon, Case No. 8,475.

§ 309. Distribution of proceeds.

Assets from the sale of incumbered land should be applied to extinguish the incumbrances, in order of their priority.—In re Longfellow, Case No. 8,486.

An assignee selling property held by bankrupt under conditional sale must account for the proceeds to the holder of the notes which are secured by such sale.—Allen v. Whittemore, Case No. 241.

A lienor whose lien expires by limitation between the order of sale of realty discharged of liens and the actual sale is still entitled to share in the proceeds of sale.—Davis v. Stitzer, Case No. 3,654.

The circuit court has original jurisdiction to determine the respective rights of persons in a fund received by the assignee from a sale of incumbered property, and held to abide a decision of the court.—Giveen v. Smith, Case No. 5,467.

A judgment creditor in North Carolina in 1867 issued execution, but obtained no levy, because enjoined by the military commandant. Junior judgment creditors afterwards made a levy, and, the debtor having become bankrupt, the land was sold by the assignee free of incumbrances, pursuant to an agreement with the sheriff. *Held*, that the senior judgment creditor had no lien by which he could claim part of the proceeds.—In re Mebane, Case No. 9,380.

Where lands are sold by the assignee free of incumbrances, pursuant to an agreement with a sheriff who had levied executions thereon, the execution creditors are entitled to payment from the proceeds.—In re Mebane, Case No. 9,380.

Where property subject to a chattel mortgage is sold by the assignee without objection from the mortgagee, he is not entitled to be paid the full amount of his debt out of the estate, as privileged, where there is a deficiency on the sale.—In re Purcell, Case No. 11,469.

Senior mortgagee on sale of property in bankruptcy is entitled to payment of his mortgage in full, together with costs and expenses.—In re Bartenbach, Case No. 1,068.

3. Appointment, and Powers and Duties of Register in General.

§ 310. Appointment.

The books and papers in the register's office must be open to inspection at the local seat of justice.—In re Sherwood, Case No. 12,774.

A register cannot fulfill the duties of his appointment for any county in which the business in bankruptcy must wait upon his convenience, or in which he cannot hold sessions whenever business may require them, or cannot continue them at convenient intervals.—In re Sherwood, Case No. 12,774.

§ 311. Powers.

The register's power is limited only by express exceptions in Act 1867.—In re Bank of North Carolina, Case No. 896.

Wherever it is provided in the bankrupt law that the court may exercise a power, the register to whom a case in bankruptcy has been referred may exercise that power, unless some person having some interest in the estate of the bankrupt shall make some objection to the exercise thereof. Act 1867.—In re Bank of North Carolina, Case No. 896.

The register's acts are the acts of the courts, and he is vested with all the powers of the district courts in relation to all matters about which there is no contest. He is also to give their opinions upon all questions, points, and matters arising before him upon which there is a contest, which opinions will be final unless the parties litigant request the question, point, or matter contested to be certified to the district judge.—In re Gettleston, Case No. 5,373.

He has power to direct a sale of debts and choses in action belonging to the estate if creditors do not object.—In re Bank of North Carolina, Case No. 896.

In a case referred to the register under the rules of the court, he has the powers of the district judge in all uncontested administrative matters.—In re Lanier, Case No. 8,070.

He may, of his own motion, inquire into delays, and indicate steps for a speedy settle-

ment.—In re Bank of North Carolina, Case No. 896.

The discretion of the bankruptcy court to exercise jurisdiction to liquidate liens on bankrupt's realty cannot be delegated to or assumed by the register.—In re Addison, Case No. 76.

Applications by assignees to settle controversies under section 17, Act 1867, or to sell property under section 25, must be made to the court, and not to a register.—In re Graves, Case No. 5,709.

Where the bankrupts surrender their property to the register, who appoints a watchman to guard and keep it, and submits a report of his action to the judge for approval, the latter will order a commissioner to take testimony as to the facts.—In re Bogert, Case No. 1,599.

§ 312. Contempts.

Refusal by a bankrupt to obey the register's order to produce his books and papers is a contempt.—In re Allen, Case No. 208.

A party who seeks to review an act of a register must do so in a respectful manner.—In re Breck, Case No. 1,823.

§ 313. Charges against register.

On trial of charges against a register, the creditor may offer evidence to contradict the register as to facts called out by his examination.—In re Bank of North Carolina, Case No. 896.

§ 314. Adjournment of question into court.

Pending decision on a question adjourned in the court under Act 1867, § 4, it is not necessary to adjourn further proceedings in the matter.—In re Levy, Case No. 8,296.

On the adjournment into court of the question of granting a new trial, the whole case must be brought fully before the court.—In re Marsh, Case No. 9,108.

§ 315. Certifying questions.

In the event of a controversy, the question raised before the register must be certified to the judge for his opinion.—In re Brandt, Case No. 1,812.

A question, in order to be properly certified to the judge, must arise regularly in the course of proceedings before the register, and between the parties having the legal right to raise it.—In re Wright, Case No. 18,069.

Questions which are not upon any point or matter which has arisen in the course of any proceedings before the register cannot be certified for the opinion of the court. (Act 1867, § 6, subd. 1.)—In re Bray, Case No. 1,818; In re Peck, Id. 10,887.

Registers can certify to the court only questions which actually arise, and not those which are likely to arise.—In re Pulver, Case No. 11,466.

Abstract questions which do not arise in the course of the proceedings, certified to the bankruptcy court in behalf of a person who is not a party, will be returned without decision.—In re Haskell, Case No. 6,191.

No opinion will be given on abstract questions certified to the judge by the register.—In re Sturgeon, Case No. 13,564.

4. EXAMINATIONS IN BANKRUPTCY.

§ 316. Jurisdiction and power to order.

The register has authority to allow an order for the examination of the bankrupt under Act 1867, § 26.—In re Lanier, Case No. 8,070.

The register has power to make the order, under section 26 (Act 1867), requiring the bankrupt or a witness to appear and be examined.—In re Pioneer Paper Co., Case No. 11,178.

§ 317. Who may require examination.

The debtor, at the instance of creditors who contest an involuntary petition, may be subjected to an examination in relation to his indebtedness to the petitioning creditor.—In re Heusted, Case No. 6,440.

Creditors whose claims have been protested against, if duly proved, will be entitled to an order for the examination of the bankrupt under Act 1867.—In re Belden, Case No. 1,241.

Only a creditor who has proved his claim under Act 1867, § 26, or who has tendered proof of a debt which has not been allowed under section 22 of such act, may apply to examine the bankrupt.—In re Ray, Case No. 11,589.

A bankrupt summoned at the instance of a creditor who has proved his claim cannot refuse to be sworn and examined on the ground that the claim is not valid, unless such invalidity has been proved.—In re Winship, Case No. 17,878.

Where a resolution of composition has been adopted and confirmed by the requisite number of creditors, the right of a creditor to examine the bankrupt under Rev. St. § 5086, is suspended.—In re Tifft, Case No. 14,032.

An execution creditor, who has received no satisfaction for his debt other than the lien acquired by the issue of an execution, and any right or title which said creditor may have under an alleged assignment for the benefit of creditors, and the said liens, if any exist, are not security for the full amount of the debt, and the amount and value are unknown, and who has proved his claim, is entitled to an examination of the debtors in composition proceedings.—In re Schwab, Case No. 12,499.

§ 318. Second examination.

The assignee must see that the examination of the bankrupt is thorough and complete. A second order is not granted except for cause.—In re Gilbert, Case No. 5,410.

The examination of a bankrupt by one creditor, under Act 1867, § 26, does not bar his examination by other creditors, but the bankrupt must be protected from annoyance as far as possible.—In re Adams, Case No. 40.

Where the bankrupts have been examined by the assignees, a new examination will not be ordered on the application of creditors opposing a discharge, unless reason is shown therefor.—In re Isidor, Case No. 7,105.

§ 319. Who may be examined.

The wife of the bankrupt is competent as to facts affecting his estate.—In re Anderson, Case No. 351.

The bankrupt's wife must attend before the register, and submit to an examination, the same as any other witness, under Act 1867, § 26; and she may be punished for contempt, under § 7, if she refuses to answer.—In re Woolford, Case No. 18,029.

A receiver appointed by a state court, against whom a suit by the assignee is pending for the possession of the bankrupt's books, is not privileged to refuse to produce the books and testify before the register. Act 1867, § 26.—In re Hulst, Case No. 6,864.

The assignee may be subpœnaed to testify in the same manner as other witnesses, and the register has authority to make the requisite order.—In re Smith, Case No. 12,988.

The assignee is not subject as of course to examination by any creditor at his pleasure, but will be protected against unnecessary annoyance by refusing an examination, except upon issues regularly referred to the register.—In re Smith, Case No. 12,988.

Any one possessing information may be examined concerning the same matter in reference

to which the bankrupt may be examined.—In re Blake, Case No. 1,492.

The bankrupt cannot object to the examination as a witness of one who has been enjoined from disposing of property transferred to him by the bankrupt on petition filed by the assignee, on the ground that the witness has been made a party to the bankruptcy proceedings.—In re Feinberg, Case No. 4,716.

A summons to a witness to attend before a register in bankruptcy may be served outside the district but within 100 miles of the place where the witness is required to attend.—In re Woodward, Case No. 18,000.

§ 320. Time of examination.

The bankrupt cannot be examined as a witness, either to support the petition in bankruptcy or to defeat it. Act 1842.—In re King, Case No. 7,785.

The petitioner for a decree is deemed a bankrupt from the time of his application, and he may be examined before a commissioner prior to the adjudication. Act 1841.—Ex parte Lee, Case No. 8,178.

The examination of the debtor before adjudication may be ordered under act 1867, § 26, though he denies both the indebtedness and the act of bankruptcy.—In re Salkey, Case No. 12,252.

A creditor who has proved his claim may apply for an examination of the bankrupt before the first meeting of creditors. Act 1867.—In re Patterson, Case No. 10,814.

An order for examination may be granted a creditor (Act 1867, § 26), notwithstanding the election of a trustee and committee of creditors under § 43.—In re Cooke, Case No. 3,168.

A witness may be examined prior to the examination of the bankrupt, and though there be no question in controversy to be settled by testimony. Act 1867, § 26.—In re Fredenberg, Case No. 5,075.

The time for an examination of a bankrupt does not expire with the making of the application for his discharge.—In re Solis, Case No. 13,165.

An order for an examination of the bankrupt's wife will be refused where applied for by the assignee after neglecting to make his report on the return day of the order to show cause why a discharge should not be granted, where it appears that such application was not made in good faith, but merely for the purpose of delay.—In re Selig, Case No. 12,641.

The fact that the bankrupt has received his discharge more than two years before is not a good objection to his being examined in accordance with the requirements of Act 1867, § 26.—In re Heath, Case No. 6,304. CONTRA, see In re Witkowski, Case No. 17,920. See, also, In re Jones, Case No. 7,449.

A bankrupt can be examined more than two years after his discharge, in aid of any prosecution to be commenced by the assignee against a third person, but not for the purpose of instituting or aiding a proceeding to vacate the discharge, or extorting a settlement of stale claims against the bankrupt.—In re Dole, Case No. 3,965.

§ 321. Place of examination.

If a nonresident creditor, whose claim is contested, cannot personally appear, without hardship, an order will be made for his examination before a register of the district in which he resides.—In re Kyler, Case No. 7,956.

§ 322. Application.

The assignee's application for examination of the bankrupt, under Act 1867, § 26, need not be verified by affidavit, or specify the reasons therefor, or the matters to be inquired into.—In re Lanier, Case No. 8,070.

Application by a creditor to a register for an order for examination of the bankrupt must be on affidavit or verified petition showing cause.—In re Adams, Case No. 39.

Third persons are required to submit to examination only on cause shown by affidavit.—In re Gilbert, Case No. 5,410.

After an examination pursuant to an order has been commenced, the order will not be vacated, on motion of the bankrupt, because not founded on an affidavit.—In re McBrien, Case No. 8,665.

§ 323. Form and sufficiency of order.

Orders for examination are summonses under Act 1867, § 26, and may be issued by blank forms, signed by the clerk.—In re Bellamy, Case No. 1,266.

An order made by the register for the examination of a bankrupt, reciting that it was made upon the application of F. & Co., parties claiming to be interested in the estate, "and who have duly proved their debt herein," is in proper form. Such order need not recite that it was made upon a verified application in writing.—In re Vetterlein, Case No. 16,926.

§ 324. Notice of examination.

No notice need be given the bankrupt of the examination of a witness called by the assignee.—In re Levy, Case No. 8,295.

§ 325. Intervention.

Where creditors conducting an examination of a debtor in apparently earnest opposition to a composition suddenly cease without apparent cause, the register may allow another creditor to continue the examination.—In re Vanderhoef, Case No. 16,840.

Creditors cannot interpose to prevent the examination of the bankrupt summoned at the instance of another creditor.—In re Winship, Case No. 17,878.

On the examination of a witness respecting the bankrupt's estate on the application of a creditor, other creditors have no right to intervene and object to questions asked.—In re Stuyvesant Bank, Case No. 13,582.

A creditor is not entitled to interfere or be represented by counsel, not being a "party" to the proceeding.—In re Comstock, Case No. 3,080.

§ 326. Matters subject to inquiry—In general.

The bankrupt or witness may be examined fully, substantially as under a reference upon a creditors' bill, or in proceedings supplementary to execution.—In re Pioneer Paper Co., Case No. 11,178.

On an examination of the bankrupt any questions are proper which elicit an answer tending to show an interest of the bankrupt in property at the time the petition was filed.—In re Carson, Case No. 2,461.

A bankrupt must answer questions put to him in relation to property in which it is shown that he might possibly have an interest.—In re Bonesteel, Case No. 1,628.

A bankrupt cannot be examined as to property acquired or business done after the date of filing his petition, where he states that the same has no connection with or reference to his estate or business prior to that date.—In re Rosenfield, Case No. 12,059.

Upon the examination of the bankrupt, he may be compelled to answer questions relating to matters transpiring prior to the time when the creditor's debt was contracted.—In re Craig, Case No. 3,322.

It is the duty of the bankrupt to disclose whatever the parties interested may be concerned to know regarding his debts, business, or estate.—In re Cooke, Case No. 3,168.

On the examination of the bankrupt, a creditor who has filed proof of a debt, claiming that it was contracted by fraud, cannot inquire as to the facts constituting the fraud. Act 1867, § 33.—In re Wright, Case No. 18,065.

The question whether a debt is fraudulently contracted, and therefore not affected by a discharge, can only be raised and determined in a suit to collect the debt in which the discharge is set up as a bar.—In re Wright, Case No. 18,065.

A bankrupt having testified that he is not the owner of certain property, questions relating to the identity of the owner, duration, extent, and character of the ownership are irrelevant.—In re Van Tuyl, Case No. 16,880.

It is proper upon an examination by the assignee to ask the bankrupt questions tending to show that, within a short time after filing his petition, he had money in his possession not acquired by the transaction of any business subsequent to such filing.—In re McBrien, Case No. 8,666.

The bankrupt may be examined to show that the debt of the examining creditor was fraudulently contracted.—In re Koch, Case No. 7,916.

A witness cannot rightfully object to being sworn or refuse to be examined upon any matters which are within the subjects mentioned in Act 1867, § 26.—In re Blake, Case No. 1,492.

Upon an examination of a witness respecting the estate of the bankrupt, upon the application of a creditor, he may be compelled to answer questions respecting his transactions with the bankrupt.—In re Stuyvesant Bank, Case No. 13,582.

A witness must answer all proper questions relating to his trade and dealings with the bankrupt prior to bankruptcy, and, if necessary, produce any book containing the transactions with the bankrupt.—In re Earle, Case No. 4,244.

The bankruptcy court cannot question the validity of a judgment of a state court of competent jurisdiction, and a judgment creditor may refuse to be examined in relation to a question of usury in a debt for which the judgment was rendered.—McKinsey v. Harding, Case No. 8,866.

A witness cannot refuse to answer questions concerning his dealings, etc., with the bankrupt on an examination in bankruptcy, on the ground that his answer may furnish evidence against him in a civil case, by the assignee.—In re Fay, Case No. 4,708.

A witness examined before a commissioner in bankruptcy proceedings cannot refuse to answer a question which may subject him to no other injury than one of a civil nature.—In re Danforth, Case No. 3,560.

A witness who purchased claims against the estate, being examined before a register as to where he obtained the money paid therefor, and having answered that it did not come from the bankrupts, is bound, on pain of contempt, to state where he did obtain it.—In re Lathrop, Case No. 8,106.

A witness cannot be compelled to answer as to the original consideration for a negotiable bond issued by the bankrupt, where the creditor is a bona fide holder for value.—In re Leland, Case No. 8,229.

The bankrupt's wife may be required to testify to all facts and transactions to which she was either a party or a witness, but not to mere confessions or admissions of her husband concerning his dealings with third persons.—In re Gilbert, Case No. 5,410.

Questions asked the bankrupt's wife as to the incumbrances upon her property which she apparently held for the benefit of her husband, are pertinent and proper.—In re Craig, Cases Nos. 3,323, 3,324.

Questions relating to the amount of and derivation of the property of the bankrupt's wife, which she apparently held for her husband, are pertinent and proper.—In re Craig, Cases Nos. 3,323, 3,324.

Where the wife of a member of a bankrupt firm claims certain estate standing in her name, the bankrupt may be examined as to what property the wife owns, and the amount of money that she had at any time.—In re Clark, Case No. 2,805.

The assignee may inquire into all the facts and circumstances of the transaction of the purchase of a house by the bankrupt, where the title is taken in the wife's name.—In re Schonberg, Case No. 12,477.

§ 327. —— Incriminating matters.

The bankrupt may decline to answer, if the answer would incriminate himself.—In re Koch, Case No. 7,916.

The bankrupt may decline to answer a question as to the disposal of his property which is broad enough to cover the time subsequent to the filing of the petition, the answer to which might subject him to criminal punishment. Act 1867, § 44.—In re Patterson, Case No. 10,816.

A bankrupt cannot refuse to answer questions as to his having lost money at gaming on the ground that they would criminate or degrade him.—In re Richards, Case No. 11,769.

A witness need not answer a question which does not relate to any matter of fact in issue, or to any matter contained in his direct testimony, where a truthful answer would tend to degrade him.—In re Lewis, Case No. 8,312.

The keeper of a gambling house, in which the bankrupt was alleged to have lost a large sum of money, is privileged from testifying as to his residence at the time the money was alleged to have been lost by the bankrupt, on the ground that such testimony would tend to criminate him.—In re Graham, Case No. 5,659.

§ 328. —— Privileged communications.

One who appeared as counsel in an equity suit brought by the assignee against the bankrupts and others, may be compelled to testify as a witness for the creditors in proceedings in opposition to the discharge.—In re Leland, Case No. 8,232.

A witness who claims to have acted as counsel for a bankrupt cannot, on that ground, refuse to be sworn as a witness in the bankruptcy proceedings.—In re Woodward, Case No. 17,999.

Since the passage of Act Feb. 25, 1868, the bankrupt cannot refuse to testify on the ground that his answer might criminate himself; but the privilege of communication between client and solicitor is still protected.—In re Krueger, Case No. 7,942.

The attorney of the bankrupt cannot add to his oath as a witness a reservation as to privileged communications.—In re Adams, Case No. 42.

Counsel for bankrupt cannot be required to disclose information as to affairs of bankrupt obtained from him or persons referred to by him.—In re Aspinwall, Case No. 591.

Counsel for bankrupt, when examined as a witness, is required to answer all questions, except those which require him to disclose information as to the affairs of the bankrupt which he received, as such counsel, from the bankrupt, or from persons to whom he was referred by the bankrupt for the purpose of obtaining information.—In re Aspinwall, Case No. 591.

Where, in a bankruptcy proceeding, an attorney is called as a witness, he is not entitled to reserve in the oath which he takes the right to refuse to answer any question on the ground of privilege, as the attorney of the bankrupt.—In re Adams, Case No. 42.

§ 329. —— Powers of register.

The register will pass upon questions objected to, and, exceptions being taken, will, at the close of the testimony, entertain motions to strike out answers or admit excluded questions, and certify the questions to the court.—In re Levy, Case No. 8,298; In re Lyon, Id. 8,643.

A register conducting an examination should declare his opinion upon questions arising thereon, and, on exceptions, should certify the questions to the court.—In re Reakirt, Case No. 11,614.

The register has no power to decide upon the competency and materiality or relevancy of any question, and when required he must take and report the testimony which he deems inadmissible.—In re Levy, Case No. 8,296; In re Patterson, Id. 10,818; In re Koch, Id. 7,916; In re Rosenfield, Id. 12,059; In re Bond, Id. 1,618.

The register has no power to limit in advance the time for the conclusion of the examination of the bankrupt.—In re Tift, Case No. 14,036.

The register cannot fix a time at which an examination of the bankrupt shall terminate or limit the inquiries so long as they are relevant.—In re Waitzfelder, Case No. 17,047.

The register may refuse to suspend the examination which is pending until the questions which have arisen in the proceeding, and have been certified to the judge for decision, have been decided, where no creditor at that time is entitled to priority.—In re Tifft, Case No. 14,030.

Where an attorney appears to examine the bankrupt on behalf of a creditor, and it appears that his power of attorney has been revoked, it is not error for the register to refuse the attorney the right to examine the bankrupt as to the circumstances under which the revocation of his power of attorney had been obtained.—In re Tifft, Case No. 14,030.

§ 330. —— Right to counsel.

A person summoned as a witness in an examination before the register is not entitled to be attended by counsel.—In re Comstock, Case No. 3,080; In re Feeny, Id. 4,715; In re Fredenberg, Id. 5,075; In re Schonberg, Id. 12,477; In re Stuyvesant Bank, Id. 13,582.

The bankrupt's attorney may attend the examination, and object to improper questions put to the bankrupt, but the latter has no right, without consent of the magistrate, to consult his attorney before answering.—In re Tanner, Case No. 13,745.

The register has discretionary power to allow a bankrupt under examination to consult with his counsel, and the question whether the bankrupt should be allowed to consult, upon his examination, must be determined by the register, according to the circumstances of each particular case.—In re Patterson, Id. 10,815; In re Collins, Id. 3,008; In re Judson, Id. 7,562; In re Lord, Id. 8,502.

§ 331. Certifying questions to court.

The certificate of a register on certifying a question put to the bankrupt must show the preceding question where necessary for a decision by the court.—In re Patterson, Case No. 10,820.

The question whether an examination is so far completed as to be admissible in evidence is not one which can properly be certified to the court for decision by the register taking the examination.—In re Noyes, Case No. 10,370.

The only parties to bankrupt proceedings are the bankrupt and the creditors, and a witness cannot take the opinion of the judge on a certificate by the register.—In re Fredenberg, Case No. 5,075.

A certificate by a register stating a question objected to on an examination, and that he excluded the question, is not a "special case," under Act 1867, § 6.—In re Levy, Case No. 8,296.

§ 332. Adjournment into court.

The objection of the bankrupt to the granting of an order for examination before the first meeting raises an issue of law which the register must adjourn into court. (Act 1867, § 4).—In re Patterson, Case No. 10,814.

But the argument of the question before the register waives the right to such adjournment, and it cannot be made after decision by the register.—In re Patterson, Case No. 10,814.

A question put to a bankrupt or other witness on an examination before a register, even though objected to in proper form, does not raise an issue of law which can be adjourned into court. Act 1867, § 4.—In re Levy, Case No. 8,296.

§ 333. Effect of failure to appear or answer interrogatories.

The proper practice, where a bankrupt's wife fails to appear before the register in bankruptcy, upon the usual order and subpœna to appear and testify, is to obtain an order to show cause why an attachment should not issue against her for contempt.—In re Bellis, Case No. 1,276.

The bankrupt cannot be attached for contempt for the disobedience of an order for examination served on him without the jurisdiction of the bankruptcy court.—In re Hodges, Case No. 6,562.

The bankrupt will not be adjudged in contempt for disobeying an order for examination under Act 1867, § 26, issued after his discharge was granted, where the discharge had not been set aside.—In re Jones, Case No. 7,449.

The circuit court in a state to which a commission issued by a bankrupt court in another state is sent may compel a witness to testify, or punish for a refusal.—In re Johnston, Case No. 7,423.

A nonresident creditor becomes subject to the jurisdiction by proving his debt, and is bound to obey an order to appear for examination touching the same, and in case of disobedience his claim may be stricken out.—In re Kyler, Case No. 7,956.

A bankrupt cannot refuse to be sworn merely by reason of claiming that he has an offset which extinguishes the debt of the creditor at whose instance the order for examination was issued, and that he desires to file a petition for re-examination of the claim.—In re Kingsley, Case No. 7,818.

The bankrupt will be compelled by the court to answer all proper questions propounded.—In re Holt, Case No. 6,646.

Where the bankrupt declines, under the advice of counsel, to answer a question, the creditor may apply to the district judge to punish him for contempt.—In re Rosenfield, Case No. 12,059.

On an application for attachment of witnesses for contempt in not making answers on examination under a commission, the attachment will be refused, where no written interrogatories accompanied the commission, and no information is furnished as to the particular inquiry.—In re Glaser, Case No. 5,476.

Failure of a bankrupt to attend on the adjourned day of his examination cannot be punished as a contempt.—In re Carpenter, Case No. 2,427.

An excuse of a bankrupt for failure to attend an adjourned meeting in composition proceedings, that he had already been subjected to an exhaustive examination, and that his business required his constant attendance, is sufficient to terminate the bankrupt's examination, so far as that meeting is concerned, where the creditors, by a vote more than sufficient to pass the resolution of composition, resolve that the cause assigned was satisfactory to the meeting.—In re Tifft, Case No. 14,029.

A bankrupt who refuses to be sworn and examined under the advice of counsel will not be punished for contempt or amerced in costs other than those of the certificate.—In re Winship, Case No. 17,878.

It is not a sufficient excuse for not answering a question put to the bankrupt that he has already replied to it at a former examination, held at the instance of some other creditor or the assignee.—In re Vogel, Case No. 16,984.

§ 334. Production of books and papers.

On the application of a creditor who asserts that his debt has been created in a fiduciary capacity the court will direct the debtor to produce, even before time for a decree, all books and papers having relation to the debt.—In re Parker, Case No. 10,722.

§ 335. Right to witness fees.

The wife of a bankrupt is not bound to appear and be examined unless she is paid the usual and proper witness fees.—In re Van Tuyl, Case No. 16,881.

A bankrupt is bound to appear and submit to an examination when ordered, without being paid witness' fees.—In re O'Kell, Case No. 10,474.

§ 336. Conduct of examination in general.

Where the creditor fails to appear on the day appointed for the examination of the bankrupt, it may be adjourned.—In re Robinson, Case No. 11,942.

The examining party has the right to have the examination reduced to writing and sworn to and subscribed by the witness.—In re Jackson, Case No. 7,128.

The bankrupt cannot require the register to have his testimony taken down in longhand when the assignee furnishes a stenographer.—In re Frey, Case No. 5,114.

Where an examination is abruptly terminated by the failure of the assignee's counsel to appear, and an order for a new examination is taken, the bankrupt cannot refuse to testify.—In re Van Tuyl, Case No. 16,881.

The examination of a witness called by the assignee may be proceeded with, without reference to the examination of the bankrupt which is being had on behalf of the creditors.—In re Levy, Case No. 8,295.

The proceedings are under the control of the register, and should proceed without unreasonable delay.—In re Hyman, Case No. 6,984.

The bankrupt is to be examined and cross-examined like any other witness.—In re Levy, Case No. 8,296.

The bankrupt cannot be cross-examined by his counsel on matters opened by the examination, but may, on the advice of counsel, explain and correct his statement (Act 1841).—In re Bragg, Case No. 1,799.

The bankrupt may be cross-examined by his own counsel (Act 1841).—In re Leachman, Case No. 8,157.

A bankrupt, on examination by a creditor, is entitled to explain any matters as to which he has been examined, and to this end may be questioned by his counsel. He is not bound to pay the register's fees for such testimony.—In re Noyes, Case No. 10,370.

A general order requiring meetings to be held before a register *held* prospective in its operation, and not to affect a pending meeting presided over by the deputy clerk.—In re Holmes, Case No. 6,632.

The bankrupt's examination, taken before a master in chancery, may be admitted in evidence, so far as it elucidates his affairs.—In re Bragg, Case No. 1,799.

(E) ACTIONS BY AND AGAINST ASSIGNEE.

See, also, ante, §§ 208–213.

§ 337. Jurisdiction—District court.

The district courts have original jurisdiction of all cases and controversies between third persons and an assignee in bankruptcy, as such.—Bachman v. Packard, Case No. 709.

The district court has full power, as a court of equity, to settle all controversies between the bankrupt and his creditors.—Fowler v. Dillon, Case No. 5,000.

The district court has exclusive jurisdiction of all controversies between the assignee and the bankrupt, depending on his relation as such.—Carr v. Gale, Case No. 2,434.

District courts have jurisdiction, under Rev. St. § 4979, of a suit by or against an assignee, whenever he is a necessary and proper party, although other persons may be joined.—Olney v. Tanner, Case No. 10,506.

The federal district courts have jurisdiction of a suit to set aside a contract upon grounds created by the bankrupt law, and will entertain jurisdiction to prevent their officers being placed in unreasonable jeopardy.—Main v. Glen, Case No. 8,973.

The district court has jurisdiction of an action by an assignee to recover a balance due from a principal to the bankrupt as factor at the time of the presentation of his petition in bankruptcy.—Kelly v. Smith, Case No. 7,675.

The district court has jurisdiction, under Rev. St. § 4970, of a suit by creditors against the assignee of a bankrupt member of a firm to procure an adjudication of their debts and their right of priority as against individual creditors, and may give complete relief therein.—Swann v. Sanborn, Case No. 13,675.

The district court has jurisdiction of a controversy as to the ownership of a fund in the hands or under the control of the assignee, without regard to the residence of the parties in interest.—In re Sabin, Case No. 12,195.

Where the bankrupts collect from their undertenants rent accruing before the bankruptcy, and secured by a lien upon crops, the district court has jurisdiction of a petition filed by the landlord to recover such fund.—Wylie v. Smith, Case No. 18,110.

§ 338. —— Circuit courts.

The circuit court has jurisdiction, concurrent with the district court, of all cases arising under Act 1841.—McLean v. Lafayette Bank, Case No. 8,885.

The circuit courts have jurisdiction in all cases in which suit is brought by or against the assignees, and he cannot be compelled to go into the state courts to assert his right as such.—McLean v. Lafayette Bank, Case No. 8,885.

The circuit courts have concurrent jurisdiction with the district courts of all actions by an assignee against persons claiming an adverse interest in the estate of a bankrupt.—Hallack v. Tritch, Case No. 5,956.

The circuit court will exercise jurisdiction over distinct interests and parties, on allegations of fraud, in order to adjust liens and make distribution of assets.—McLean v. Lafayette Bank, Case No. 8,888.

The federal circuit court has jurisdiction of an action to set aside a general assignment by the bankrupt, and distribute the property among the lien and general creditors.—McLean v. Meline, Case No. 8,890.

The assignee may sue in the circuit court on a note of which the bankrupt is payee (Act 1841).—Pritchard v. Chandler, Case No. 11,436.

The circuit court has jurisdiction to determine the validity of conveyances alleged to be in fraud of the bankrupt act.—Giveen v. Smith, Case No. 5,467.

The concurrent jurisdiction conferred upon the federal circuit court and the federal district court by Act 1867, § 2, is limited to cases where there is a controversy concerning the right to, or some interest in, some specific thing between the assignee and a third person, and does not include an action to collect a simple debt.—Bachman v. Packard, Case No. 709.

The circuit court has not jurisdiction of suits brought by the assignee of the bankrupt, simply to collect the assets.—Woods v. Forsyth, Case No. 17,992; Same v. Jackson Iron Mfg. Co., Id. 17,993.

Suits may be brought by an assignee in bankruptcy in the federal circuit courts to collect assets due the estate, without reference to amount or value in controversy.—Payson v. Coffin, Case No. 10,858.

A bill will lie in the circuit court to enjoin enforcement of a fraudulent judgment obtained by an assignee in bankruptcy against an alleged debtor of the bankrupt, though all parties are citizens of the same state.—Noyes v. Willard, Case No. 10,374.

Suits by an assignee in bankruptcy are excepted from the general rule that the federal courts have no jurisdiction of controversies between citizens of the same states, and this exception includes a suit by such assignee against a person not a party to the proceedings in bankruptcy.—Atkinson v. Purdy, Case No. 616.

The circuit court has no jurisdiction of a bill by the assignee of a bankrupt firm against a member thereof and his assignee, where both are citizens of the same state, to require such assignee to pay complainant a surplus after individual creditors are satisfied. Act 1867, § 2.—Stevens v. Appleton, Case No. 13,394.

The federal circuit court has jurisdiction of a bill filed by an assignee in bankruptcy in the nature of a creditors' bill to reach assets in the hands of third parties, where the amount in dispute exceeds $500, and the controversy is between citizens of the state where it was brought and the citizens of another state.—Spaulding v. McGovern, Case No. 13,217.

The circuit court will entertain a bill by an assignee against several mortgagors and other lienholders to ascertain the amounts due, and sell all the property free from incumbrances.—Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., Case No. 13,643.

The federal circuit court has jurisdiction of a bill by an assignee to recover money or property of the bankrupt preferentially or fraudulently conveyed.—Flanders v. Abbey, Case No. 4,851.

The federal circuit court has full jurisdiction over a bill brought to set aside a transaction impeached as fraudulent under Act 1867, § 35, to declare the same void, and to enjoin the parties temporarily and perpetually from pursuing proceedings touching the same transaction in state courts.—Little v. Alexander, Case No. 8,393.

The action given to the assignee by Act 1867, § 35 (14 Stat. 534), to recover property, or the value thereof, transferred contrary to such section, is within the jurisdiction conferred upon the circuit court by section 2 of said act prior to the amendment of June 22, 1874 (18 Stat. 178).—Brooke v. McCraken, Case No. 1,932.

A suit by an assignee to set aside a fraudulent conveyance, after the discharge, of property concealed prior thereto, is not a suit to annul the discharge, and may therefore be brought in the circuit court.—Nicholas v. Murray, Case No. 10,223.

§ 339. —— Dependent on locality.

An action by an assignee to recover a sum of money due the bankrupt, under a written contract, is not local.—Babbitt v. Burgess, Case No. 693.

The district court of the United States, in a district other than that in which the bankruptcy proceedings are pending, has no jurisdiction of a suit by an assignee to recover assets of the bankrupt or moneys paid in violation of the bankruptcy acts.—Shearman v. Bingham, Case No. 12,733; Jobbins v. Montague, Id. 7,330; Lamb v. Damron, Id. 8,014. CONTRA, see Moore v. Jones, Case No. 9,768; Sherman v. Bingham, Id. 12,762; Goodall v. Tuttle, Id. 5,533.

The circuit court has jurisdiction of an action against a resident of the district, brought by an assignee appointed in another state to recover a preference or to collect assets.—Hunt v. Jackson, Case No. 6,893; Post v. Rouse, Id. 11,300; Gindrat v. Dane, Id. 5,455. CONTRA, see Lathrop v. Drake, Case No. 8,109.

The circuit court has jurisdiction of a common-law or equity suit by an assignee in bankruptcy appointed in another district, in a case of diverse citizenship, where the amount in dispute exceeds $500.—Payson v. Dietz, Case No. 10,861.

Under Act 1867, § 2, a circuit court has jurisdiction of a cross bill, filed by an assignee in bankruptcy in a district other than that in which the decree in bankruptcy was made, to redeem mortgaged property in which the complainant has the legal title to the equity of redemption.—Barnard v. Hartford, P. & F. R. Co., Case No. 1,003.

The jurisdiction acquired by a circuit court sitting in equity, by virtue of the character of the complainant as assignee in bankruptcy, is not lost merely because the complainant has parted with all his title pendente lite; and the court also has jurisdiction of a cross bill filed by a new defendant, irrespective of his residence.—Barnard v. Hartford, P. & F. R. Co., Case No. 1,003.

Where the assignee brings an action in a district other than that where the proceedings are pending, an appearance and answer by defendant does not preclude him from raising the question of jurisdiction.—Jobbins v. Montague, Case No. 7,330.

§ 340. —— State courts.

It seems that state courts are not deprived of jurisdiction in ordinary common-law and equity suits simply because brought by an assignee in bankruptcy.—Mitchell v. Great Works Mill. & Mfg. Co., Case No. 9,662.

The jurisdiction of the bankruptcy court of a suit brought by the assignee to recover property fraudulently mortgaged or conveyed is not exclusive of the state courts, and the court which first obtains jurisdiction will have the right to decide the matter.—Yeadon v. Planters' & Mechanics' Bank, Case No. 18,130.

Where the rights of assignees are not regarded in the state court, their remedy is under

section 25 of the judiciary act.—Johnson v. Bishop, Case No. 7,373.

No suit by an assignee for a sum exceeding $500 can be prosecuted in a state court under Act June 22, 1874, § 2.—Hallack v. Tritch, Case No. 5,956.

The assignee may sue in a state court to recover back money paid by the bankrupt in violation of Act 1867, § 39, and the bankruptcy court will not restrain such suit upon petition of the defendant therein.—In re Central Bank, Case No. 2,547.

A judgment in a state court against an assignee in bankruptcy, directing payment out of the assets in the assignee's hands, does not, alone, furnish legal grounds to the district court, as a court of bankruptcy, for directing payment by the assignee.—In re Central Bank of Brooklyn, Case No. 2,549.

An agreement between the bankrupt and a part of his judgment creditors cannot bind his estate, unless signed by the assignee. An assignee has no power to give consent to a decree of the state court, rendered in accordance with the terms of a written agreement, and the bankruptcy laws do not give him power to become defendant to a suit in a state court commenced after the adjudication.—In re Anderson, Case No. 351.

§ 341. —— Service of process.

A subpœna to appear and answer in a suit in equity brought by an assignee to restrain the foreclosure of a mortgage is an original process in a civil suit, within the judiciary act of 1789 (section 11), and cannot be served on the defendant in another district, as no authority for such service appears in Act 1867.—Jobbins v. Montague, Case No. 7,329.

The district court in equity has no jurisdiction over a citizen of another state, neither found within nor having property within the district, to relieve from a preference in fraud of the bankrupt act at the suit of an assignee in bankruptcy appointed in the district.—Paine v. Caldwell, Case No. 10,674.

The recovery of a judgment in the state court, and its collection in fraud of the bankrupt act, will not give the federal district court jurisdiction upon service of process upon the attorney in the suit.—Paine v. Caldwell, Case No. 10,674.

§ 342. Right of action by assignee—In general.

The assignee is not entitled to any greater rights in respect to recovering back money or other property, under section 39, than under section 35, Act 1867. The two sections are to be construed together.—Hubbard v. Allaire Works, Case No. 6,814.

The assignee may impeach a transfer by the bankrupt, though it may be held valid and binding as against the bankrupt.—Carr v. Gale, Case No. 2,435; Allen v. Massey, Id. 231; In re Collins, Id. 3,007, affirming Case No. 3,004.

Where a preference is obtained through a judgment and a levy, an assignee may proceed by a suit in equity to set aside the lien, and may make the sheriff, as well as the creditor, a party, if the proceeds of the execution be still in the hands of the sheriff. Case No. 17,200 reversed.—Warren v. Tenth Nat. Bank, Case No. 17,202.

A suit in equity cannot be maintained by an assignee to recover real estate, purchased by the defendant in good faith, from the bankrupt's assignees in insolvency, appointed several years before under the state law, for a nominal consideration, where it has no market value, within a month before proceedings in bankruptcy, although the property has since increased in value.—Goldsmith v. Hapgood, Case No. 5,522.

A bill in equity will lie by the assignee to recover shares of stock purchased by a third person with funds of the bankrupt, fraudulently put into his hands.—Hyde v. Cohen, Case No. 6,967.

A bankrupt in possession of realty at the time of its sale by the assignee, who thereafter agreed with the purchaser to vacate on a certain day, holds as tenant under the purchaser, and a petition will not lie by the assignee for delivery of possession.—In re Hale, Case No. 5,912.

The assignee may file a bill against all incumbrancers to ascertain the validity, priority, and amount of incumbrances.—McLean v. Lafayette Bank, Case No. 8,886; Id. 8,888.

In equity, an assignee cannot maintain a bill against a mortgagee of the chattels of the bankrupt to avoid the mortgage as a fraudulent preference, after having sold the chattels without order of court for the sale of incumbered property, under Act 1867, § 25, when the mortgagee, by answer, repudiates all claim to the funds received from the sale, and acquits the assignee from all liability.—Giveen v. Smith, Case No. 5,466.

A suit by the assignee to set aside certain transfers as in fraud of Act 1867 is maintainable, notwithstanding the property is in his possession after seizure by the marshal.—Kellogg v. Russell, Case No. 7,666.

A bill by the assignee for an accounting in respect to goods purchased by defendants from the bankrupt's employés, in pursuance of an alleged fraudulent scheme, is not maintainable, where the assignee shows no injury to himself by the fraud, and where it is shown that the goods have been seized by the marshal under a provisional warrant, and turned over to the assignee, whose possession of the goods for the benefit of the estate is undisputed.—Smith v. Claflin, Case No. 13,026.

A creditor receiving the proceeds of a sale on attachment, after proceedings in bankruptcy, may be compelled to pay the amount to the assignee, by an action in the federal court.—Bradley v. Frost, Case No. 1,780.

A conveyance by the bankrupt alleged to be fraudulent as to creditors will not be set aside at suit of the assignee, when there are no provable debts, as the estate, after satisfying the claims against it, belongs to the bankrupt.—Nicholas v. Murray, Case No. 10,223.

The clauses in Act 1867 which give the power to an assignee to sue for and recover the amount of unlawful preferences are not subject to the rule of construction applied in cases of repeal of penal statutes. Case No. 16,849 affirmed.—Tinker v. Van Dyke, Case No. 14,058.

A transferee of stock in a bankrupt company is liable to the assignee in bankruptcy in respect to such stock; but, where the transfer was not accepted by the transferee, the transferror alone is liable.—Wilbur v. Stockholders, Case No. 17,636.

The word "nonassessable," written across the face of a stock certificate, is not binding as against the assignee in bankruptcy of the company.—Upton v. Burnham, Case No. 16,799.

§ 343. —— As representing creditors.

The assignee of a bankrupt corporation represents both the interests of the creditors and of the bankrupt, and as against stockholders he can recover for unpaid subscriptions, so far as the question touches on the validity of the stock, as if solely acting in the interests of creditors.—Upton v. Jackson, Case No. 16,802.

The assignee represents the whole body of creditors, and he may sue to set aside a transfer, or to recover back property, or to contest the validity of any security given contrary to

the bankruptcy act.—Everett v. Stone, Case No. 4,577; Bradshaw v. Klein, Id. 1,790; In re Metzger, Id. 9,510; In re Leland, Id. 8,230.

To entitle the assignee to sue in such cases, it is not necessary that any creditor have a specific lien on the property conveyed.—Barker v. Barker's Assignee, Case No. 986; Beecher v. Clark, Id. 1,223; In re Duncan, Id. 4,131.

As the assignee represents all the creditors, he may assert any right which they might assert as to conveyances fraudulent or otherwise invalid as to them under the general or local law, and he may sue in every case where they might have sued had the debtor not become bankrupt.—Bradshaw v. Klein, Case No. 1,790; Moore v. Young, Id. 9,782; Pratt v. Curtis, Id. 11,375; Verselius v. Verselius, Id. 16,925; Mitchell v. McKibbin, Id. 9,666; In re Leland, Id. 8,234; In re Werner, Id. 17,416.

When a conveyance is attacked for fraud, outside the bankrupt act, the assignee represents the rights of general creditors, and may for such fraud avoid the instrument, though he has no specific lien on the property thereby conveyed.—Cragin v. Carmichael, Case No. 3,319.

The assignee is the proper party plaintiff to impeach a deed given by the bankrupt, though only one class of creditors is interested to set it aside.—Pratt v. Curtis, Case No. 11,375.

The assignee of a bankrupt corporation does not represent its creditors in respect to a claim against an officer under a statute making him personally liable for the corporate debt.—Bristol v. Sanford, Case No. 1,893.

§ 344. —— As representing the bankrupt.

The assignee may maintain an action in a court of justice for the recovery of the property of the bankrupt.—Johnson v. Bishop, Case No. 7,373.

An assignee in bankruptcy may sue on a written contract entered into between the bankrupt and the defendant, to recover a debt alleged to be due the bankrupt thereunder.—Babbitt v. Burgess, Case No. 693.

The assignee of a corporation for the purposes of a suit to recover back a dividend wrongfully declared stands precisely in the position of the corporation.—Main v. Mills, Case No. 8,974.

A decree in mortgage foreclosure made after the filing of the petition in bankruptcy in a suit commenced before such filing will bar the right of the assignee of the mortgagor to raise the question of usury.—Cutter v. Dingee, Case No. 3,518.

The assignee in bankruptcy, of one of two joint makers of a note and mortgage, cannot (in Wisconsin) maintain a petition to declare the securities void for usury.—Bromley v. Smith, Case No. 1,922.

Action by assignee to recover usury, see "Banks and Banking," § 20.

§ 345. —— Foreign assignee.

Where an assignment, by an operation of law, is not sufficient to enable the assignee to maintain an action in his own name in the courts of a certain state, the assignee of the bankrupt in England cannot maintain an action at law in his own name against the debtor of a bankrupt in such state, but it must be brought in the name of the bankrupt.—Blane v. Drummond, Case No. 1,531.

The assignees of a British bankrupt cannot maintain a suit in their own names, in Maryland, against a debtor of the bankrupt.—Perry v. Barry, Case No. 11,000.

§ 346. —— In partnership cases.

The assignee of a firm may sue to recover property standing in the name of one of the partners, purchased with firm funds, and conveyed by him in fraud of Act 1867.—Patrick v. Central Bank, Case No. 10,803.

The assignee in bankruptcy of one partner cannot set aside a conveyance made by both partners with intent to prefer a joint creditor, where the other partner does not also become bankrupt within the time limited by Act 1867.—Forsaith v. Merritt, Case No. 4,946.

Property transferred by an insolvent partnership to a partnership creditor, by way of preference or otherwise, where the firm has never been declared bankrupt, cannot be recovered by an assignee of the surviving partners after the death of one of them.—Withrow v. Fowler, Case No. 17,919.

The assignee may recover at law or in equity, as the nature of the case requires, from a solvent partner what is due from him by the articles of copartnership.—Wilkins v. Davis, Case No. 17,664.

Where a partner in an insolvent firm executes a composition deed with the firm creditors, referring to them as "his creditors," and, in pursuance thereof, signs compromise notes in the firm name, and makes payments from the firm's funds in fraud of the rights of such creditors, and is afterwards declared a bankrupt, his assignee can, in the interest of the firm creditors, recover the sums so paid in fraud of their rights.—Bean v. Amsinck, Case No. 1,167.

On the bankruptcy of the general partner in a limited partnership, where, under the local law, the special partner is liable for all sums drawn out by him, with interest, the assignee can recover from the solvent special partner the sums withdrawn by him during the continuance of the firm.—Wilkins v. Davis, Case No. 17,664.

§ 347. Right of action against assignee.

A receiver, appointed in supplementary proceedings prior to the filing of a petition in bankruptcy against the debtor, may sue the assignee in bankruptcy and a prior voluntary assignee in the district court to set aside an assignment to the latter as void in fact and under the statute.—Olney v. Tanner, Case No. 10,506.

§ 348. Limitations of actions—Limitations applicable to particular actions.

The two-years limitation for suits by or against the assignee under Act 1841, § 8, has no reference to suits growing out of dealings of the assignee with the estate after it comes into his hands, but only to suits having reference to rights existing prior thereto.—In re Conant, Case No. 3,086.

The bar prescribed by Act 1867, § 2, applies to causes of action which had accrued to the bankrupt before his bankruptcy as well as to those which accrued to the assignee after the bankruptcy.—Norton v. De La Villebeuve, Case No. 10,350.

All transactions, illegal or fraudulent by the common law, the statute law, or by rules of law, other than the special limitations in Act 1867, § 35, are governed by the limitation of two years of section 2.—Bean v. Brookmire, Case No. 1,168.

A suit to set aside a fraudulent conveyance by the bankrupt, whether brought by the assignee or by a creditor upon the refusal of the assignee, is within the limitation of two years. Act 1867, § 2.—Freelander v. Holloman, Case No. 5,081.

The two-years limitation provided by Act 1841, and by Act 1867, § 2 (Rev. St. § 5057), applies to suits by assignees to collect the debts and assets of the estate as well as to suits relating to specific property.—Mitchell v. Great

Works Mill. & Mfg. Co., Case No. 9,662; Norton v. Barker, Id. 10,349; Miltenberger v. Phillips, Id. 9,621; Payson v. Coffin, Id. 10,858; Id. 10,859; Walker v. Towner, Id. 17,089; Scovill v. Shaw, Id. 12,552. CONTRA, see Pritchard v. Chandler, Case No. 11,436; Sedgwick v. Casey, Id. 12,610; Davis v. Anderson, Id. 3,623; In re Krogman, Id. 7,936; Smith v. Crawford, Id. 13,030.

The two-years limitation provided by Act 1867, § 2, applies to a petition filed by the assignee in the bankruptcy court to recover assets, as well as to a formal action at law or suit in equity.—In re Krogman, Case No. 7,936.

An action by the assignee of a bankrupt bank, to recover counsel fees paid, without authority, by third persons acting as liquidators under a state law, is barred in two years. Rev. St. § 5057.—Miltenberger v. Phillips, Case No. 9,621.

The two-years limitation (Rev. St. § 5057) applies to an action by the assignee to enforce against stockholders the payment of their unpaid shares.—Walker v. Towner, Case No. 17,089; Payson v. Coffin, Id. 10,859; Scovill v. Shaw, Id. 12,552.

Rev. St. § 2027, limiting the time for the commencement of suits, at law and in equity, by or against assignees, to two years, does not apply to a proceeding to review a bill in equity.—Wilt v. Stickney, Case No. 17,854.

The limitation of two years applies only to controversies over which the federal circuit court would have jurisdiction.—Sedgwick v. Casey, Case No. 12,610.

§ 349. —— Accrual of cause of action.

Where property fraudulently conveyed by the bankrupt is levied upon and sold after proceedings in bankruptcy are commenced, the cause of action of the assignee against the purchaser to set aside the sale does not accrue until such purchaser acquires title under the judgment and execution sale.—Davis v. Anderson, Case No. 3,623.

In the case of a transfer of property to hold in trust for certain uses, and to become absolute under certain conditions, *held*, that the limitation did not commence to run until the title became absolute.—Haskill v. Frye, Case No. 6,195.

The two-years limitation, in the case of an action by the assignee to enforce against stockholders' payment of their unpaid shares, begins to run from the date of the assignment to the assignee, and not of the date of the assessment on the shares by the bankruptcy court.—Payson v. Coffin, Case No. 10,859.

The cause of action by a trustee in bankruptcy to recover a payment made by the bankrupt of money, the title to which was in an assignee under a general assignment, does not accrue, under Rev. St. § 5057, until he has become vested with the title of such assignee under a decree setting the assignment aside as void under the bankrupt act.—Tappan v. Whittemore, Case No. 13,750.

§ 350. —— Effect of absence of defendant.

Where the bankrupt was a nonresident at the time the cause of action accrued, and it does not appear when he became a resident of the state, or that he had resided more than three years in the state since the cause of action accrued, as required by the state act, the statute of limitations does not apply as a defense by the assignee, although the creditor was a corporation of another state.—Capelle v. Trinity M. E. Church, Case No. 2,392.

§ 351. —— Effect of ignorance, fraud, or concealment of cause of action.

Where property has been conveyed by the bankrupt upon a secret trust to defraud his creditors, the cause of action does not accrue to the assignee under Act 1841, § 8, until the fraud has been discovered.—Carr v. Hilton, Case No. 2,436.

Where the bankrupt and the promisor of a note fraudulently conceal the cause of action from the assignee, from the moment when his title accrues, the two-years limitation in Act 1841 does not begin to run, but a fraudulent concealment after the assignee's title accrues is not sufficient to prevent the running of the statute.—Pritchard v. Chandler, Case No. 11,436.

The limitation of two years under Act 1867, § 2, for an action against the assignee does not apply to a case of fraud by the bankrupt upon his wife, except from the time of its discovery.—In re Anderson, Case No. 351.

The fact that the assignee did not discover his right to certain property of the bankrupt until after the expiration of two years from the time an action accrued to him therefor does not remove the bar prescribed by Act 1867, § 2.—Norton v. De La Villebeuve, Case No. 10,350.

A suit to set aside a fraudulent conveyance, made after discharge, of property concealed prior thereto, may be brought by the assignee within two years from the discovery of the fraud.—Nicholas v. Murray, Case No. 10,223.

A statute of limitations of two years will not bar an action, where the facts attending a fraudulent transfer by the bankrupt were concealed by the parties, and not brought to the attention of the assignee, until within three months of bringing suit.—Tyler v. Angevine, Case No. 14,306.

The statute of limitations does not begin to run against the assignee in the case of property concealed until the fraud is discovered.—Fullings v. Fullings, Case No. 5,151a.

A suit brought 7 years after the assignee's appointment to set aside a conveyance as fraudulent, the bankrupt having continued in possession, is barred by the statute of limitations (Act March 2, 1867, § 2) for want of due diligence in discovering the fraud.—Andrews v. Dole, Case No. 373.

§ 352. —— Commencement of action.

Where the action was commenced within two years, but the assignee directed the clerk not to issue the summons, and it was not issued or served until more than two years from the time the cause of action accrued, the action is barred.—Walker v. Towner, Case No. 17,089.

§ 353. —— Pleading.

A bill of discovery by an assignee in bankruptcy to recover property fraudulently concealed 10 years prior thereto, alleging that the facts only came to complainant's knowledge "within the past year," *held* sufficient.—Forbes v. Overby, Case No. 4,928a.

§ 354. Form of remedy—Actions generally.

Where goods seized by the marshal were delivered to a purchaser from the bankrupt on his giving a forthcoming bond and a decree setting aside the sale as fraudulent is finally affirmed in the supreme court, the purchaser being insolvent, the assignee may proceed either upon the forthcoming bond or one of the appeal bonds, and without first enforcing the same against the estate of the purchaser.—Storrs v. Engel, Case No. 13,494.

Secret preferences paid as inducements to signing composition deeds may be recovered either at law or in equity.—Bean v. Brookmire, Case No. 1,169; Id. 1,170.

§ 355. —— Actions at law.

Trover by an assignee for property belonging to the bankrupt lies in the circuit court against the bankrupt and one claiming title.—Carr v. Gale, Case No. 2,435.

Trover will not lie by the assignee against judgment creditors to recover the value of the bankrupt's property, sold on execution, prior to the commencement of bankruptcy proceedings. —Gaytes v. American, Case No. 5,286.

A sale by a debtor of all his real and personal property to a creditor, within a week of the filing of a petition in bankruptcy, with knowledge of the debtor's insolvency, is in fraud of Act 1867, and trover will lie by the assignee to recover the value of the personal property.—Foster v. Hackley, Case No. 4,971.

An assignee may bring trover for property converted before his appointment, if the conversion took place after the filing of the petition, as his title relates back to the commencement of the proceedings. Act 1867, § 14.—Mitchell v. McKibbin, Case No. 9,666.

§ 356. —— Suits in equity.

Money paid as a fraudulent preference under Act 1867 may be recovered by the assignee in equity, although the same might also be recovered in an action at law.—Goodenow v. Milliken, Case No. 5,535.

Where money has been fraudulently paid by a bankrupt to certain creditors to induce them to sign a composition agreement, the assignee in bankruptcy may recover it back, and equity will entertain such a bill, although he might have maintained an action at law.—Bean v. Brookmire, Case No. 1,169.

A bill in equity by the assignee is not demurrable on the ground that he has a complete remedy at law, where the facts show that questions of fraud, trust, and partnership are all involved in the case at issue.—Taylor v. Rasch, Case No. 13,801.

Ignorance of the precise amount of goods transferred in fraud of Act 1867 will not give the assignee the right to claim a discovery in equity, as he can obtain a full disclosure on examination of the preferred creditor, under section 26 of such act.—Garrison v. Markley, Case No. 5,256.

Where assets are alleged to belong to the bankrupt, and are held by the defendants under claims of different rights, a suit in equity by the assignee in the form of a creditors' bill is the proper remedy to recover the same.—Stotesbury v. Cadwallader, Case No. 13,498.

The fact that there are other creditors of defendant is no objection to the assignee's bringing a suit to recover assets in the form of a creditors' bill.—Stotesbury v. Cadwallader, Case No. 13,498.

A suit in equity cannot be maintained by an assignee to obtain possession of a vessel alleged to belong to the estate of the bankrupt. The remedy is at law.—In re Oregon Iron Works, Case No. 10,562.

Neither will an injunction be allowed in such case upon the petition of the assignee to restrain the person in possession of such vessel from removing it beyond the jurisdiction of the court. The remedy is replevin.—In re Oregon Iron Works, Case No. 10,562.

A court of equity will take jurisdiction of a bill charging the constructive fraud contemplated by Act 1867, § 35, even though the suit, except in the form of the bill, is nothing more than an action for money had and received. But all persons concerned must be made parties.—Harmanson v. Bain, Case No. 6,072.

§ 357. —— Summary proceedings.

The assignee may petition summarily to set aside a mortgage given after the commencement of proceedings. Resort to a bill in equity is unnecessary.—In re Sims, Case No. 12,888.

The assignee may proceed by summons or petition upon a forthcoming bond, and need not resort to a plenary suit.—Storrs v. Engel, Case No. 13,494.

An assignee in bankruptcy can proceed against an adverse claimant of property only by action at law or plenary bill in equity.—Ferguson v. Peckham, Case No. 4,741.

Where the vendee purchased from the vendor before he was adjudged a bankrupt, in good faith, without knowledge of the bad faith of the vendor, and is financially responsible, the bankruptcy court will not settle the question of the validity of the sale upon motion by the assignee, but he must proceed in equity by bill. —In re Hunt, Case No. 6,881.

The bankruptcy court, against the protest of a receiver appointed by a state court, will not summarily order a sale of property forcibly taken by the marshal from his possession, the title to such property having vested in the receiver, but the rights of the assignee must be enforced by plenary suit.—In re Hulst, Case No. 6,863.

A suit by an assignee against a third person to recover assets claimed to belong to the bankrupt should be commenced by a bill in equity or a suit at law, and not by summary proceedings by petition, and a decree in such proceedings will be set aside for irregularities on petition of the defendant to the circuit court, under Act 1867.—In re Bonesteel, Case No. 1,627.

The question as to the validity of an execution lien on bankrupt's property attacked as a preference cannot be settled by petition and answer, but only by bill in equity or suit at law. —In re Ballou, Case No. 818.

A proceeding by the assignee to have a mortgage declared invalid, and a state court enjoined from foreclosing the same, should be by formal bill rather than by mere petition.—In re Kerosene Oil Co., Case No. 7,726.

The assignee can obtain possession of books of account transferred by the bankrupt before petition filed only by proceeding by a bill in equity or action at law, in which the validity of the conveyance can be tested, and not by a petition.—Rogers v. Winsor, Case No. 12,023.

Property fraudulently disposed of by a bankrupt in proceedings by or against him may be recovered by the assignee upon petition in the bankruptcy court, proceedings upon which may be of a summary character.—Bill v. Beckwith, Case No. 1,406.

Where mortgaged personalty of an absconded bankrupt is sold by agreement, under order of court, and the proceeds paid into court, the right thereto, as between the mortgagee and assignee, must be determined by a petition for distribution, and not by suit.—In re Masterson, Case No. 9,268.

Property held by the bankrupt to secure him as surety for another cannot be reached by the creditor by summary petition against the assignee, but only by a plenary suit.—Hurst v. Teft, Case No. 6,939.

The district court has no power to determine by summary proceedings the validity of the title of a general assignee for the benefit of creditors.—In re Marter, Case No. 9,143.

The objection that the relief sought to set aside a transfer by the bankrupt must be obtained by bill instead of on petition is waived where not taken by pleading.—In re Ulrich, Case No. 14,327.

A petition by an assignee against an alleged fraudulent transferee and his sureties in a bond for possession of goods seized by the marshal, who were not otherwise parties to the bankruptcy proceedings, where in substance a bill, may be remanded to the rules, and proceeded in as a bill in equity.—Lisberger v. Garnett, Case No. 8,383.

The bankruptcy court has no jurisdiction of a summary petition by a mortgagee for the sale of mortgaged property in the hands of receivers appointed by the state court, not parties to the petition.—Bradley v. Healey, Case No. 1,781.

§ 358. Defenses.

Adjudication of bankruptcy on a petition charging fraudulent conveyance does not estop the grantee from claiming that the conveyance is valid as to him.—In re Marter, Case No. 9,143.

A bankrupt is liable at the suit of the assignee for a tort committed on the bankrupt's property when he went into bankruptcy, and it is no defense in such an action that he has no property of his own with which to respond.—Carr v. Gale, Case No. 2,435.

An objection by the assignee to a contract made by the bankrupt corporation with one of its officers will not be entertained in a court of equity, unless he offers to return the consideration received.—Miller v. Halsted, Case No. 9,572.

It is no defense to an action by an assignee to recover a debt due the bankrupt that said debt has been claimed by the bankrupt as a set-off in a pending suit.—Miller v. Delaware, L. & W. R. Co., Case No. 9,566.

Where a firm holds a large claim against an insolvent corporation of which a member of the firm is a director, and at a meeting of the creditors, at which such member was present, measures were taken to pay and secure the claim, and such corporation becomes bankrupt, upon the assignee bringing a bill against the firm it will be enjoined from setting up any right by virtue of the votes of the directors which were in fraud of the assignee.—Bradley v. Converse, Case No. 1,776.

It is no defense to an action to recover secret preferences paid to obtain signatures to a composition deed that the composition deed was invalid, because not signed by all the creditors, pursuant to its terms, it appearing that the greater part of the creditors believed that the composition had been signed by all the creditors in good faith.—Bean v. Brookmire, Case No. 1,170.

Where a discharge is granted after opposition on specifications held not to have been proved, the court will not direct the assignee, who had previously commenced suit in the state court, to discontinue it, on the ground that the allegations in the bill of complaint were the same as those of the specifications in opposition to the discharge.—In re Penn, Case No. 10,928.

In an action by the assignee of an Illinois corporation against a stockholder to recover the amount unpaid on his stock, it is not a sufficient defense that the corporate proceedings have not been strictly in accordance with the statute.—Upton v. Hansbrough, Case No. 16,801.

The fact that a call for unpaid subscriptions to stock was for more than was necessary to pay the debts of the company cannot be tried in an action by the assignee in bankruptcy against an individual stockholder.—Upton v. Hansbrough, Case No. 16,801.

Ignorance of the condition of the company at the time the subscription was made is no defense to a suit by the assignee in bankruptcy for an assessment.—Payson v. Withers, Case No. 10,864.

The action of the bankrupt court in making an assessment upon stockholders of the bankrupt corporation cannot be collaterally assailed in suits to enforce collection of the assessment.—Payson v. Stoever, Case No. 10,863.

An order of assessment by the bankruptcy court, upon the premium notes of a bankrupt insurance company, does not bind the maker of such a note, so as to preclude him from disputing its validity when sued thereon by the assignee.—Lamb v. Lamb, Case No. 8,018.

An assessment by the court on unpaid subscriptions to the stock of a bankrupt corporation is conclusive, and not impeachable collaterally.—Michener v. Payson, Case No. 9,524.

§ 359. Parties.

In a chancery attachment against a British bankrupt, the federal circuit court will permit the assignees of such bankrupt, on giving security and producing a copy of the proceedings of the commissioners certified by a notary public, at Liverpool, in England, who is certified to be such by the American consul at Liverpool, to be made parties to defend the suit, and to release the attached effects.—Wilson v. Stewart, Case No. 17,837.

All suits in relation to the bankrupt's estate should be brought in the name of the assignee. To a suit in the name of the bankrupt, defendant may plead the appointment of the assignee in abatement.—Cook v. Lansing, Case No. 3,162.

The assignee is entitled to be made a party to suits pending in the state court by or against the bankrupt, and the bankrupt will be enjoined from interfering with them.—Samson v. Burton, Case No. 12,285.

The bankrupt is a proper party to a bill to set aside a sale by him as fraudulent or illegal under the bankrupt law.—Verselius v. Verselius, Case No. 16,925.

The bankrupt is not a necessary party to a suit by the assignee against the voluntary assignee of the bankrupt to set aside a conveyance made by the latter.—Harding v. Crosby, Case No. 6,050.

The fact of nonjoinder of a person jointly liable with defendant is available only by plea in abatement. Case No. 16,849. affirmed.—Tinker v. Van Dyke, Case No. 14,058.

Where an assignee, who has brought a suit in equity, and has entered an appearance in a suit brought against him, has absconded, no further proceedings can be taken until proceedings have been taken to bring the co-assignee in, and compel him to elect whether he will be made a party.—Fenton v. Collerd, Case No. 4,731.

Where the assignee is made a party to a suit, he must come in and assert his rights, or he will be barred by decree on default, as any other party.—Turner v. Indianapolis, B. & W. Ry. Co., Case No. 14,259.

§ 360. Joinder of causes.

The assignee may embrace in one suit all such matters and causes of action as might be included by the creditors in a creditors' bill.—Spaulding v. McGovern, Case No. 13,217.

A bill by the assignee to set aside a chattel mortgage, a sale thereunder, and an assignment for creditors as fraudulent against creditors, and to recover the property, is not multifarious, the object of the bill being to recover the estate and clear it of incumbrances, and all the acts of the defendants having been done with a common purpose.—Platt v. Preston, Case No. 11,219.

§ 361. Pleading.

An assignee in an action of trover, in alleging title to property, must allege an adjudication in bankruptcy.—Wright v. Johnson, Case No. 18,082.

A bill by an assignee in bankruptcy to recover notes alleged to have been transferred in violation of Act 1867 need not directly allege an adjudication of bankruptcy, where it sets out the filing of the petition, the appointment of the assignee, and the assignment to him.—Lakin v. First Nat. Bank, Case No. 7,999.

A bill to set aside a conveyance made by a bankrupt for the benefit of his wife and children, alleging that he was much embarrassed

at the time, is good on demurrer, though it did not aver that he was then insolvent.—Pratt v. Curtis, Case No. 11,375.

The declaration in an action by the assignee to set aside a transfer as in violation of the act must set out the facts to show its illegality. —Hallack v. Tritch, Case No. 5,956.

In an action by the assignee to recover the value of goods transferred by the bankrupt, contrary to Rev. St. § 5128, the complaint must either allege actual conversion of the property, or a demand by the assignee and a refusal to deliver it, as the receipt of such goods by the creditor is not tortious, and does not of itself amount to a conversion of the property.—Shuman v. Fleckenstein, Case No. 12,826; Brooke v. McCraken, Id. 1,932.

Where the petition in bankruptcy was filed before the amendment of June 22, 1874, shortening the time within which a preference may be attacked as fraudulent, and requiring that the creditor should have knowledge that it was made in fraud of the act, a bill thereafter filed is sufficient to make a case within the statute as it existed before the amendment.—Warren v. Garber, Case No. 17,196. CONTRA, see Grey v. Thomas, Case No. 5,806.

In a suit to set aside a sale as fraudulent under Rev. St. §§ 5128, 5129, as amended June 22, 1874, knowledge by defendant that the sale was in fraud of the act must be averred and proved. —Crump v. Chapman, Case No. 3,455.

§ 362. Issues and proof.

An assignee who sues to recover the value of property alleged to have been conveyed by the bankrupt as an illegal preference under Act 1867, § 35, cannot recover, on the ground that the conveyance was void at common law or under the state statute.—Cragin v. Carmichael, Case No. 3,319.

Under an allegation that the bankrupt did "transfer, assign, and convey" to defendant, plaintiff is not limited to proof of technical assignment under state laws.—Andrews v. Graves, Case No. 376.

§ 363. Evidence.

The assignee, suing as such, must produce the commission and proceedings and deed of assignment.—McIver v. Moore, Case No. 8,831.

Possession by the bankrupt, when his property was assigned, and a removal and sale of it, in connection with another person afterwards, is prima facie evidence of conversion.—Carr v. Gale, Case No. 2,435.

The assignee, to maintain his title to sue in trover, need prove only the decree of bankruptcy and his appointment. This is prima facie evidence of his title under the law, without producing the bankrupt's petition to be declared a bankrupt.—Carr v. Gale, Case No. 2,434.

In an action of trover by an assignee against a third person and a bankrupt, the explanations and schedules attached to the latter's petition cannot be used in his favor.—Carr v. Gale, Case No. 2,435.

In an action of trover by an assignee against a third person and the bankrupt, the declarations of the latter are competent evidence against him.—Carr v. Gale, Case No. 2,435.

A party who has caused a deposition to be taken before a register to be used as evidence in a cause cannot thereafter object to such use. —Lawrence v. Graves, Case No. 8,138.

Creditors who receive an illegal preference are liable to the assignee. The intent of the debtor to give, and of the creditor to secure, an unauthorized preference, may be shown by circumstances.—Giddings v. Dodd, Case No. 5,405.

In a suit by an assignee the proceedings in bankruptcy are admissible to show the appointment of the assignee, and the introduction of the record of such proceedings up to the time of his appointment, no use being made of them because the insolvency was admitted, is not a ground for error.—Babbitt v. Walbrun, Case No. 695.

In a suit by the assignee to recover the value of the property alleged to have been fraudulently transferred by the bankrupt, every declaration of the bankrupt in relation to defrauding his creditors and acts on his part showing the nature and extent of the fraudulent scheme are admissible, where a prima facie case of conspiracy is made out.—Tyler v. Angevine, Case No. 14,306.

In an action by the assignee of a corporation to collect unpaid subscriptions to stock, evidence of misrepresentations by an agent of the corporation at the time of subscription is inadmissible. —Michener v. Payson, Case No. 9,524.

The exemplification of a record offered in evidence is not admissible to prove a decree of the bankruptcy court authorizing an assessment by the assignee of the bankrupt corporation, where it appears that parts of the proceedings which culminated in such decree are not certified, and there is no offer to prove their contents.—Payson v. Brooke, Case No. 10,857.

In order to prove a particular proceeding in a bankrupt case, the whole record of such proceeding must be produced, but it is not necessary to produce the whole record of the case.— Payson v. Brooke, Case No. 10,857.

Declarations of a bankrupt are properly admitted in evidence on the trial of a suit between his assignee and a third person as to title to certain property.—In re Clark, Case No. 2,802.

The bankrupt is a competent witness where his assignee is a party, as he can have no legal interest in the decision of the case.—Wright v. Rogers, Case No. 18,090.

Where, within two months before commencement of proceedings, the bankrupt mortgages his stock of goods to raise money to pay a creditor pressing for satisfaction, and the mortgagee is a party to the negotiations, the burden is on the latter to show good faith and actual value. Rev. St. § 5128.—In re Sims, Case No. 12,889.

Defendants must contradict and explain every fact tending to cast suspicion upon the conveyance.—Alexander v. Todd, Case No. 175.

§ 364. Trial.

In summary proceedings by the assignee to recover property fraudulently disposed of, the bankruptcy court may order issues of fact to be tried by a jury.—Bill v. Beckwith, Case No. 1,406.

In a suit by the assignee in involuntary proceedings to set aside a transaction as fraudulent, the federal circuit court may refer the question of bona fides to a jury, where the bankrupt has not had the privilege of a jury.—Little v. Alexander, Case No. 8,393.

In trover to recover the value of property alleged to have been fraudulently sold by the bankrupt, it is error to instruct the jury that if the sale of the property by the bankrupt was not in the usual and ordinary course of business it was fraudulent, as such fact is only prima facie evidence of fraud.—Babbitt v. Walbrun, Case No. 694.

A charge to the jury that they are to give a verdict for the assignee in bankruptcy if they find that a certain sale by the bankrupt was fraudulent, and that the second buyers participated in it or had reasonable cause to know of the fraud, is sufficient, without a separate charge that the participation in the fraud was essential to recover.—Babbitt v. Walbrun, Case No. 695.

In determining the question as to whether the transferee had knowledge of the insolvency of

the assignor, it is not error for the court to direct the attention of the jury to the distinction between "reasonable cause to believe" and "actual belief."—Lawrence v. Graves, Case No. 8,138.

§ 365. Injunctions and receivers.

On a bill filed by the assignee in bankruptcy to set aside a general assignment by the bankrupt, where the voluntary assignees were restrained from interfering with the property, *held*, that a receiver should be appointed by the bankruptcy court.—Sedgwick v. Place, Case No. 12,619.

An assignee who brings a suit under Act 1867, against a person claiming title to property, is not entitled to an injunction pending the suit restraining such person from intermeddling with the property which is in the latter's possession, and to a receivership thereof, unless the assignee shows some emergency or some peril of loss which the court will be unable to redress.—Beecher v. Bininger, Case No. 1,222.

Where an insolvent corporation, before its bankruptcy, has obtained the appointment of a receiver in a state court, to whom its property is transferred, and an action is brought by its assignee in bankruptcy against the receiver to set such transfer aside, the bankruptcy court will grant an injunction restraining the receiver from executing the trusts of the receivership, and will appoint a receiver of the property and its proceeds pending suit.—Platt v. Archer, Case No. 11,213.

An injunction against the sale on execution of property which the assignee sues to recover will not be dissolved on an answer and affidavit denying the merits of the bill.—Platt v. Dickenson, Case No. 11,216a.

§ 366. Compromise.

Where an assignee brings action against the attorneys of the bankrupt to recover money paid and property assigned to them by him before filing his petition, in payment and as security for their services rendered and to be rendered in the bankruptcy proceedings, and after issue is joined the assignee applies for leave to compromise the suit, such leave will not be granted, as such suit is not a proper one for compromise of disputed claims under general order No. 20.—In re Rowe, Case No. 12,092.

The expense and delay of a litigation will not justify a compromise in a case where public interests and the due administration of the bankrupt law require the settlement of the questions of law involved by the judgment of the court.—In re Rowe, Case No. 12,092.

§ 367. Recovery and decree.

Where an assignee sells property free from incumbrances, and the holder of a mortgage thereon is present at the sale, and a bill in equity is brought by the assignee against the mortgagee and purchasers of the property to determine their respective rights against the mortgagee, who threatens an enforcement of his mortgage, it is competent for the court to determine the validity of the mortgage, although the holder repudiates all claim to a fund in court retained for the purpose of paying the same, and disavows all liabilities of the assignee to himself by reason of such sale; and, if found to be a fraudulent preference, its cancellation may be decreed, and its enforcement against the property and the purchasers thereof enjoined.—Giveen v. Smith, Case No. 5,467.

A bill for an account and a receiver filed by an assignee of two insolvent partners against a solvent partner, may be retained until the receiver has reported a settlement of all other demands against the firm.—Cory v. Clark, Case No. 3,260.

In the case of a joint purchase in fraud of Act 1867, each purchaser is liable for the full value of the property, though they were interested in different proportions.—Schulenburg v. Kabureck, Case No. 12,487.

Where a transfer of property by the bankrupt is held void under Act 1867, as against the assignee, the transferee will be regarded as a trustee for the assignee, and will be held to account as such, where it appears that the transferee has disposed of the property.—Schrenkeisen v. Miller, Case No. 12,480.

A decree annulling a voluntary assignment to creditors made within six months before the commencement of bankruptcy proceedings must contain a direction for a conveyance by the voluntary assignee to the assignee in bankruptcy, and no subsequent account in a state court should be had unless some extraordinary reason requires a distribution, under the laws of the state, for the benefit of the general body of creditors.—Burkholder v. Stump, Case No. 2,165.

A creditor who has taken an unlawful preference by execution and seizure of the bankrupt's property is liable for its value, and is only to be allowed, on the accounting, credit for the actual expenses of sale, not including the officer's fees.—Sedgwick v. Millward, Case No. 12,618.

On awarding to the assignee the proceeds of an unlawful preference obtained by judgment and levy of execution, the sheriff will be allowed his legal fees and costs of the suit, which were charged on the creditor. Case No. 17,200 reversed.—Warren v. Tenth Nat. Bank, Case No. 17,202.

In an action by the assignee to recover property fraudulently transferred, the value of such portion as is exempt from execution must be deducted before judgment.—Grow v. Ballard, Case No. 5,848.

A mere general allowance in the decree of the reasonable charges and expenses of the voluntary assignee will not include expenses of a proposed account in the state court.—Burkholder v. Stump, Case No. 2,165.

The defendant in an equity suit must account, before a master, for property received by him. Orders of reference to a master will be settled on notice.—Benjamin v. Graham, Case No. 1,301.

An assignee suing for the value of goods fraudulently transferred may recover damages for their detention, including profits made out of them, or injuries received by them, while in possession of the creditor.—Shuman v. Fleckenstein, Case No. 12,826.

A decree declaring a conveyance void at the suit of the assignee, and directing defendant to convey to the assignee, does not establish title in the assignee under such defendant, nor any privity between them.—McFarland v. Goodman, Case No. 8,789.

A recovery on a wife's chose in action by the assignee, substituted in place of the husband who had become bankrupt pending suit, inures to the benefit of the creditors.—In re Boyd, Case No. 1,745.

(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

Presentation and proof of claims on election of assignee, see ante, §§ 163–171.

1. Provable Debts and Demands.

§ 368. In general.

Any debt which may be proved by complying with any of the provisions of the bankrupt act is a provable debt.—Rankin v. Florida, A. & G. C. R. Co., Case No. 11,567.

§ 369. Time of accrual.

Only such debts as exist at the time of filing the petition are provable, and a debt which exists at the time of the actual adjudication, but not existing at the time the petition was filed, is not provable.—In re Crawford, Case No. 3,363. CONTRA, see Downer v. Brackett, Case No. 4,043; In re Hennocksburgh, Id. 6,367.

Where an absolute transfer is given to secure a debt on an extension of time to the debtor, the creditor, before the expiration of such time, has an existing indebtedness provable in bankruptcy.—Ecfort v. Greely, Case No. 4,260.

The election of the United States to take judgment upon a bond given to secure a claim against a vessel will prevent them from proving it as a debt due from the bankrupt obligor; and such debt is not affected by the discharge previously obtained.—In re Mansfield, Case No. 9,049.

Where a claim evidenced by a bond, given by a claimant for property seized by the United States, as liable to forfeiture for violation of the rules of war, is not reduced to judgment until after the adjudication of the bankruptcy of such claimant and a final dividend has been determined, it is not provable against the bankrupt estate, and is not barred by the discharge.—United States v. The Rob Roy, Case No. 16,179.

§ 370. Contingent demands and liabilities.

One who has been garnished and defaulted, and subsequently declared a bankrupt, is not a debtor of the garnisher, so as to make his claim provable as that of a creditor.—Ex parte Columbian Ins. Co., Case No. 3,037.

The statute liability of stockholders of a corporation for its debts is not a claim provable in bankruptcy against them.—Bristol v. Sanford, Case No. 1,893; James v. Atlantic Delaine Co., Id. 7,179.

§ 371. Claims of indorsers, sureties, etc.

No debt, but such as is due and owing at the time of the bankruptcy, can be proved under the commission. Therefore an indorser or acceptor of a bill of exchange, drawn by the bankrupt, who has not paid it before the bankruptcy, cannot prove the debt.—Marks v. Barker, Case No. 9,096. CONTRA, see Baker v. Vasse, Case No. 784.

Where the holder of a note fails to prove the same against the maker's estate, the indorser may prove it, and receive dividends, though he has not paid the note.—In re Ellerhorst, Case No. 4,381.

The right of an indorsee of a note to prove the same in bankruptcy is controlled by the law of the state where the contract of transfer is made.—In re Shelbourne, Case No. 12,745.

Where the proceeds of an accommodation note made by the agent of a company go to the use of his bankrupt firm, and an indorser pays the same and proves the claim in bankruptcy, and recover judgment against the company, the company cannot also prove the claim.—In re Morse, Case No. 9,853.

Proof of a claim as indorser upon a note made by the bankrupt will be disallowed where it appears that, after the adjudication of bankruptcy, a new note had been given, and the first note taken up.—In re Montgomery, Case No. 9,730.

A surety of the bankrupt whose individual note is expressly received in payment may prove his claim. (Act 1867, § 19.)—In re Morrill, Case No. 9,821.

The pledgee of notes, held to secure a debt in a smaller amount, may prove them against the maker's estate to their full amount, and receive dividends to the extent of his debt, though they are invalid in the hands of the pledgor.—Bailey v. Nichols, Case No. 741.

§ 372. Claims against indorser of a note or drawer of bill of exchange.

Where a bankrupt agreed to furnish money to a person to take out a patent and to pay the expenses, and receive an interest in the same, and a note thereafter is made by such person and indorsed by the bankrupt, and given to a chemist for work done on the patent, the latter may prove such note as a valid claim against the estate of the bankrupt.—In re Bruce, Case No. 2,044.

A mere covenant by a creditor not to sue an accommodation acceptor does not prevent him from proving against the drawer's estate.—Downing v. Traders' Bank, Case No. 4,046.

In the case of negotiable paper, where the makers have been declared bankrupts, and have offered notes for composition payments, the creditor may prove for the whole amount against the indorser, as nothing short of actual payment, or a present right to receive a dividend, from the maker's estate, will operate to reduce the creditor's right to prove against the indorser's estate.—In re Hicks, Case No. 6,456.

§ 373. Claims barred by limitation.

A debt barred by the statute of limitations of the state in which the bankrupt resides and where the petition is filed cannot be proved.—In re Kingsley, Case No. 7,819; In re Reed, Id. 11,635; In re Doty, Id. 4,017; In re Hardin, Id. 6,048; In re Noesen, Id. 10,288; In re Cornwall, Id. 3,250.

A debt barred by the New York statute of limitations (which affects the remedy only) may be proven.—In re Shepard, Case No. 12,753.

A debt, barred by the statute of limitations in the state where the bankrupt resides, is not provable in bankruptcy against his estate by a creditor resident in another state, even though not barred by the statutes of that state.—In re Hardin, Case No. 6,048.

A debt, to be barred by limitation so as not to be provable, must be shown to be barred throughout the limits of the United States.—In re Ray, Case No. 11,589; In re Shepard, Id. 12,753. CONTRA, see In re Hardin, Case No. 6,048; In re Reed, Id. 11,635.

A state statute of limitations is suspended by the bankruptcy proceedings, and if the debt is not barred at such time it may be proved, though at the time of proof it would be otherwise barred.—In re Eldridge, Case No. 4,331; In re Wright, Id. 18,068; In re Maybin, Id. 9,337. CONTRA, see Nicholas v. Murray, Case No. 10,223.

The suspension of the statute by the filing of the petition continues so long as there is a fund to distribute.—In re Maybin, Case No. 9,337.

The entry of a debt upon the schedule by the bankrupt is not such an acknowledgment or new promise as will revive a debt which is barred by the statute.—In re Hardin, Case No. 6,048; In re Kingsley, Id. 7,819. CONTRA, see In re Hertzog, Case No. 6,433.

§ 374. Equitable demands.

Equitable debts are provable on the same footing as legal debts.—Sigsby v. Willis, Case No. 12,849; In re Blandin, Id. 1,527; In re Buckhause, Id. 2,086.

§ 375. Unliquidated demands.

Losses suffered by a broker in disposing of goods purchased for the bankrupt, which he failed or refused to receive, are unliquidated claims, and not provable.—In re Smith, Case No. 12,975.

Where a cause of action has arisen by the bankrupt's breach of an absolute contract, it is no objection to assessing and proving the damages in bankruptcy by the injured party that they may be difficult of estimation.—Ex parte Pollard, Case No. 11,252.

On a contract under which the parties have a mechanic's lien not completed when petition was filed, a pro rata allowance only will be made. For work done afterwards nothing is allowed.—In re Cook, Case No. 3,151.

A contract of employment with a corporation is ipso facto dissolved by the filing of a petition in bankruptcy, and the employé may have his damages assessed, and prove the amount.—Ex parte Pollard, Case No. 11,252.

A claim by retired partners for unliquidated damages, by reason of their liability, under the provisions of a lease, to the firm, that, in case of failure to perform, the lessors may re-enter and relet the premises at the risk of the lessees, who should remain liable for the rent and be credited with the sums actually realized, cannot be proved against the estate of their former partners.—Ex parte Lake, Case No. 7,991.

§ 376. Claims arising out of torts.

A debt created by fraud is provable under Act 1867, §§ 19, 33.—In re Rosenberg, Case No. 12,054; In re Rundle, Id. 12,138.

Damages for a tort are not provable until they have been assessed.—In re Bailey, Case No. 729.

The claim of a bank for fraudulent overdrafts of a customer, made by collusion with its cashier, may be proven directly against the estate in bankruptcy of a company, of which the customer was the principal shareholder, to which the checks were given, to the exclusion of the assignee in bankruptcy of the customer.—In re Eureka Mfg. Co., Case No. 4,550.

A claim against a partner for false representations as to the credit of his firm, inducing a person to purchase their paper, is a claim for damages for a tort, and is not provable before judgment obtained thereon.—In re Schuchardt, Case No. 12,483.

§ 377. Rent and damages for breach of covenants in lease.

A demand for rent accruing after the bankruptcy is not provable.—In re May, Case No. 9,325; In re Hufnagel, Id. 6,837; In re Commercial Bulletin Co., Id. 3,060.

Where, in eminent domain proceedings, a tenant has been paid a certain amount on a basis of his obligation to pay rent, the landlord can prove a claim for rent of the balance of such amount on the bankruptcy of the tenant.—In re Clancy, Case No. 2,782.

Where tenants are put into bankruptcy pending summary proceedings to eject them, and afterwards such proceedings are enjoined by the bankruptcy court, the landlord is not entitled to rent under the lease from the service of the injunction to the adjudication of bankruptcy, he is only entitled to a proper allowance, and the same rule applies after adjudication.—In re Lynch, Case No. 8,634.

The loss of rent after the bankruptcy of the lessee, on a reletting by the landlord, who terminated the tenancy under the terms of the lease, for a breach of covenant, cannot be proved.—Ex parte Houghton, Case No. 6,725; In re Croney, Id. 3,411; In re Hufnagel, Id. 6,837.

Where a bankrupt, before his adjudication, hired premises and sold out his business to his brother, and surrendered such premises to him, but continued to pay the rent, and afterwards directed the landlord to relet them, and agreed to account for the rent until they were relet, proof of the debt for the rent until the premises were relet is valid.—In re Bruce, Case No. 2,044.

A claim against the bankrupt by his lessee for prospective profits of the business at a stand on the bankrupt's premises on breach of the lease by the bankrupt cannot be proved.—In re Leland, Case No. 8,233.

§ 378. Assigned claims.

One who has in good faith bought a debt against the bankrupt after the commencement of the proceedings may prove it.—In re Murdock, Case No. 9,939.

A person who in good faith purchases claims against a bankrupt with the intention of stopping proceedings and giving him time may prove them.—In re Pease, Case No. 10,880; In re Strachan, Id. 13,519.

Where there are assets in the hands of the assignees in bankruptcy exceeding the amounts of unpaid debts, proved and unproved, claims purchased by the bankrupt's agents may be allowed to the extent of the sums paid therefor by the purchasers, who will be subrogated to the rights of the creditors whose claims they bought.—In re Lathrop, Case No. 8,104.

§ 379. Claims against several bankrupts.

The holder of a bill of exchange is entitled to prove his debt in bankruptcy against the drawer, the acceptor, and the payee, and to receive a dividend from all their estates until his full debt is paid; and, if one only be bankrupt, he may prove his debt against such bankrupt, and also proceed against the others at law. Act 1841.—In re Babcock, Case No. 696.

The bona fide holder for value of an accommodation bill is entitled to prove as to all parties against whom he could have supported an action on the bill.—Downing v. Traders' Bank, Case No. 4,046.

A joint debtor, having security on the separate estate of one of the creditors, may prove his entire claim against both estates, but is not entitled to greater dividends than, in the aggregate, amount to his debt.—In re Howard, Case No. 6,750.

An indorsed note held as security for the debt of the indorser in a less amount, evidenced by a note, may be proved, to the amount of the debt, against the estate of the indorser in bankruptcy, and also against the estate of the bankrupt maker.—Ex parte Farnsworth, Case No. 4,672.

§ 380. Want of consideration.

A person to whom notes are sent for discount, who fails to pay drafts drawn against the proceeds in favor of an indorser of the notes, cannot prove his claim on the notes against the bankrupt payee of the drafts; for, he having failed to pay the drafts, he has no right to retain the notes, and is not a holder for value.—In re Howard, Case No. 6,751.

Brokers holding stocks on a margin at a profit when the petition was filed, who hold for an unreasonable time, and sell on a decline, without notice, cannot prove a claim for differences.—In re Daniels, Case No. 3,566.

A holder of notes, who was not a bona fide holder, sought to prove them against the estate of a bankrupt who had indorsed the same, the latter having received them to secure himself as an accommodation indorser of other notes for the maker of the notes in question. *Held*, that the notes were not provable, as they were without consideration between the maker and the bankrupt, the latter not having been called upon to pay the said notes upon which he was an accommodation indorser.—In re Hook, Case No. 6,672.

§ 381. Claims arising out of illegal transactions.

The bankrupt court may pass upon the legality of a claim, though it has no jurisdiction to enforce a penalty imposed by the state law on account of an act making such claim illegal.—In re Pittock, Case No. 11,189.

Notes given by the bankrupt for the excess of bonus over legal interest are not provable, and must be surrendered to the assignee.—Shaffer v. Fritchery, Case No. 12,697.

A debt contracted in whole or in part for spirituous liquors in violation of a law of the state is not provable.—In re Paddock, Case No. 10,657.

A claim for the price of spirituous liquors lawfully sold in New York to a citizen of Maine who intended them for sale in Maine, in violation of law, is provable in bankruptcy in Maine, though it could not be recovered in the courts of the state.—In re Murray, Case No. 9,954.

A note payable "in current money of the state" in which it is made is provable, though the state, at the time of its maturity, is in rebellion.—In re Whittaker, Case No. 17,598.

Confederate treasury notes, although not "bills of credit" issued by a state, are nevertheless illegal, and a promissory note given in consideration of such notes is void for illegality of consideration, and is not a debt provable in bankruptcy.—Bailey v. Milner, Case No. 740.

Money actually paid on "puts" and "calls," which are void as wager contracts, may be proved as claims against the estate of the party from whom they are taken.—Ex parte Young, Case No. 18,145.

A speculative option, where the object of the parties is not a sale and delivery of goods, but a settlement in money of differences, commonly called a "put," is void as a wagering contract, and is not a provable debt in bankruptcy.—In re Chandler, Case No. 2,590.

Where a savings bank, in violation of its charter and the laws of the state, discounts notes of the bankrupt, neither the notes nor a claim for money loaned thereon can be proved.—In re Jaycox, Cases Nos. 7,237, 7,238, 7,241.

§ 382. Taxes.

A tax collector will not be allowed to prove, against the bankrupt's estate, taxes which have been deducted from the value of property taken by creditors under attachments valid, as against the assignee, at the time of appraisal.—Foster v. Inglee, Case No. 4,973.

§ 383. Claims under insurance policies.

The terms and conditions of an insurance policy remain binding upon the insured after adjudication of bankruptcy of the insurance company to the same extent as before.—In re Firemen's Ins. Co., Case No. 4,796.

A clause in an insurance policy, limiting the right of action to one year from the loss, is valid, and binding even after bankruptcy of the company; but proof of the debt in bankruptcy is equivalent to the commencement of a suit.—In re Firemen's Ins. Co., Case No. 4,796.

An adjustment of the loss before the filing of the petition in bankruptcy is a settlement and a waiver of the limitation clause.—In re Firemen's Ins. Co., Case No. 4,796.

Policy holders in a bankrupt fire insurance company are not entitled to the return of any part of the premiums paid for the unexpired term, or to any deductions on outstanding premium notes.—In re Western Ins. Co., Case No. 17,435.

A claim against a bankrupt insurance company, founded upon a covenant to repay part of the premium on cancellation of the policy, is provable.—In re Independent Ins. Co., Case No. 7,019.

A waiver of conditions, made in good faith by the company while solvent, is binding upon its assignee in bankruptcy.—In re Firemen's Ins. Co., Case No. 4,796.

A fire policy is a "contingent liability" of the insurance company, entitling the insured to share in dividends where the loss occurs before the order for final dividends.—In re American Plate Glass Ins. Co., Case No. 314.

§ 384. Claims of wife.

The fact that a wife allows her husband to have and use her money in his own business indefinitely does not affect a claim by her as against other creditors after he becomes bankrupt.—Van Kleeck v. Miller, Case No. 16,860.

Under the Massachusetts statutes, the bankrupt's wife may prove as a creditor against his estate in bankruptcy for money realized by him out of property which she had as her separate estate, if the evidence clearly shows that the transaction was intended to be a loan, and not a gift.—In re Blandin, Case No. 1,527.

Where a wife received money, and placed it in her husband's hands with the verbal understanding that it should be returned upon demand, and she afterwards draws all but $700, and it appears that the husband had at various times given her furniture, etc., and had taken out life insurance policies for her benefit, upon the husband's being declared a bankrupt seven years after the receipt of such money the wife is entitled to prove her $700 claim, without interest, as a debt against her husband's estate.—In re Bigelow, Case No. 1,398.

§ 385. Deficiency on mortgage foreclosure.

Where the assignee permits a pending mortgage foreclosure to proceed to decree, and a sale of the property, he agrees to such mode of ascertaining the value of the property, and the deficiency is a provable claim.—In re Stansfield, Case No. 13,294.

A judgment for deficiency against the bankrupt on a sale under foreclosure in the state court, permitted by the bankrupt court, cannot be proved by the mortgagee, where leave was not given for the purpose of ascertaining the value of the security.—In re Herrick, Case No. 6,421.

A mortgagee who, without leave of court or notice to the assignee, sells mortgaged property at public auction for less than the amount of the mortgage, will not be allowed to prove for the balance.—In re Miller, Case No. 9,555.

The bankruptcy court may allow to be proved as a debt a deficiency arising on a sale under a decree of foreclosure of a mortgage in a suit in a state court commenced after adjudication in bankruptcy without permission of the bankruptcy court. Case No. 9,699 affirmed.—In re Moller, Case No. 9,700.

§ 386. Alimony.

A claim for alimony, whether accruing before or after commencement of proceedings, is not a provable debt, and enforcement thereof cannot be stayed by the bankruptcy court.—In re Lachemeyer, Case No. 7,966.

§ 387. Claims of cestuis que trust.

An indebtedness to a cestui que trust is provable.—In re Blandin, Case No. 1,527.

§ 388. Judgments and claims put in judgment.

A claim to have a judgment in favor of the claimant against the bankrupt set aside on account of fraud, whereby it was rendered for a smaller sum than was actually due, and to recover what is still due under the contract on which the judgment was rendered, is a debt

provable under the bankrupt law.—In re Van Buren, Case No. 16,833.

A judgment rendered against the bankrupt in a state court, from which he has appealed before the filing of his petition, is conclusive on the presentation of the same as a debt.—In re Leszynsky, Case No. 8,278.

A writ of error and supersedeas of execution leave the judgment intact, and it is provable.—In re Sheehan, Case No. 12,737.

The commissioners of a bankrupt's estate cannot allow a judgment debt, which has slept for 30 years, to be proved before them, unaccompanied by sufficient reasons for the neglect to prosecute it.—In re Morris, Case No. 9,825.

Judgments in actions, whether arising ex delicto or ex contractu, are provable debts, under Act 1841.—In re Comstock, Case No. 3,073.

A suit and judgment against a bankrupt on a fiduciary debt does not preclude the creditor from proving it.—Bourne v. Maybin, Case No. 1,700.

A claim of the United States for the value of goods forfeited for violation of the customs laws is provable, though the United States has recovered a judgment for such value.—In re Vetterlein, Case No. 16,929.

A creditor may prove a debt, though he has recovered a judgment for the same before a justice of the peace prior to the adjudication.—In re Vickery, Case No. 16,930.

The costs and interest in the case of a debt put into a judgment before the petition was filed may be proved with the debt.—Ex parte O'Neil, Case No. 10,527.

A judgment extinguishes the debt upon which it was founded, and constitutes a new debt. A judgment obtained after an adjudication of bankruptcy is not provable against estate of bankrupt.—In re Williams, Case No. 17,705.

A claim founded on a judgment recovered after commencement of the proceedings, without leave of the bankruptcy court, is not provable.—In re Maybin, Case No. 9,337.

A simple contract debt existing before the filing of the petition, on which a judgment has been rendered after such filing, is provable, within the meaning of Act 1867.—In re Brown, Case No. 1,975; In re Crawford, Id. 3,363; In re Stansfield, Id. 13,294.

It is not necessary, for creditors who have recorded judgments against a bankrupt, after the adjudication to vacate their judgments in order to prove claims on which the judgments were rendered.—In re Stevens, Case No. 13,391.

A judgment entered in an action for tort after commencement of bankruptcy proceedings upon a verdict previously rendered is not provable.—Black v. McClelland, Case No. 1,462.

A judgment for a fine obtained in a criminal proceeding is not a provable debt.—In re Sutherland, Case No. 13,639.

That there is usury in a judgment sought to be proved, and that the bankrupts did not defend against it on that ground, is not available to the assignee, where no fraud or collusion therein is alleged.—In re Kitzinger, Case No. 7,861.

§ 389. Costs and expenses in pending suits in general.

Where a suit has been commenced bona fide, and the defendant becomes a bankrupt, the actual costs are to be paid out of the estate, but no subsequent costs.—Ex parte Foster, Case No. 4,960.

A debt must be proved or allowed before the costs made prior to the commencement of the proceedings in bankruptcy can be allowed.—In re Preston, Case No. 11,393.

Compensation for services of an attorney and counsel of receiver of insolvent corporation will be allowed where it appears that they benefited the estate.—Platt v. Archer, Case No. 11,214.

Compensation for services of attorney and counsel of the receiver of an insolvent corporation in resisting proceedings by assignee to recover the property will not be allowed.—Platt v. Archer, Case No. 11,214.

A creditor is not entitled to reimbursement for expenses and costs of a suit in a state court to compel a voluntary assignee to distribute the estate, where the suit was not beneficial to the creditors, the estate having been placed in the hands of the assignee in bankruptcy under a composition.—In re Dumahaut, Case No. 4,126.

Attorney's commissions and costs, stipulated to be paid on foreclosure, will not be allowed by the register, upon the bankruptcy of the mortgagor before the mortgage was foreclosed, when the proceedings to foreclose are invalid.—In re Devore, Case No. 3,847.

A creditor not allowed to apply to a state court for an order directing the payment, out of the estate in the hands of a voluntary assignee, of referee's fees incurred in an action in the state court.—In re Dumahaut, Case No. 4,125.

§ 390. Fees and disbursements on levy on bankrupt's property.

Where a sheriff, before the bankruptcy proceedings, has seized the bankrupt's property under a judgment which is afterwards set aside, and he has had the custody of the property, and has preserved the same, and has incurred expense in so doing, he is entitled to be reimbursed out of the estate.—In re Williams, Case No. 17,705.

The sheriff is entitled to reasonable compensation for levies and services under executions issued before bankruptcy proceedings commenced, but no compensation will be allowed in respect to executions issued subsequent to the filing of the petition.—Platt v. Stewart, Case No. 11,221.

A sheriff who has, in good faith, levied upon property of a debtor afterwards adjudged a bankrupt is entitled to his poundage out of the proceeds in the hands of the assignee, without regard to the validity of the judgment.—In re Welch, Case No. 17,367.

§ 391. Costs, fees, and disbursements in attachment proceedings.

The expenses of an attachment made for the sole purpose of securing the creditor's debt, within four months of the bankruptcy proceedings, are not allowable as a claim against the estate.—In re Davis, Case No. 3,616; In re Archenbrown, Id. 503.

Where the original debt has been proved and allowed, costs of an attachment made in good faith before the commencement of the bankruptcy proceedings may be proved as a general debt against the estate and without knowledge of the debtor's insolvency.—In re Preston, Case No. 11,393.

Where it appears that the attachment which was dissolved by the bankruptcy proceedings was merely auxiliary to such proceedings, the costs and expenses thereof will be allowed.—In re Ward, Case No. 17,145.

The omission of the attachment creditors to commence proceedings in bankruptcy is not sufficient to rebut the positive averment in their petition that the attachment proceedings were not taken to defeat the operation of Act 1867.—In re Ward, Case No. 17,145.

Costs of an attachment dissolved by the bankruptcy proceedings will not be allowed out of the fund unless the attachment was designed to aid the bankruptcy proceedings, and of benefit to

the general creditors.—In re Irons, Case No. 7,067.

Unless an attachment dissolved by bankruptcy could not have been effectual to preserve the property for the general creditors, the costs may be paid out of the fund.—Ex parte Holmes, Case No. 6,631.

The reasonable expenses of creditors in attachment proceedings *held* should be paid out of the fund, where such proceedings contributed to preserve the property.—In re Schwab, Case No. 12,498.

A claim by a sheriff for fees and expenses in attachment proceedings, begun within four months prior to the commencement of proceedings in bankruptcy, will be allowed, where it is conceded that the attachment conserved the property and benefited the general creditors.—In re Jenks, Case No. 7,276.

Costs incurred by a sheriff for insurance, packing, etc., of goods on an attachment which has been dissolved by the proceedings in bankruptcy, where beneficial to the estate, will be ordered to be paid by the assignee.—In re Fortune, Case No. 4,955.

The costs of an attachment, laid by the wife of the bankrupt in a libel for divorce, are not provable, and are not an equitable charge against the assets.—In re Foye, Case No. 5,021.

Where a flock of sheep belonging to the bankrupt were taken on attachment prior to the filing of the petition, *held* that the officer was entitled to compensation from the assignee for keeping such sheep until claimed and received by the assignee.—Zeiber v. Hill, Case No. 18,206.

An attaching creditor of the bankrupt who pays liens upon the attached goods, to save his attachment, must be repaid such amounts by the assignee of the debtor, such attachment having become void upon the bankruptcy of the debtor.—In re Baker, Case No. 762.

The charges of a deputy sheriff for attempting to arrest the debtor, for which there was no apparent necessity, disallowed.—In re Ward, Case No. 17,145.

2. The Right to Prove as Affected by Acts of Creditors.

§ 392. In general.

An attachment by a creditor of the property of his insolvent debtor is not a fraud upon the bankrupt act.—In re Baker, Case No. 762.

Taking property on attachment or execution is receiving a preference, but merely recovering judgment is not.—In re Stevens, Case No. 13,391.

Where a creditor has attempted to obtain a preference over other creditors, by fraudulently increasing the amount of his claim, the whole claim will be rejected.—In re Elder, Case No. 4,326; Marrett v. Atterbury, Id. 9,102.

A judgment in favor of the bankrupt, in a suit commenced by him before the bankruptcy, but tried after the adjudication therein, where the defendant offered no evidence in support of a claim set up in defense as a distinct cause of action, is not an estoppel against proof of the claim by defendant in bankruptcy.—In re People's Safe-Deposit & Savings Inst., Case No. 10,971.

If the guarantors of a note participate in the act by which their principal forfeited his claim against the bankrupt estate, they occupy no better position and cannot prove the same.—In re Ayers, Case No. 685.

Where the holder of a note has forfeited his claim against the estate of the bankrupt maker by taking a preference, the guarantors of such note have no right to prove it against such estate, their liability having been discharged by the principal.—In re Ayers, Case No. 685.

The fact that certain creditors have made a champertous agreement with a third party for the collection of their debts from the bankrupt furnishes no ground for the disallowance of such claims, on petition of a creditor.—In re Lathrop, Case No. 8,103.

A claim for money loaned to a debtor to aid him in the commission of an act of bankruptcy cannot be included among his provable debts.—In re Hatje, Case No. 6,215.

Where a foreign creditor seeks to prove against the bankrupt estate a claim, part of which has been collected in the foreign country by judgment and execution, he must account to the assignee for the property so collected before proving the balance of his claim, where it appears that had such judgment and execution been issued in this country the proceedings would have been stayed, as a foreign creditor cannot claim under the comity of nations to be more favored than the citizens of this country.—In re Bugbee, Case No. 2,115.

Seizure of part of a shipment of goods under the right of stoppage in transitu does not prevent proof of claim as to those delivered.—Bearse v. Ropes, Case No. 1,192.

§ 393. Receiving preference—What constitutes a preference.

A deed of mortgaged land to the mortgagee, where the mortgage amounts to more than its value, cannot be a preference; and the mortgagee, in giving up the deed, is entitled to prove the balance of his debt.—Coxe v. Hale, Case No. 3,310.

The surrender of a policy of insurance under a stipulation giving such right, with a return of part of the premium, is not a preference to the insured.—In re Independent Ins. Co., Case No. 7,019.

A payment or other disposition of property by a debtor, after the petition is filed, is not a preference which will prevent proof of the debt without a surrender.—In re Randall, Case No. 11,552.

An adjustment of accounts between an insolvent debtor and creditor, not followed by any actual change or transfer of property, rights, or credits, to the prejudice of other creditors, is not contrary to the bankrupt act, but it is not binding on the assignee.—In re Comstock, Case No. 3,079.

The assignee under a general assignment for creditors without preferences is not prohibited from proving his debt in bankruptcy.—In re Horton, Case No. 6,707.

A judgment taken with an intention to receive the entire estate for an equal distribution among the creditors, by a creditor who held overdue paper of the debtor, and was informed that they were hard pressed, is a fraudulent preference.—Harrison v. McLaren, Case No. 6,139.

§ 394. —— Effect upon right to prove debt.

A transfer of property by an insolvent trader to a person who had reasonable cause to believe such insolvency, when made with intent to give a preference, precludes the transferee from proving his debt.—Cookingham v. Morgan, Case No. 3,183; Bingham v. Richmond, Id. 1,415.

The knowledge by a creditor, to whom an accommodation note was indorsed by the debtor, that the latter could not pay his debts as they matured, is reasonable cause to believe him insolvent.—In re Shoenberger, Case No. 12,802.

An execution creditor, knowing that his debtor is unable to pay his debts at maturity, is chargeable with knowledge of his insolvency.—In re Forsyth, Case No. 4,948.

A creditor, having before him what the statute declares to be prima facie evidence of fraud, will be deemed to have reasonable cause to be-

lieve in the existence of such fraud, until the presumption is overborne by opposing evidence.—In re Kingsbury, Case No. 7,816.

An act which the statute declares shall be prima facie evidence of fraud must be deemed contrary to its provisions, unless the presumption is repelled by opposing proofs.—In re Kingsbury, Case No. 7,816.

The testimony of the parties to an alleged preferential transaction as to their intention is entitled to little weight against the proof of the transaction itself.—Oxford Iron Co. v. Slafter, Case No. 10,637.

The fact that the preference was taken to preserve the bankrupt's assets, and with the intent of making a distribution of the proceeds of the property pro rata among all the creditors, does not give the creditor a right to prove his claim.—In re Walton, Case No. 17,130.

An attempt to gain a preference which entirely failed will not subject the creditor to the penalty of the statute as one who knowingly receives a preference.—In re Bousfield & Poole Mfg. Co., Case No. 1,703.

A creditor who receives money and goods from his debtor, knowing him to be insolvent, is guilty of obtaining a fraudulent preference, and, if he contests the right of the assignee, he cannot prove his claim.—In re Forsyth, Case No. 4,948.

The holder of a note with security therefor given by the maker to the indorser, the holder having taken it as an incident to the note, which security is rejected as within the prohibition of Act 1867, § 35, will nevertheless be permitted to prove his claim upon the note.—In re Kansas City Stone & Marble Mfg. Co., Case No. 7,610.

A debtor suffers his property to be taken on legal process when he allows it to be seized in execution on a judgment obtained by default.—In re Forsyth, Case No. 4,948.

A second mortgage on a stock of goods, given in place of a mortgage executed two years prior thereto, *held* to supersede the prior lien, and to be a fraudulent preference.—In re Jordon, Case No. 7,529.

A creditor who, having reason to believe that his debtor could not pay his debts in the ordinary course of business, secured from him goods and accounts against third persons to be applied on his debt, and indorsed on his notes sums so received under false dates, and who failed to surrender the property to the assignee, is not entitled to prove his debt, having secured a preference contrary to the provisions of Act 1867.—In re Kingsbury, Case No. 7,816.

Where the transferee of an insolvent has not acted in good faith, he will not be allowed amounts which he paid to obtain the benefit of the transfer.—Cookingham v. Morgan, Case No. 3,183.

The restriction of the proof of a debt of a preferred creditor to a moiety is limited to cases of actual fraud, and not to cases of mere knowledge that a preference was intended. (Act June 22, 1874, § 12).—In re Black, Case No. 1,459.

A mere fraud on the bankrupt law, by accepting a preference in violation of its provisions, is not an "actual fraud," which will prevent proof of the debt, under Act June 22, 1874, § 12.—In re Riorden, Case No. 11,852.

An effort to secure an honest debt from a failing creditor is not an actual fraud, within the meaning of section 5021.—In re Bousfield & Poole Mfg. Co., Case No. 1,703.

Only a moiety of the debt can be proved where the creditor received a preference with knowledge of his debtor's insolvency, and that a fraud on Act 1867 was intended, except in cases of constructive fraud, where he voluntarily restores the preference.—In re Schoenenberger, Case No. 12,473.

A preferred creditor cannot prove his debt, or any part of it, until he has voluntarily or by compulsion surrendered his preference.—In re Currier, Case No. 3,492.

Where there is a surplus in the hands of the assignee after paying all other creditors in full, he cannot object to proof of a claim by a judgment creditor from whom the assignee had recovered as a fraudulent preference the amount collected, before the bankruptcy of the debtor, on the judgment.—In re McGuire, Case No. 8,813.

§ 395. —— Surrender of preference.

Under Act 1867, § 23, a creditor, who voluntarily surrenders to the assignee a preference received contrary to section 39 of such act, may prove his debt.—In re Drummond, Case No. 4,094; In re Montgomery, Id. 9,728; In re Reece, Id. 11,633; In re Scott, Id. 12,518; Coxe v. Hale, Id. 3,310; In re Clarke, Id. 2,843; Zahm v. Fry, Id. 18,198. CONTRA, see In re Colman, Case No. 3,021; In re Princeton, Id. 11,433; In re Walton, Id. 17,130; Bingham v. Frost, Id. 1,413; In re Israel, Id. 7,112.

A mere repayment by a preferred creditor to the debtor, after a petition in bankruptcy is filed, does not take the place of a surrender to the assignee.—In re Currier, Case No. 3,492.

A creditor who has made a full surrender of a fraudulent preference before suit brought against him may prove his claim. After suit brought, and before a recovery, it is discretionary with the court to permit proof of the claim.—In re Stephens, Case No. 13,365.

A preferred creditor may surrender (Act 1867, § 23) at any time before judgment against him in a suit brought by the assignee, and his right to prove his debt will not be affected by the commencement or pendency of such suit.—In re Kipp, Case No. 7,836. CONTRA, see Phelps v. Sterns, Case No. 11,080.

A preferred creditor who surrenders his preference after suit brought by the assignee, and the taking of proofs therein, and a finding against him but before judgment, and pays the taxable costs of the suit on its dismissal, may prove his claim.—Burr v. Hopkins, Case No. 2,192; In re Riorden, Id. 11,852.

There can be no surrender by a creditor of a preference under section 23, after there has been a recovery of the property by the assignee under section 35 or section 39 (Act 1867).—In re Stephens, Case No. 13,365; In re Leland, Id. 8,230; Id. 8,235, affirming Case No. 8,231; In re Cramer, Case No. 3,345; In re Lee, Id. 8,179.

The payment by the creditor of the judgment obtained against him by the assignee does not revive his right to prove against the estate.—In re Davidson, Case No. 3,599; In re Richter's Estate, Id. 11,803; In re Tonkin, Id. 14,094; In re Ayers, Id. 685.

An adjudication which does not give the assignee possession of the mortgaged property, but declares against the validity of the lien of a mortgage, is a recovery by the assignee, within the meaning of Act 1867, § 39, which will prevent the creditors who have received a preference under it from proving their debts.—In re Leland, Case No. 8,230.

Under the amendment of June 22, 1874, § 12, providing that the person receiving a preference with knowledge that a fraud on the act was intended, if a creditor, shall not be allowed to prove for more than a moiety of his debt, a preferred creditor, after recovery against him by the assignee, can prove no part of his debt under any circumstances.—In re Cramer, Case No. 3,345; In re Stein, Id. 13,352; In re Black, Id. 1,459; In re Daken, Id. 3,539.

Under such statute, notwithstanding a recovery against the preferred creditor by the assignee, the creditor may prove his entire debt

if he has not actively assisted in the fraud and has paid the judgment.—In re Newcomer, Case No. 10,148; In re Kaufman, Id. 7,627.

Where such creditors have actively assisted in the fraud he may still prove a moiety of his claim.—In re Kaufman, Case No. 7,627. CONTRA, see In re Cramer, Case No. 3,345; In re Dakin, Id. 3,539.

A decree, in a contest between the assignee and the claimant, on a reference as to surplus proceeds of a foreclosure sale, declaring claimant's mortgage to be in fraud of the act, is binding in the bankruptcy proceedings, and the fact that the claimant's mortgage was declared invalid upon such proceedings does not give the claimant the right to prove his claim, as this did not amount to a voluntary surrender by him.—In re Dakin, Case No. 3,539.

Creditors recovering judgment after the adjudication need not vacate their judgments in order to prove the claims on which they were rendered.—In re Stevens, Case No. 13,391.

A creditor, who has been compelled to repay the amount received as a condition of consenting to a composition, the composition having failed, is entitled to prove his claim, and receive dividends.—Brookmire v. Bean, Case No. 1,942.

§ 396. —— Effect on other claims not preferred.

A creditor receiving a fraudulent preference from the firm of A., B. & C. is not barred from proving another debt against the firm of B. & C.—In re Comstock, Case No. 3,079.

Where a preferred creditor has two separate claims, and receives a preference on one of them alone, he may prove the other without a surrender of the preference.—In re Richter's Estate, Case No. 11,803; In re Holland, Id. 6,604; In re Lee, Id. 8,179.

The fact that an insolvent has preferred a creditor by transferring property to him in satisfaction of a claim due at that time will not debar such creditor from proving other claims against the estate of the bankrupt which were not due at the time of such transfer, and were not in any way secured thereby.—In re Arnold, Case No. 551.

A creditor who secures a preference by obtaining property applicable to his whole debt, and indorses the payment as made only on part of the notes held by him, will nevertheless be prevented from proving his whole debt, and not merely the notes upon which the payment was indorsed.—In re Kingsbury, Case No. 7,816.

An open, running account, for merchandise sold, consisting of various items of charges and credits at different times, is but a single claim, and the receiving of a preference upon such account, which is not surrendered according to Act 1867, § 23, will disentitle the creditor to a dividend on any part thereof.—In re Richter's Estate, Case No. 11,803.

Where a creditor of a bankrupt proved a claim composed of a merchandise account and an accommodation note, and subsequently received payments from the bankrupt on account of the accommodation note, the creditor cannot divide the proofs into two parts, after objection by the bankrupt's assignee that such creditor had received a preference.—In re Barnes, Case No. 1,013.

A retiring partner who receives a fraudulent preference may be allowed to prove such partnership debts as he has paid.—In re Stephens, Case No. 13,365.

3. Rules Applicable to Secured Claims.

§ 397. Who are secured creditors.

A mortgage given by a debtor before his bankruptcy to indemnify a surety will be held by the bankruptcy court to inure to the benefit of the creditors to whom the surety became bound.—In re Pierce, Case No. 11,140.

A banker has no lien upon the moneys of a depositor for any separate debt which the depositor may be owing him, and he must prove his debt with the other creditors.—In re Warner, Case No. 17,177.

The claim of a bank arising out of commercial paper taken by the bankrupt firm, and discounted by it, is not a secured claim, and is not reduced by collections from the makers, not in excess of the balance due after payment of dividends from the bankrupt estate.—In re Weeks, Case No. 17,349.

The joint note of a husband and wife, secured by a deed of trust of the wife's property, should be allowed as a secured claim against the estate of the husband, although the wife may have died leaving heirs. Act 1867.—In re Hartel, Case No. 6,157.

A creditor who has never accepted a deed of trust made to a third person for his benefit, and who disclaims all interest in it, may prove his claim as unsecured.—In re Saunders, Case No. 12,371.

§ 398. Right and duty to prove claims.

As regards proof of debts, secured and unsecured creditors stand upon the same footing.—In re Bowie, Case No. 1,728.

A creditor may be required to prove his debt, reciting the security and setting forth the consideration, and the assignee may contest the claim for any usurious surplus.—Bromley v. Smith, Case No. 1,922.

Where a creditor has a mortgage upon the bankrupt's homestead, he may be required to exhaust that remedy, before he can enforce his other remedies against the bankrupt's estate.—In re Sauthoff, Case No. 12,379.

In the case of obligations loaned by third persons to the bankrupt as security for debts, the creditor will not be required to first exhaust his remedy on them.—In re Sauthoff, Case No. 12,379.

Where a policy of insurance on the bankrupt's life, payable to his wife, is given to a creditor as security for a debt, he will not be required to exhaust his remedy on such policy before resorting to the general fund, as the rights of the wife are superior to those of the assignee in bankruptcy.—In re Sauthoff, Case No. 12,379.

The creditors of a bankrupt having security, whether by judgment, mortgage, or otherwise, must prove their debts against the bankrupt and foreclose their liens under the authority of the bankruptcy court, or they may be barred of their debt and lose the benefit of their securities.—Davis v. Anderson, Case No. 3,623; In re Davis, Id. 3,618.

A secured creditor cannot enforce his security after commencement of bankruptcy proceedings without first proving his debt, and receiving permission of the bankruptcy court.—Lee v. Franklin Ave. German Sav. Inst., Case No. 8,188.

§ 399. Surrender of security.

Creditor holding security from a third person may prove his debt without surrendering it, but otherwise with security from the bankrupt.—In re Babcock, Case No. 696.

Security given by the bankrupt to a surety must be surrendered or applied before he proves his debt against the assets of the principal.—In re High, Case No. 6,473; In re Holbrook, Id. 6,588.

A debt guarantied may be proved as unsecured, without surrendering the guaranty under Act 1867.—In re Anderson, Case No. 350.

Creditors holding notes or bills secured by a mortgage to an accommodation indorser have a lien for securing their payment, and must release their lien before they will be allowed to prove their claims for the whole amount as unsecured. (Act 1867, § 20.)—In re Jaycox, Cases Nos. 7,240, 7,242.

A creditor receiving a negotiable bond from his debtor as security for a loan cannot set up want of title in the debtor and prove its whole debt without surrendering the bond.—In re Norris, Case No. 10,303.

A creditor holding security on property which never belonged to the bankrupt may prove his whole debt without first disposing of the security. (Act 1867, § 20.)—In re Dunkerson, Case No. 4,157.

The amount of a debt, after deducting the value of real estate mortgaged to secure it, and the value of chattels acquired from foreclosure of a chattel mortgage, may be allowed.—In re Cram, Case No. 3,343.

§ 400. Waiver of lien or security by proving claim.

Proof of a judgment debt waives the lien.—Briggs v. Stephens, Case No. 1,873.

A creditor, ignorant of his legal rights, will not be held, in the absence of proof of fraud, to intend what his innocent acts imply, particularly if acting in a fiduciary capacity.—In re Brand, Case No. 1,809.

Where a mortgage, pledge, or lien is given by a principal debtor to secure his surety, and both become insolvent, and the holders of such debts prove in full against both estates and vote under both bankruptcies, they thereby waive their security.—Ex parte Morris, Case No. 9,823.

An existing lien upon specific property may be preserved by proving the claim in bankruptcy, and having the lien allowed.—Bucknam v. Dunn, Case No. 2,096.

§ 400a. Proof of deficiency.

Security held by a creditor may be taken by him at its value as found by the bankruptcy court, and his claim proved for the balance, or it may be sold under order of such court. This is a matter resting within its discretion.—In re Grant, Case No. 5,690.

A creditor having a lien on property is admitted as a creditor only for the balance of the debt after deducting the value of the property.—In re Winn, Case No. 17,876.

A creditor, who has a security for his debt, may prove his claim for the overplus, without abandoning the security, but must set forth the value of the security.—In re Bolton, Case No. 1,614.

One owning a debt secured by an insurance policy on the life of the bankrupt is entitled to prove the amount of the debt less the surrender value of the policy.—In re Newland, Case No. 10,170.

Where an insurance policy for $4,000 on the life of the bankrupt is set forth in his lists of debts as security for a debt of $4,000, upon which $550 has been paid before the bankruptcy, and the debt is proved for $3,450, and the surrender value of the policy at the time is credited on the debt by order of court, and a dividend is subsequently paid, and the holder of the policy keeps it alive by paying premium, and before another dividend is paid the bankrupt dies, the debt must be charged at its original amount, without deducting the surrender value, with interest, and the payments must be credited with interest, and the amount received on the policy must be applied to extinguish the balance due on the debt, the creditor having credit for all premiums paid by him after the petition in bankruptcy was filed, and out of the balance, if any, the assignee must be refunded the $550 and the dividend, with interest.—In re Newland, Case No. 10,171.

Where the bankrupt has given a mortgage to secure accommodation notes and indorsements by the mortgagee, the holders of the paper are entitled to prove the balance of their debt after sharing pro rata in the proceeds of the mortgaged property.—Ex parte Dalby, Case No. 3,540.

§ 401. Proof of debt as unsecured.

Where the proof of a debt states that the sum claimed is the amount of the judgment, setting forth the particulars of the judgment, and states that its consideration is goods sold, and that for the sum claimed no security has been received, but the proof does not state that the judgment is a lien upon real estate, when in fact it is, the debt is not proved as unsecured, and the security of the lien of the judgment is not surrendered to the assignee.—Sedgwick v. Stewart, Case No. 12,625.

A mortgage securing a note is not extinguished by proving the note as unsecured, but the assignee is subrogated to the rights of the holder.—Hiscock v. Jaycox, Case No. 6,531.

A creditor proving a claim as unsecured will be required to relinquish all security held by it.—In re Granger, Case No. 5,684.

A creditor proving his whole debt as unsecured, without disclosing the security, waives his lien.—In re Brand, Case No. 1,809.

Where a creditor, without any fraudulent intent, has, in ignorance of his rights, proved a secured claim as unsecured, he will be allowed to amend by setting up his security.—Ex parte Harwood, Case No. 6,185; Ex parte Lapsley, Id. 8,083; In re Clark, Id. 2,806; In re Hope Min. Co., Id. 6,681; In re Jaycox, Id. 7,242; In re McConnell, Id. 8,712.

A secured creditor proving his claim as unsecured will be allowed to amend, after receipt of dividend, only in the case of mistake or ignorance, in the absence of fraud, where all persons can be placed in statu quo.—In re Parkes, Case No. 10,754.

Creditors who are also debtors to the bankrupt in an amount less than their claim will be allowed to withdraw their proof, pay back a dividend received, and file new proof of their claim as secured, to the extent of the amount due from them, after a suit brought by the trustees to recover the amount due from such creditors, on their averring that they had never intended to claim any more than the difference.—In re Kaufman, Case No. 7,626.

§ 402. Proof of debt secured.

A creditor secured by a deed of trust, who has caused the property to be sold after petition filed, may thereafter prove his debt as a secured debt.—In re Ruehle, Case No. 12,113.

A bank having lien under its by-laws on stock for indebtedness of a stockholder should prove its debt as secured, and obtain leave to sell the stock to apply thereon.—In re Morrison, Case No. 9,839.

A creditor holding a trust deed to another as security must prove his debt as a secured debt, and obtain permission of the court to sell the property.—In re Needham, Case No. 10,081a.

4. AMOUNT.

§ 403. How determined in general.

The creditor and the bankrupt cannot submit to arbitration the question of the amount due from the bankrupt's estate.—In re Ford, Case No. 4,932.

§ 404. As affected by date of accrual.

A note which falls due after the filing of the petition is not a provable debt for its face val-

ue at the date of such filing.—In re Riker, Case No. 11,833.

§ 405. Demand note, etc., purchased at discount.

The father of the bankrupt, being assignee of his estate, under a voluntary assignment, cannot purchase debts owing by the bankrupt, at a discount, with the trust funds, and hold them, as against other creditors, for their face value.—In re Houghton, Cases Nos. 6,727, 6,728.

An agent of the bankrupts who purchases their note from creditors for less than its face cannot prove for the balance.—In re Lathrop, Case No. 8,103.

A settlement between the pledgee and the insolvent pledgor, by which notes are taken as payment for a certain sum, will not prevent proving them for their face value against the estate of the bankrupt makers.—Ex parte Kelty, Case No. 7,681.

An indorsee before maturity of a negotiable note, without notice of existing equities in New York, can only prove against the estate of the maker the amount paid therefor.—In re Shelbourne, Case No. 12,745.

Where a mortgage is given to indemnify the mortgagee for his advances, and he loans his acceptances to the mortgagor, and after the bankruptcy of the latter buys up the paper at a discount, he can charge against the mortgaged property only what he paid in cash to take up the acceptances.—Ex parte Ames, Case No. 323.

§ 406. Interest on claim.

The amount proved should not include interest beyond the day of adjudication.—In re Bugbee, Case No. 2,115; In re Haake, Id. 5,883.

A secured creditor may, however, apply the proceeds of his security to the satisfaction of his debt, principal and interest, up to the time of payment, when so stipulated in his contract.—In re Haake, Case No. 5,883.

Claims purchased for the purpose of stopping proceedings against the bankrupt should be proven as of the date of adjudication, but may draw interest to date of actual payment.—In re Strachan, Case No. 13,519.

Creditors, who have proved their claims against the estate of a bankrupt, are entitled to interest on their claims from the filing of the petition to the date of payment, if the bankrupt's estate is sufficient to pay the same to all.—In re Hagan, Case No. 5,898; In re Town, Id. 14,112; In re Bank of North Carolina, Id. 895, reversing Case No. 894.

Separate creditors are not entitled, as against firm creditors, to be paid interest on their debts subsequent to the adjudication.—In re Berrian, Case No. 1,351.

A claim upon the judgment obtained by the United States against the bankrupt, after the commencement of proceedings in bankruptcy, will be allowed, together with the costs and interest to the date of payment.—In re Bousfield & Poole Mfg. Co., Case No. 1,704.

Interest will not be allowed where the debt depends upon a new promise.—In re Reed, Case No. 11,635.

The rule in Illinois that, where a debt is usurious, the creditor forfeits all the interest, will be enforced in the bankruptcy court, when a creditor offers such debt for proof.—In re Prescott, Case No. 11,389.

§ 407. Part payment of claim.

The holder of a note may prove the entire amount against the maker's estate, though he has been partly paid by the indorser.—In re Ellerhorst, Case No. 4,381.

The holder of a note made by the bankrupt, who received from an indorser part payment in release of his liability, must prove the whole note, as he is a trustee for the indorser.—In re Souther, Case No. 13,184.

The receipt of partial payment from an accommodation acceptor after the bankruptcy of the drawer does not prevent the holder from proving the full amount due at the time of the adjudication.—Downing v. Traders' Bank, Case No. 4,046.

Holder of a draft may prove for whole amount against drawer's estates, though he has been paid in part by acceptor whom he has released, and who in turn released drawer.—In re Baxter, Case No. 1,120.

The holders of a note, who have received a dividend from the estate in bankruptcy of the maker, can prove only the balance against the estate in bankruptcy of the indorser.—In re Howard, Case No. 6,750.

The holder of a note, who receives payment from the maker before submitting proof against the estate of the indorser, can only prove for the balance; otherwise where he receives payment after the affidavit is filed.—Ex parte Harris, Case No. 6,109.

A surety who pays the debt of a bankrupt principal can only prove the difference between the debt and the amount realized on securities held by him as indemnity.—In re Baldwin, Case No. 796.

A creditor selling a note of the bankrupts to their agent for less than its face, intending to compromise his claim, cannot prove for the balance.—In re Lathrop, Case No. 8,103.

§ 408. Note held as pledge.

A pledgee in good faith and for value before maturity of promissory note can receive dividends from the estate of the bankrupt makers only for the amount for which he holds them in pledge, where the equities between the original parties would prevent the pledgor from proving them.—Ex parte Kelty, Case No. 7,681.

5. SET-OFF.

See, also, post, § 492.

§ 409. When allowed in general.

The acceptor or indorser of a bill of exchange, who pays it after the bankruptcy of the drawer, may offset the same against the bankrupt's assignees, if the debt was subsisting when the action was brought.—Marks v. Barker, Case No. 9,096.

Nothing can be set off, under Rev. St. § 5073, against the principal of a debt due a creditor, except a debt due from the creditor to the bankrupt.—In re Purcell, Case No. 11,470.

A set-off cannot be allowed in the case of a fiduciary relation between the bankrupt and a creditor.—Scammon v. Kimball, Case No. 12,435.

A note which is subject to an offset for a larger amount is not a provable debt.—In re Ford, Case No. 4,932.

In the case of accommodation notes given by the bankrupt to a creditor, and afterwards proved against the estate by the holders, the dividend paid upon the notes may be set off against the dividend due such creditors.—In re Purcell, Case No. 11,470.

Where bankrupts, as agents of a corporation, consign goods to a firm for sale, and prior to the receipt of the goods such firm has accepted and paid drafts of the bankrupts to an amount exceeding all their consignments, such transaction is not a payment which will discharge the firm from liability for the proceeds of the goods, as such firm could not apply such proceeds of the goods of the corporation to the

payment of a debt due to them from the bankrupts.—In re Baxter, Case No. 1,119.

Where no notice is taken of a seller's letter refusing to deliver goods on credit as agreed unless an old debt were paid, and the buyer goes into bankruptcy, and his assignee does not offer to complete the contract, the notice does not constitute such a repudiation of the contract as will authorize its value being set-off against the seller's old debt.—In re Wheeler, Case No. 17,488.

A debtor of a bankrupt who accepts a transfer of the bankrupt's note, without any stipulation concerning the terms of such transfer, holds the same merely as a trustee, and cannot set it off against the debt due by him to the bankrupt.—In re Lane, Case No. 8,043.

The bailee of an insolvent's goods, who, before a petition in bankruptcy was filed, employed the debtor to assist in the management of the goods, is entitled to a credit for the amount paid therefor, as against the assignee in bankruptcy.—Catlin v. Foster, Case No. 2,519.

A court of equity may disallow a set-off of a claim against the bankrupt, when it would work injustice (Act 1867, § 20).—Hitchcock v. Rollo, Cases Nos. 6,535, 6,536.

An order expunging a claim against the bankrupt, where the creditor did not appear before the register, is not such an adjudication thereof as to prevent the creditor from pleading it as a set-off in an action by the assignee.—Catlin v. Foster, Case No. 2,519.

A claim for a loss under an insurance policy may be set off against an indebtedness to the bankrupt insurance company under Act 1867, § 20, though such set-off gives a preference, as the rights of the parties are to be determined by the business relations of the parties at the time of the loss, and, where the indebtedness is not due, a bill in equity will lie to establish the set-off.—Drake v. Rollo, Case No. 4,066.

A claim against an insolvent insurance company for loss under its policies cannot be set off against an unpaid subscription to its capital stock, where it is insolvent.—Sawyer v. Hoag, Case No. 12,400; Scammon v. Kimball, Id. 12,435.

Stockholders of an insolvent corporation who are also creditors cannot be allowed to deduct the amount due them from their respective proportions of the unpaid capital.—Wilbur v. Stockholders, Case No. 17,636.

A defendant cannot, under the bankrupt law of 1800, set off a debt due to him from a partnership against a claim by the assignee of one of the firm who became bankrupt.—Oxley v. Tucker, Case No. 10,638.

A creditor who has proved his claim in bankruptcy may withdraw the same, and plead it as an offset, in a suit brought by the assignee against him. (Rev. St. §§ 5073, 5105.)—Harmanson v. Bain, Case No. 6,073.

A creditor collecting money for his debtor, and failing to pay it over, has no priority over other creditors.—Bank of Commerce v. Russell, Case No. 884.

§ 410. Bank deposits.

A deposit in a bank becomes, upon the bankruptcy of the depositor, a security for, and payment pro tanto of, his liabilities to the bank, by the operation of the law of mutual credits.—Hough v. First Nat. Bank, Case No. 6,721; Ex parte Howard Nat. Bank, Id. 6,764.

A bank holding an indorsed note may set off the same against the general deposit account of the maker, under Act 1867, § 20.—Blair v. Allen, Case No. 1,483.

A bank has the right to set off, against a deposit account of the bankrupt, a draft of the bankrupt maturing after his failure, and before he was declared a bankrupt.—In re Petrie, Case No. 11,040.

But a liability as indorser, where the principals are solvent, cannot be set off against such deposit.—Ex parte Howard Nat. Bank, Case No. 6,764.

§ 411. Claims purchased.

One who purchases a negotiable note after a commission of bankruptcy has issued may prove the same, subject to all legal set-offs existing at the time of the bankruptcy.—Humphreys v. Blight's Assignees, Case No. 6,870.

A bond due from a bankrupt to defendant cannot be set off against defendant's note to a third person, assigned to the assignee in bankruptcy after commission issued.—McIver v. Wilson, Case No. 8,833.

A claim against the bankrupt purchased before the filing of the petition, but with full notice of insolvency, and with intent to use the same as a set-off, is available for that purpose to the purchaser, under Act 1867, § 20.—In re City Bank of Savings, Loan & Discount, Case No. 2,742; Hovey v. Home Ins. Co., Id. 6,743. CONTRA, see Hitchcock v. Rollo, Cases Nos. 6,535, 6,536; Sawyer v. Hoag, Id. 12,400.

The amendment of June 22, 1874, § 6, providing that, in case of compulsory bankruptcy, no offset shall be allowed of a claim purchased or transferred after the act of bankruptcy in respect of which the adjudication shall be made, and with a view of making such set-off, does not apply to voluntary bankruptcy; and a claim purchased with full knowledge of insolvency of the bankrupt, and with intent to use the same as a set-off, is available in a voluntary proceeding.—Lloyd v. Turner, Case No. 8,436.

Under such amendment, equity will not aid a person indebted to the bankrupt to set off against his indebtedness a demand which he bought after knowledge of the general suspension of commercial paper, though the purchaser denies that he bought the same with intention of using it as a set-off—Hunt v. Holmes, Case No. 6,890.

Under such amendment, a debtor buying a claim against the bankrupt before bankruptcy proceedings are commenced against him, but with knowledge of insolvency and contemplated bankruptcy, cannot set off the same against his debt.—Mattocks v. Lovering, Case No. 9,299; Rollins v. Twitchell, Id. 12,027.

A debtor of the bankrupt who has purchased negotiable notes of the bankrupt, after his insolvency, but without notice thereof, and before the filing of an involuntary petition against him, may, under such amendment, set off such notes against his debt.—Mattox v. Cady, Case No. 9,301.

One purchasing a grain-storage receipt issued by an insolvent milling company, without knowledge of the insolvency, and who is refused delivery of the grain on presenting his receipt, is entitled to set off the value of the grain thus converted, in an action against him by the assignee to recover assets.—McCabe v. Winship, Case No. 8,668.

One to whom a bankrupt is indebted for money advanced, and who, before the bankruptcy, has purchased a note of the bankrupt, having in his possession at the time of the bankruptcy goods of the bankrupt, consigned to him for sale, may sell the goods, and, as against a claim for the proceeds, set off his claims against the bankrupt, under Rev. St. § 5073, as amended by Act 1874.—Goodrich v. Dobson, Case No. 18,297.

§ 412. Amount of set-off.

Where a negotiable note is payable in greenback currency, and the payee's other debtors are in the habit of paying in the payee's depreciated certificates of indebtedness, the rate at which the maker may set off such certificates, held by himself, is their market value at the time the note matured.—Harmanson v. Bain, Case No. 6,073.

6. PROCEDURE.

§ 413. Power of register in general.

Where a question of law or fact is raised in respect to the sufficiency of proof of a debt, it must be certified for the decision of the judge.—In re Bogert, Case No. 1,598.

A claim by petitioning creditors for counsel fees incurred before adjudication must be first presented to the court by petition.—In re Dibblee, Case No. 3,886.

Assignee ordered to furnish bankrupt a list of creditors who have proved debts.—In re Blaisdell, Case No. 1,488.

Form of relief of creditors of a corporation, where the bankrupts hold its unpaid stock, and the corporation has not made assessments thereon.—Gibson v. Lewis, Case No. 5,398.

§ 414. Before whom proof to be made.

The clerk of the district court, who is a standing commissioner, cannot take proof of debts, under Act 1841.—In re Gaylor, Case No. 5,282a.

Although the bankruptcy proceedings have been stayed, having been superséded by arrangement under Act 1867, § 43, the sole power to admit claims against the bankrupt's estate is not vested in the trustees under the arrangement, but they should be proved before the register.—In re Bakewell, Case No. 788.

Debts due to creditors residing within the district where the proceedings are pending must be proved before a register of the district. A commissioner of the circuit court cannot take such proof under Act 1867.—In re Strauss, Case No. 13,532; In re Haley, Id. 5,918.

Under the amendment of July 27, 1868, a debt may be proved before a United States commissioner, whether the creditor resides in the district where the proceedings are pending or another district.—In re Shepard, Case No. 12,753; In re Merrick, Id. 9,463.

The deposition of a creditor residing in another district must be taken before a register in that district; and, where residing in a foreign country, before a minister, consul, or vice consul of the United States, under Act 1867.—In re Strauss, Case No. 13,532.

Proof of debt in a foreign country can only be taken before one of the officers named in Rev. St. § 5079, and not before a consular agent.—In re Lynch, Case No. 8,635.

Proof of claim cannot be made before a notary.—In re Strauss, Case No. 13,532.

Proofs of debt taken before the attorney of the creditor are not admissible.—In re Nebe, Case No. 10,073.

Proof taken before a notary public, who is the attorney and solicitor of record for the bankrupt, will not be allowed to be filed.—In re Keyser, Case No. 7,748.

§ 415. Time of making proof.

In involuntary proceedings, the petitioning creditors on whose motion an order to show cause has been issued need not prove their debts anew.—In re Scott, Case No. 12,519.

Proof of claims may be filed after an order discharging the assignee has been set aside and the assignee ordered to proceed.—In re Maybin, Case No. 9,337.

A creditor may prove a debt and receive dividends at a fourth general meeting of creditors, called five years after the bankrupt's discharge, for the purpose of declaring a dividend from assets unexpectedly realized.—In re Robinson, Case No. 11,941.

§ 416. Form and sufficiency of deposition.

Creditors must prove their debts absolutely, without any protest or qualification or reservation.—Dutton v. Freeman, Case No. 4,210.

A claim is not duly proved, and must be rejected, unless it appears from the statement of the deponent thereto that a debt exists which the creditor has a present right to have paid out of the bankrupt's estate.—In re Walton, Case No. 17,129.

Proof of debt founded on a promissory note must set forth the consideration of the note, and whether any payments have been made on it.—In re Loder, Case No. 8,456.

A bona fide holder of commercial paper acquired before maturity may prove the same on showing that he paid a valid consideration, without showing the consideration between the original parties (Act 1867, § 22).—In re Lake Superior Ship-Canal, Railroad & Iron Co., Case No. 7,998.

In proving a claim founded upon a note in which only the initials of the Christian names are given the full names must appear.—In re Valentine, Case No. 16,812.

A lien creditor must disclose the particular character of his lien.—In re Bridgman, Case No. 1,866.

The particulars of the consideration must be stated in the deposition.—In re Elder, Case No. 4,326.

A demand by its terms payable in gold coin should be proved according to its terms.—In re Elder, Case No. 4,326.

A deposition filed by a creditor, setting forth a claim for breach of contract, but not asking for assessment of the alleged damages, is not due proof of the debt.—In re Clough, Case No. 2,905.

Proof of a debt in the case of a bankrupt firm should show with reasonable certainty whether it was contracted by the firm or the individual partners.—In re Walton, Case No. 17,129.

A nonnegotiable chose in action may be proved by the deposition alone of the assignee thereof, but such deposition should show the name of the original creditor to enable the assignee in bankruptcy to compare the debt with the books of the bankrupt.—Ex parte Davenport, Case No. 3,586.

A deposition by the debtor that he believes the account against him to be correct is admissible.—Cambioso v. Maffet, Case No. 2,330.

Depositions to prove claims must contain the averments required by Rev. St. § 5077, and must be made by the party authorized, and conform substantially to the prescribed forms.—In re Port Huron Dry Dock Co., Case No. 11,293.

A proof of debt in the mode required by the statute establishes a prima facie case, though it is subject to objection and counter proof.—In re Saunders, Case No. 12,371.

Informality in proofs will not avail where the creditor, as a witness, has sworn positively of his own knowledge.—McKinsey v. Harding, Case No. 8,866.

§ 417. Who may make deposition.

A person who has transferred a claim against the bankrupt cannot prove it for the true owners.—In re Ford, Case No. 4,932.

A member of a bankrupt firm cannot represent claims against the estate.—In re Mitteldorfer, Case No. 9,674.

Claims against the bankrupt estate may be proved by attorney.—In re South Boston Iron Co., Case No. 13,183.

A creditor cannot prove by an attorney testifying upon information and belief, unless he is prevented from giving the affidavit, as provided by Act March 2, 1867, § 22.—In re Barnes, Case No. 1,012.

The absence of a claimant, which will render a proof of debt by an agent admissible, must be "from the United States"; nor will the oath of an agent that he is better acquainted with the facts than his principal render the deposition of the agent alone admissible as proof of debts.—In re Whyte, Case No. 17,606.

Proof of debt may be made by an agent who has had exclusive charge and control of the same, and knows personally all the facts required to be sworn to in proving it, the creditor himself having no personal knowledge of the facts.—In re Watrous, Case No. 17,270.

Officers of corporations, to make proof of debts due from a bankrupt, must receive special appointment for that purpose, under Act 1841.—Albany Exch. Bank v. Johnson, Case No. 133.

The fact that the president of a corporation had ceased to be a stockholder cannot be raised as an objection to proof of a claim by him in favor of the corporation against his estate in bankruptcy, under Act 1867.—In re Morgan, Case No. 9,797.

The receiver of the property of a creditor is an assignee of a debt due to such creditor, and may prove the debt, supported by the deposition required by general order No. 34.—In re Mills, Case No. 9,612.

Claims of a corporation may be proved by a receiver appointed by the state court on its dissolution.—In re Republic Ins. Co., Case No. 11,705.

A receiver of a bankrupt corporation can prove a debt due the corporation against a bankrupt in a bankrupt court in another state.—Ex parte Norwood, Case No. 10,364.

§ 418. Signatures and authentication.

The omission of the commissioner who took the deposition in proof of debts to sign the jurat may be supplied.—In re McKibben, Case No. 8,859.

Proof of debt taken before a notary must be authenticated by his official seal, which must be sufficient to prove itself.—In re Nebe, Case No. 10,073.

§ 419. Receiving and filing.

All proofs of debts must be sent to the assignee for him to register, as required by Act 1867, § 22, and thereafter returned to the register, and filed in the clerk's office with the other papers, under general order No. 7.—Anonymous, Case No. 461.

The bankruptcy court cannot refuse to receive a proof which appears on its face to have been taken by a proper officer, and to be correct in form and substance.—In re Merrick, Case No. 9,463.

A register need not file a deposition for proof of debt taken and certified to before another register, which does not appear to him to be in conformity with law, but should adjourn the issue into court, under section 4, Act 1867.—In re Loder, Case No. 8,456.

The debt is not considered as proven where the creditor retains possession of his deposition.—In re Shepard, Case No. 12,753.

Receiving and filing a proof confers jurisdiction over the claim, but concludes nothing, and the court may still revise, correct, or reject it.—In re Merrick, Case No. 9,463.

It is not the duty of the register to notify the bankrupt or his attorney of the filing of proof of any claim before the first meeting of creditors.—In re Patterson, Case No. 10,814.

§ 420. Amendment of proof.

A creditor may correct clerical errors in his proof of claim at any time before final dividend.—In re Myrick, Case No. 10,000.

Where a creditor filed his proof of debt on May 28, 1869, and in October, 1869, was examined by the assignee, and he afterwards applied to amend his proof, his application was granted, although it was opposed by the assignee on the ground that the application was too late.—In re Montgomery, Case No. 9,729.

An application to amend proof of claims on two notes so as to show that a new note had been given in settlement will be denied, as a new claim may be proved on the new note.—In re Montgomery, Case No. 9,731.

§ 421. Withdrawal of proof.

The register cannot order or permit the withdrawal of proof of a debt after he has passed upon it, and allowed, certified, and transmitted the claim to the assignees.—In re McIntosh, Case No. 8,826.

A creditor cannot withdraw his proof of debt, though he can have leave to withdraw the instrument by which it is evidenced. Act 1867, § 24.—In re Emison, Case No. 4,459.

Where proof of a debt was made under a mistake of law or fact, the creditor will be permitted to withdraw it, but only where all parties will be restored to their original position.—In re Hubbard, Case No. 6,813.

When the proof of debt made by a creditor against a bankrupt contains mistakes, the proof cannot be withdrawn, but the creditor will be allowed and required to amend his proof.—In re Lowerre, Case No. 8,577.

After leave has been granted to creditors to amend their proofs of debt, they cannot be withdrawn by such creditors.—In re Hallie, Case No. 5,960.

The court will not grant leave to withdraw a proof merely for the purpose of allowing a creditor to continue an arrest of the bankrupt which was made before commencement of the proceedings in bankruptcy.—In re Wiener, Case No. 17,620.

§ 422. Expunging proof.

Where it appeared that the amount and nature of the claim were incorrectly entered upon the books, though the proof itself and the dividend sheet correctly stated it, and a dividend had been paid upon due notice, a motion to expunge the proof of such claim on the grounds of such incorrect statement, and that it was barred by the statute of limitations, will be denied, as the inaccuracy of the record in regard to the claim was not a sufficient ground, and the statute of limitations did not apply.—In re Alden, Case No. 151a.

A claim founded upon notes indorsed by a bankrupt will not be expunged where it appears that they were negotiated for the bankrupt's sole benefit, notwithstanding they were made payable "in gold, or Canada currency."—In re Granger, Case No. 5,684.

Where a debt founded on a judgment is offered against the estate of a bankrupt, and it appears that, subsequent to the presentation of the proof of such debt, the court in which the judgment was entered had set it aside, the proof of such debt will be expunged.—In re Bruce, Case No. 2,044.

A claim may be expunged where proved after the determination by the district court, in a proceeding to which the creditor was a party, that he had received a fraudulent preference, and was disabled to prove any part of his debt. Case No. 8,231 affirmed.—In re Leland, Case No. 8,235.

Where a debtor, holding the legal title to a note as trustee, deducts a debt due from himself to the bankrupt, and proves for the remainder, the proof may be expunged without prejudice to his proving the whole note as trustee.—In re Lane, Case No. 8,043.

On motion to expunge a proof of debt and to establish a set-off, personal judgment cannot be rendered against the creditor for money in his hands.—In re Forbes, Case No. 4,922.

The register has no power to expunge or diminish the claim of a creditor if the creditor objects, but must require the parties to form an issue to be certified to the court (General Order No. 34).—In re Muldaur, Case No. 9,906.

The bankruptcy court may refer to the register a petition of a creditor praying that the proof of claim of another creditor be expunged on account of matters occurring since the claim was proved.—In re Loring, Case No. 8,512.

Where the testimony of the bankrupt is desired on a motion to expunge proof, he should be summoned as a witness.—Canby v. McLear, Case No. 2,378.

On the hearing of a motion to expunge a proof, the moving party is entitled to open and close. —Canby v. McLear, Case No. 2,378.

The answer to a petition to expunge proofs cannot be used as evidence in the proceeding. —Canby v. McLear, Case No. 2,378.

Papers annexed to an answer to a petition to expunge proofs must be proved in the usual manner, to be used as evidence.—Canby v. McLear, Case No. 2,378.

§ 423. Objections.

Before one creditor can be admitted to examine the rights of another creditor, he must prove his debt. If the proof is not sufficient, it is amendable.—Dutton v. Freeman, Case No. 4,210.

Creditors who have proved their debts may serve on the register a protest against the proof of any claims by certain other creditors, and request to be notified if any such claims are pending.—In re Smith, Case No. 12,971.

One creditor may, without the consent of the assignee, intervene and oppose the allowance of the claim of another alleged creditor.—In re Joseph, Case No. 7,532. CONTRA, see In re Randall, Case No. 11,552.

An application to contest a claim against bankrupt's estate will be allowed upon a petition and affidavits stating fully and in detail the grounds upon which such application is based. —In re Overton, Case No. 10,625.

Objections to proof of a claim must be made by written allegations, specifying with reasonable certainty the ground of such objection.—In re Walton, Case No. 17,128.

A proof of debt is not open to objection because it appears that the statute of limitations, if set up, would be a bar.—In re Knoepfel, Case No. 7,892.

The assignee may set up the defense of usury against a creditor of the estate.—In re Moore, Case No. 9,752.

The order to show cause why the proof of debt should not be vacated on objection by a creditor must be made by the court, and not by register.—In re Comstock, Case No. 3,071.

On a trial of a claim upon a judgment, matters which were available to the bankrupt as a defense in the original suit cannot be set up.—Stillwell v. Walker, Case No. 13,451.

The objections to the claim of a creditor will be considered as admitted where he fails to appear and submit to an examination under an order therefor given in accordance with general order 34.—In re Lount, Case No. 8,543.

A proof of a claim, which has been postponed by the register until after the election of an assignee, is then to be treated as if it had not been tendered before the election of the assignee.—In re Herrman, Case No. 6,425.

The remedy of the assignee in the case of a usurious contract is to require the creditor to prove his debt in the usual form, reciting the security and setting forth the consideration, when he may contest the claim for any usurious surplus.—Bromley v. Smith, Case No. 1,922.

§ 424. Evidence and witnesses.

A claim founded upon accounts current between the bankrupt and his creditors, and upon a comparison of those accounts current and the correspondence and books of the bankrupt, by the agent of the latter who kept those books, is provable.—In re Stanton, Case No. 13,295.

A note evidencing a debt must be produced when required by the assignee, register, or the bankrupt. Not so, however, if the note has been merged in a judgment.—In re Knoepfel, Case No. 7,892.

Promissory notes cannot be properly proved without their production or proof of their loss.— In re Jaycox, Case No. 7,240.

To prove a claim by the United States for the value of goods forfeited for violation of the customs laws, books and papers of the bankrupts, seized under a warrant issued under Act 1867, § 2, are admissible.—In re Vetterlein, Case No. 16,929.

In bankruptcy proceedings the United States laws, and not the state laws, apply with respect to excluding a witness on the ground of interest.—In re Merrill, Case No. 9,466.

Under Rev. St. § 858, state laws in force prior to December 1, 1873, are rules of decision in the federal courts as to the competency of witnesses, and a bankrupt may testify to support a claim of his wife against the estate, where such testimony would be competent under Act Pa. April 15, 1869.—In re Bean, Case No. 1,166.

A creditor, though the wife of the bankrupt, is a competent witness to support her claim.—In re Richards, Case No. 11,770.

The testimony of a bankrupt husband will not be admitted to prove a claim by his wife against his estate for a sum loaned to him out of her separate estate.—In re Bechtel's Case, Case No. 1,204.

A creditor is a competent witness to prove a contract under which his claim arose, though the bankrupt has since died; and such witness cannot be excluded on the ground of interest, under Rev. St. § 858, as the proof of a debt is a proceeding in rem, and is not an action against the bankrupt or his personal representatives.— In re Merrill, Case No. 9,466.

A bankrupt is a competent witness where a claim against his estate is contested, though the creditor is dead, and the claim is presented by his executor.—In re Moore, Case No. 9,752.

§ 425. Hearing and determination.

When written objections to a proof are filed with a register, and testimony is taken, he must, if requested by either party, certify the same to the district judge for decision.—In re Clark, Case No. 2,808.

Claims previously determined by courts having jurisdiction cannot again be tried in the bankruptcy court, under Act 1867, § 1.—The Ironsides, Case No. 7,069.

Where, on a reference to take proof of a claim, it appears that the claim has already been proven, and not objected to, the reference should not proceed.—In re Baldwin, Case No. 795.

On a claim by one member of a syndicate of banking firms against the estate of a bankrupt

member, the court will examine into the accounts of all the members, in order to make a definite allowance against the bankrupt's estate.—In re Cooke, Case No. 3,170.

Where proof of an indebtedness has been disallowed, a retransfer by the creditors of collaterals which secure such indebtedness will not be ordered.—Dallas v. Flues, Case No. 3,544.

The submission of a claim by stipulation to the register to hear and determine does not make his decision final, as a reference under the New York Code.—In re Ford, Case No. 4,932.

The wife may submit voluntarily to the adjudication by the bankruptcy court of her specific claim to a settlement out of the bankrupt's estate, and the assignee and creditors who had opportunity to present evidence and arguments before the register, and to file exceptions, must be held to have had their day in court, and they have no right to insist that the wife should have a plenary proceeding in another court.—In re Campbell, Case No. 2,348.

§ 426. Re-examination of claim.

An order of the district court for the payment of a claim, made without notice to the assignee, will be reversed to allow him to contest the claim.—In re Mitteldorfer, Case No. 9,674.

The register has no power, against objection of parties, to require issues framed as to the re-examination of a claim until it appears that the claim ought to be expunged or diminished.—In re Aspinwall, Case No. 590.

An order for re-examination of claims made by the register without objection cannot be revoked by him upon its return.—In re Aspinwall, Case No. 590.

Creditors are in a position to ask the register to permit a re-examination of claims until a petition for such re-examination has been filed in compliance with the provisions of general order No. 34.—In re Tifft, Case No. 14,029.

On the re-examination of a claim, proof of which has once been certified as satisfactory, the creditor makes out a prima facie case by offering himself for examination and if the assignee wishes to contest the proof he must introduce opposing evidence.—In re Robinson, Case No. 11,938.

A creditor who has required the re-examination of a claim will not be heard to object that the counsel for the bankrupt also appears as counsel for the claiming creditor.—In re Morgan, Case No. 9,798.

The right of a corporation to continue its existence cannot be determined on the re-examination by the register of its claim against the estate of its bankrupt president.—In re Morgan, Case No. 9,797.

Where a receiver is allowed to amend his proof of claim by producing a deposition of an officer of the corporation, a deposition of the treasurer, taken on re-examination of the claim, may be filed by leave of the court with the same effect as if originally made as a deposition under general order No. 34.—In re Baxter, Case No. 1,121.

§ 427. Rehearing or review.

The district court has power upon petition of a contesting creditor to reverse the decision of an assignee rejecting his claim.—In re Mitteldorfer, Case No. 9,674.

A reargument or rehearing in the district on the report of a referee allowing the claim of a creditor will not be granted after separate exceptions and appeals by a contesting creditor and the assignee have been decided against them.—In re Troy Woolen Co., Case No. 14,200.

The filing of a statement of the claim within 10 days after giving notice of appeal from the decision rejecting the claim, under general order No. 26, is not a jurisdictional requisite.—Fellows v. Burnap, Case No. 4,721.

7. PRIORITIES AND DISTRIBUTION.

§ 428. Priorities in general.

When property passes to an assignee in bankruptcy, it is appropriated to the use of the bankrupt's creditors, as between them and creditors having equal equities therein before it passed to such assignee.—Aiken v. Edrington, Case No. 111.

The bankruptcy court has no power to discriminate between different classes of debts of the same legal character. (Rev. St. § 4972.)—In re Merriman, Case No. 9,479.

Agreement by assignees to give a preference when valid.—Blight v. Ashley, Case No. 1,541.

The rights of creditors, after a surrender of the assets to the assignee in bankruptcy by the assignee, under a state law, are to be determined under the provisions of the bankrupt law.—In re Bousfield & Poole Mfg. Co., Case No. 1,704.

§ 429. Lien creditors.

An assignment to attorneys of a portion of a claim for their compensation will be enforced in the bankruptcy court.—Clarke v. Clarke, Case No. 18,279.

Act 1867, § 28, does not operate to give to the five classes of creditors therein named any priority over secured creditors.—In re McConnell, Case No. 8,712.

The proceeds of goods levied on by execution under judgments whose validity is not disputed, and afterwards seized by the marshal under the warrant in bankruptcy, must first be applied to such judgments.—Swope v. Arnold, Case No. 13,702.

The rights of lien creditors to the proceeds of the sale of real estate after deducting the cost of proving the lien is superior to the lien for costs, fees, and general expenses in bankruptcy.—In re Hambright, Case No. 5,973.

The assignee must recognize any valid lien as a preferred claim, though for costs of attachment, if made a lien by the state law.—Gardner v. Cook, Case No. 5,226.

Attaching creditors *held* entitled to only a ratable part of their debt with the other creditors, under Act 1800, § 31.—Harmon v. Jamesson, Case No. 6,079.

In the distribution of the assets of the bankrupt derived from the collection of a promissory note, a creditor whose claim is in judgment has no priority.—In re Erwin, Case No. 4,524.

A judgment creditor who had failed for 13 years to record his lien in the county in which the land was located, and to prove his judgment in bankruptcy until the proceeds of the land were distributed, will not be heard thereafter to assert his priority.—In re Dunn, Case No. 4,172.

A judgment obtained in Georgia is not entitled to priority where there was a failure to make levy for seven consecutive years after 1860.—In re Cozart, Case No. 3,313.

The landlord's lien for rent, under a state statute, on goods seized by the marshal, is valid.—In re Hoagland, Case No. 6,545.

Maritime liens will be accorded the preference which they would have in the admiralty. In re Scott, Case No. 12,517, affirmed.—The Ironsides, Case No. 7,070.

The rent of mortgaged premises received by the assignee must be distributed to the general creditors. The mortgagee cannot have the rent applied to his lien unless he shows the insufficiency of his security, and actually intercepts it. In re Foster, Case No. 4,963, affirmed.—Foster v. Rhodes, Case No. 4,981.

The right to intercept the rent ceases with the completion of the foreclosure.—Foster v. Rhodes, Case No. 4,981.

Money paid to procure release of dower in mortgaged premises should be apportioned between the mortgagees.—In re Bartenbach, Case No. 1,068.

A purchaser of a mortgage given by a debtor before his bankruptcy to indemnify a surety, who has knowledge of the trust, for the benefit of creditors by such mortgage inuring for their benefit, and is himself a creditor under it, has no priority over other creditors.—In re Pierce, Case No. 11,140.

The attachment act of South Carolina is not affected by a commission of bankruptcy in England.—Harrison v. Sterry, Case No. 6,144.

§ 430. Debts due to United States.

The preference of the United States, and the right of preference for satisfaction of debts due the United States, are excepted from the general operation of the bankrupt law of 1800. —Mott v. Maris, Case No. 9,880.

Act 1800, § 62, in relation to the preference of the United States, does not give a preference to the United States, but merely saves the right of the United States in cases where such a preference has by law been previously granted.—United States v. Fisher, Case No. 15,103.

A surety who pays bonds for customs duties has a preference over other creditors. (Act March 2, 1799, § 65.)—Harrison v. Sterry, Case No. 6,144; Mott v. Maris, Id. 9,880.

The surety who has paid a bond for duties is not entitled to the same rights and privilege of priority that are given to the United States under Act 1800.—Pollock v. Pratt, Case No. 11,256.

A surety who has paid money for a bankrupt in discharge of a customs duty bond has not the right of the United States to proceed against the person of the bankrupt, but only against his effects. (Act 1800.)—Kerr v. Hamilton, Case No. 7,731.

The United States are not bound by the general equity rule for marshaling assets, nor by the rule prescribed by the bankrupt act in conformity thereto, any further than as that rule is founded in the particular case on the lien of the several parties inter sese.—In re Strassburger, Case No. 13,526.

The United States may enforce their right of priority without first exhausting securities which they may hold.—United States v. Lewis, Case No. 15,595.

If the United States have a demand against a firm some of whose partners reside in a foreign country, they are entitled to priority out of the separate estate of the resident partners. —United States v. Lewis, Case No. 15,595.

An agent of the United States in England cannot, by conforming to the bankrupt laws there, lessen the priority established in favor of the United States here.—Harrison v. Sterry, Case No. 6,144.

The United States are entitled to priority in the separate estate of the partners, although the demand is against the firm.—United States v. Lewis, Case No. 15,595.

A United States revenue officer, paying to the government the amount of a dishonored check received by him from a government debtor, is entitled to be subrogated to the rights of the United States against such debtor.—In re McBride, Case No. 8,662.

One purchasing imported goods, and being compelled, in order to obtain possession thereof, to pay duties which the importer was to pay, is entitled, on the importer's bankruptcy, to be substituted to the priority of the United States, although he has proved his claim as unsecured.—In re Kirkland, Cases Nos. 7,843, 7,844.

The penalty prescribed by the internal revenue acts for selling unstamped packages is incurred at the time of the sale; and a judgment therefor recovered by the United States after the adjudication in bankruptcy, with the exception of costs, is a provable debt, and entitled to priority of payment.—In re Rosey, Case No. 12,066.

United States, recovering a judgment upon a claim accruing after the commencement of the proceedings in bankruptcy, is entitled to priority, and no proof of claim need be made.— In re Bousfield & Poole Mfg. Co., Case No. 1,704.

A judgment obtained by the United States against persons composing a bankrupt firm, though for a debt on which one of the partners was liable as principal and the other as surety, is entitled to priority over all partnership creditors.—In re Strassburger, Case No. 13,526.

The United States need not prove their debt in bankruptcy before filing a bill to enforce their priority of payment.—United States v. Lewis, Case No. 15,595.

The complainant, as collector of internal revenue, *held* not entitled, by way of subrogation, to the rights of the United States as a preferred creditor.—Wilkinson v. Babbitt, Case No. 17,668.

§ 431. Debts due to a state.

A state is entitled to a preference over private creditors under Act 1867 (Rev. St. § 5101). —In re Dodge, Case No. 3,949.

The state has no claim to priority against a bankrupt bank in which the warden of a penitentiary deposits funds in his own name, he being liable to the state on his bond. Case No. 3,243 reversed.—In re Corn Exch. Bank, Case No. 3,242.

A claim by the warden of a state prison for the price of property of the state sold as the state's agent to the bankrupt is entitled to priority as a debt due the state.—In re Mellor, Case No. 9,401.

A claim of the state upon a contract for the employment of convicts is entitled to preference, under Rev. St. § 5101.—In re Southwestern Car Co., Case No. 13,192.

A judgment in favor of the people of the state of New York against a surety on a bail bond given for the appearance of a person indicted for a crime is a debt to the state, and is entitled to priority under Act 1867, where such surety has filed a petition in voluntary bankruptcy, and, without being adjudged a bankrupt, instituted proceedings for a composition.—In re Chamberlin, Case No. 2,580.

§ 432. Taxes and assessments.

A lien of a state on realty for taxes has priority over all other claims.—In re Brand, Case No. 1,809.

Taxes and assessments levied upon incumbered property before bankruptcy proceedings, and water taxes while the property is in the assignee's possession, must be paid by him. Case No. 9,699 affirmed.—In re Moller, Case No. 9,700.

The claim of lessors of a bankrupt lessee for the amount of taxes paid by them, which the lessee had covenanted to pay, is not entitled to preference. (Act 1867, § 28.)—In re Parker, Case No. 10,719.

Debt due to foreign state for taxes not entitled to preference.—In re Ambler, Case No. 271.

§ 433. Wages of operatives, clerks, etc.

An apprentice is an "operative" (Act 1841, § 5), and is entitled to priority.—Ex parte Steiner, Case No. 13,354.

A claim for money loaned to pay wages of operatives employed by the bankrupt is not a privileged claim under Act 1841, § 5.—In re Paulson, Case No. 10,849.

The assignee of a claim of $50 for labor is entitled to priority in payment under Act 1867, § 27, though the assignee paid for the claim only $10.—In re Brown, Case No. 1,973a.

The claim of a father for the services of his minor son, to the extent of $50, is entitled to a preference under Act 1867, § 28.—In re Harthorn, Case No. 6,162.

A person employed for a temporary service, in adjusting the books and accounts of a bankrupt, within six months before the bankruptcy, has a privileged debt for services as clerk, to the extent of $50. (Rev. St. § 5101.)—Ex parte Rockett, Case No. 11,977.

Under Rev. St. § 5101, an employé is not allowed priority in payment of wages for an unexpired term of employment, where he was wrongfully discharged.—In re Pevear, Case No. 11,053.

A claim for a balance of laborer's wages in the hands of one who advanced a part thereof, taking an assignment as security, *held* entitled to a preference.—In re Brown, Case No. 1,974.

§ 434. Claims preferred by state laws.

Under the laws of New Jersey, landlords and factory operators are entitled to pro rata payment of one year's rent and one month's wages, respectively, as secured claims; neither being superior to the other.—In re McConnell, Case No. 8,712.

Act N. Y. April 15, 1853, providing that the assets of an insolvent bank, after payment of its circulating notes, shall be first applied to payment of sums deposited with it by savings banks, gives a saving bank no prior lien, but it must share pro rata with ordinary creditors. —Sixpenny Sav. Bank v. Estate of Stuyvesant Bank, Case No. 12,919.

§ 435. Fees and expenses in bankruptcy proceedings or pending suits.

Solicitors of a voluntary bankrupt, who advance expenses to enable him to obtain his discharge, are not entitled to relief, for such expenses or their services, against his assets.—Ex parte Hale, Case No. 5,910.

A person advancing money for the fees in bankruptcy has a first lien on the estate for its repayment, and a mortgage given to secure the same gives no additional security.—Whiston v. Smith, Case No. 17,523.

Attorneys rendering services to the bankrupt prior to the adjudication, such as defending suits, giving advice, and preparing petition and schedules, are not entitled to priority under Act 1867, § 28.—In re Hirschberg, Case No. 6,530; In re Jaycox, Id. 7,239; In re Gies, Id. 5,407; In re Handell, Id. 6,017.

The urban landlord has no priority or preference, under Act Tex. April 4, 1874, concerning rents and advances, over the general creditors.—In re Robinson, Case No. 11,944.

Where the owner of yarn in possession of a bankrupt at the time of his bankruptcy, for manufacture into cloth, obtains a judgment in trover against the assignee therefor, his claim is entitled to no priority over the assignee's claims for expenses and commissions. —In re Oberhoffer, Case No. 10,396.

In the absence of a lien created by the state law the costs and charges against a bankrupt for caring for his property prior to filing the petition, however incurred, are not a preferred claim.—Gardner v. Cook, Case No. 5,226.

§ 436. Cestui que trust.

Where property delivered to the bankrupt in trust does not remain in specie, and cannot be traced, the cestui que trust must come in pari passu with the other creditors.—In re Janeway, Case No. 7,208.

A consignor whose property was sold before the bankruptcy of the consignee, and the proceeds mingled with the general assets, has no lien.—In re Coan & Ten Broeke Mfg. Co., Case No. 2,915.

Money deposited with a banker to pay a note and mortgage of the depositor when they should be sent to him is not held by the banker in a fiduciary capacity.—In re Hosie, Case No. 6,711.

A fund recovered by the assignee in virtue of the rights of the bankrupt's creditors generally, under Act 1867, § 35, must be distributed to them generally, and not given to one. The assignee does not hold such fund subject to the equities which attached to it in the hands of the bankrupt in favor of a particular creditor before it was fraudulently transferred. —White v. Jones, Case No. 17,550.

The equities of the creditors of a bankrupt in a secret fraudulent trust fund are at least equal to those of creditors of the owner of such fund.—Aiken v. Edrington, Case No. 111.

A sister of the bankrupt, who for years handled her funds and securities, is entitled to be considered holder of a mortgage which the bankrupt took up with the proceeds of her government bonds, sold without her knowledge.— Dewey v. Kelton, Case No. 3,850.

Where a bailee, prior to his bankruptcy, mixes the bailor's wheat, without the latter's consent, with his own, so that the identical property cannot be distinguished, the bailor can only prove as a general creditor and share pro rata against the estate in bankruptcy.—Adams v. Meyers, Case No. 62.

§ 437. Separate funds or accounts.

Depositors who became such after suspension of payments by a bank under an advertisement by the bank to keep the old and new accounts separate are not entitled to preference on its subsequent bankruptcy.—In re Mutual Building Fund Society & Dollar Sav. Bank, Case No. 9,976.

Where the bankrupts carried on a brokerage business, keeping the accounts and funds therein separate from their other business, the owners of bonds sold will be entitled to payment in full out of the brokerage account as against creditors in the other business.—Voight v. Lewis, Case No. 16,989.

A claim founded upon a note given under the terms of a composition proceeding in bankruptcy will not be postponed to new claims in subsequent bankruptcy proceedings. — In re Merriman, Case No. 9,479.

§ 438. Ownership of claim.

One taking an assignment of a proved claim as security for an antecedent liability of the assignor, who is apparently, though not really, the owner thereof, is not a purchaser for value, and cannot hold the claim against the true owner.—In re Sime, Case No. 12,861.

§ 439. Meetings of creditors.

The register has no discretion to refuse to call a second general meeting of creditors requested by the assignee after three months from the adjudication.—In re Rosey, Case No. 12,065.

A third meeting of creditors, not the last meeting, should not be called except for cause shown, and, if the register be satisfied that no such cause exists, he is justified in refusing to grant the order for such meeting.—In re Clark, Case No. 2,807.

Notice to creditors that a meeting will be held at a specified time and place for the purposes named in Act 1867, § 27, and that a final dividend will be declared, is sufficient to authorize such meeting to make final disposition of the estate.—In re Merchants' Ins. Co., Case No. 9,442.

The notice of the second meeting of creditors (Act 1867, § 27) and the order (Form No. 28) are to be sent to all known creditors, whether they have proved their debts or not.—In re Mills, Case No. 9,610.

Where notice of a meeting of creditors is addressed to a creditor by a wrong name, though there is no time to remedy the defect before the meeting, the creditor is not bound by the proceedings at such meeting.—Anonymous, Case No. 457.

The bankrupt is not required to attend any meeting of the creditors but the first one.—In re Wronkow, Case No. 18,105.

Creditors' meetings are properly guided by the rules and usages of parliamentary bodies in absence of specific provisions of law.—In re Merchants' Ins. Co., Case No. 9,442.

At the second meeting of creditors when due notice has been given, the whole fund in the assignee's hands, less necessary expenses, may be distributed.—In re Mills, Case No. 9,610.

The register cannot refuse to permit claimants who have made due proof to vote at a second meeting of creditors, where their claims are contested, as he has no power to expunge the proofs.—In re Jaycox, Case No. 7,240.

An execution creditor enjoined by the circuit court from further proceedings may have his claim of priority of payment out of proceeds of the property determined at a general meeting of creditors, under Act 1867, § 27, subject to exceptions to the district court.—In re Dunkle, Case No. 4,160.

A third meeting of creditors which is not a final meeting should not be called except for cause shown.—In re Son, Case No. 13,174.

§ 440. Powers of state court.

The distribution of the assets of a bankrupt cannot be interfered with by process of a state court.—In re Bridgman, Case No. 1,867.

The state court is the proper tribunal to pass upon the distribution by an executor of moneys received by him from a bankrupt's estate.—In re Major, Case No. 8,981.

§ 441. Dividends—Who entitled to in general.

A single creditor proving his debt is entitled to be paid in full; the surplus, if any, being distributed among creditors admitted by the bankrupt, but who have failed to prove their debts.—In re Haynes, Case No. 6,269.

A debt not proved until after order of distribution and designation of the day for making the dividend cannot share therein.—In re Miller, Case No. 9,556.

§ 442. —— Interest on dividends.

Where, upon appeal from an order allowing interest at 7 per cent. on a creditor's dividend, the creditor procures an order directing the trustee to deposit the money with a trust company pending the appeal, it does not constitute a warrant of his right to full interest; it is merely a change of investment by the trustee for the greater security of the creditor.—In re Kitzinger, Case No. 7,863.

Where interest becomes due to a creditor on a dividend, in consequence of delays attributable to the assignee or other creditors, the rate will be the legal rate in the state, where the assignee has not applied to have the money set aside or invested pending re-examination of the claim.—In re Kitzinger, Case No. 7,862.

Where payment of a dividend to a creditor has been delayed, through objections by other creditors or the trustee to the claim, interest should be allowed from the time it became payable.—In re Kitzinger, Case No. 7,862.

§ 443. —— Withholding payment.

The assignee may withhold dividend to creditor who is also debtor to a member of the bankrupt firm until determination of a suit by the assignee to recover the debt.—Atkinson v. Kellogg, Case No. 613.

The share of the dividend which a member of a bankrupt firm is entitled to as a member also of a firm of petitioning creditors will be retained by the assignee to await the action of his individual creditors.—In re Ellis, Case No. 4,399.

The payment of a dividend on a judgment proved in bankruptcy will be suspended pending a writ of error therefrom in the state court.—In re Sheehan, Case No. 12,737.

If the declaration of a dividend on a particular claim was unauthorized, the assignee may withhold its payment.—In re Herrick, Case No. 6,420.

Countersigning checks by the register is a judicial duty.—In re Clark, Case No. 2,810.

§ 444. —— Reopening and setting aside.

A dividend, when made pursuant to proper notice and filed in court, becomes virtually a judgment of the court, and cannot be distributed, except for some error committed by the register, apparent from his memoranda and papers on file, existing at the time or prior to making the dividend.—In re Smith, Case No. 12,989.

A register cannot vacate or reopen a dividend to pay a claim not proved and filed, or presented, prior to the dividend meeting.—In re Smith, Case No. 12,989.

A register cannot reopen a dividend to pay a claim for services rendered to the assignee, which was not presented at the dividend meeting.—In re Smith, Case No. 12,989.

Motion to vacate an order for a dividend may be made by any person interested on proper papers and notice.—In re New York Mail S. S. Co., Case No. 10,212.

Where a motion is made to set aside a dividend, and there is not sufficient evidence before the judge for him to determine the question presented, a reference will be ordered to the register to examine the proofs of the debt upon which the dividend was declared, and the assignee and the register will be enjoined from taking other proceedings until further order of the court.—In re New York Mail S. S. Co., Case No. 10,212.

§ 445. —— Unclaimed dividends.

Unclaimed dividends will not be awarded to a bankrupt's administrator after many years when opposed by creditors whose claims were not paid in full.—In re Blight's Estate, Case No. 1,540.

§ 446. Effect of proof of claim on rights of creditor.

Section 21, Act 1867, in so far as it declares that a creditor who proves his debt shall be deemed to have waived thereby all right of action and suit against the bankrupt, and that all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby, does not apply to or include a debt which is by section 33 excepted from the operation of the discharge.—In re Wright, Case No. 18,065.

By proving their debts, creditors waive all right of action against the bankrupt in other courts, and such suits thereafter commenced will be enjoined.—In re Meyers, Case No. 9,518.

Where the resident partners of a firm, having a partner residing abroad, prove a debt in bank-

ruptcy, the firm becomes a party to the bankruptcy proceedings, and the resident partners will be restrained from prosecuting proceedings abroad to collect the claim.—In re Schepeler, Case No. 12,453.

No consequences can be allowed, under Act 1867, § 21, to flow from proving a debt, which are inconsistent with the provisions of section 33; and so much of section 21 as imposes a penalty for proving a debt cannot be construed as applying to a debt which, by section 33, is not dischargeable.—In re Rosenberg, Case No. 12,054.

A judgment which, because it is for a debt fraudulently contracted, will remain, by force of Act 1867, § 33, unaffected by a discharge in bankruptcy, is not subject, when proved in bankruptcy proceedings, to the provisions of section 21 of such act.—In re Robinson, Case No. 11,939.

Creditor whose debt was created by fraud of bankrupt does not, by proving claim and taking a dividend, waive his right to sue for the balance.—In re Clews, Case No. 2,891.

Certificates of deposit are dishonored after the bankruptcy of the maker, and, after they are proved as claims, no longer possess the qualities of negotiable paper.—In re Sime, Case No. 12,861.

Proving a debt in bankruptcy does not operate as a satisfaction thereof, and, where the bankrupt's discharge is refused, the creditor who has proved his debt is remitted to his former rights and remedies. — Dingee v. Becker, Case No. 3,919.

8. Partnership and Individual Claims and Assets.

See, also, post, § 493.

§ 447. Individual assets.

Where a partner sues for a dissolution, and bankruptcy proceedings are begun against the firm, the amount claimed by the partner on dissolution is his individual property, which will pass to the assignee for the payment of his separate debts.—In re Clark, Case No. 2,798.

The "separate estate" of partners, under the Act of 1867, means that in which each partner is separately interested at the time of the bankruptcy.—In re Lowe, Case No. 8,564.

The assets of the firm become the separate property of the continuing partner, where, in good faith and for valuable consideration, they are transferred to him on the dissolution of the firm.—In re Long, Case No. 8,476.

The nature of the title to real estate held by partners cannot be changed to the prejudice of the rights of separate creditors by their classification thereof in their schedule.—In re Zug, Case No. 18,222.

Where property once belonging to a partnership has, by a bona fide contract, ceased to be partnership property, and become the separate property of one of the partners, who afterwards becomes a bankrupt, the partnership creditors are not entitled to any preference over the bankrupt's individual creditors in relation to such property.—In re Wiley, Case No. 17,656.

Where all the property of a partnership belongs to one member, and the others have no interest in the gains and profits, such property will be liable, in the first instance, to the individual debts of the person owning it.—In re Talbot, Case No. 13,727.

§ 448. Partnership assets.

A purchase of land for speculation by several persons, where a part of the lots were sold, and others built upon, and debts incurred, *held* a partnership adventure, and on the bankruptcy of one party the other would be protected, as to the partnership debts, as against individual creditors of the bankrupt.—Thrall v. Crampton, Case No. 14,008.

Real property purchased with partnership funds is to be treated as personalty, and is charged with the debts of the partnership in the first instance; and judgment creditors who have obtained judgment against those partners only in whose names the real property is held have no prior lien thereon.—Marrett v. Murphy, Case No. 9,103.

The trade assets of a partner, who after formal dissolution continues to carry on the business under the firm name, with the consent of his copartner, should be treated as joint assets.—In re Morse, Case No. 9,854.

One copartner, as between himself and the firm creditors, cannot estop himself by any dealings with the other partner from claiming partnership assets.—In re Gorham, Case No. 5,624.

Where a person guaranties the notes of a firm, and contracts for an interest in the firm property after payment of its indebtedness, he takes it subject to the rights of the creditors; and the crediting up by the firm to each member of his interest does not affect the right of the creditors to the funds in the hands of the assignee in bankruptcy of the firm.—In re Shanahan, Case No. 12,701.

A petition will not lie in bankruptcy by creditors of a firm not in bankruptcy, on the bankruptcy of a member, to recover a fund from the estate of a deceased partner not in bankruptcy.—In re Frazier, Case No. 5,070.

§ 449. Claims against firm.

The mortgagee in a chattel mortgage of a stock of goods cannot prove his claim against a partnership formed after the making of a mortgage, and before its maturity.—In re Forbes, Case No. 4,922.

Where an agent converts negotiable paper, and procures its indorsement by his firm for whose use it was discounted, both the original owner of the paper and the bank which discounted it may prove claims in bankruptcy against the firm.—In re Morse, Case No. 9,853.

A note given by the firm as an accommodation to a partner to raise his share of the firm's capital may be proven against the firm, but securities pledged by the individual partner must first be applied to its payment.—In re Norris, Case No. 10,302.

An accommodation indorser of partnership notes drawn by one partner, and fraudulently used in payment of his individual contribution of capital, *held*, on the evidence, chargeable with notice of the fraud barring him from proving them against the partnership estate in bankruptcy.—In re Dunkle, Case No. 4,161.

A claim on a bond signed individually by partners, but not for a firm obligation, is not entitled, as against the firm creditors, to be paid from the partnership assets.—In re Roddin, Case No. 11,989.

An agreement between traders to unite their stocks and capital, and that their separate business debts shall be considered joint debts of the firm, will not entitle a separate creditor, who has not consented to the arrangement before bankruptcy, to prove his claim as a joint creditor.—In re Isaacs, Case No. 7,093.

A judgment against partners and others jointly is a several claim, as against the bankrupts, and cannot receive a dividend from the joint estate.—In re Herrick, Case No. 6,420.

A joint and several note, signed individually by three partners, and by others as sureties, cannot be proved against the joint assets of the firm.—In re Holbrook, Case No. 6,588.

A joint and several note, given for money borrowed by a firm, and signed in the firm name,

with other names following, may be proved against the joint assets of the firm.—In re Holbrook, Case No. 6,588.

A judgment procured against three persons as partners may be proved against the estate of two, regarding the other as a surety, where the third has been held, in the bankruptcy proceedings, not a partner.—In re Kitzinger, Case No. 7,861.

A note given by the bankrupt firm to a member for his contribution to the capital stock, and by him turned over to his wife, who furnished the money, is evidence only of the individual debt of such member, and not provable against the firm.—In re Frost, Case No. 5,135.

A protest and notice of dishonor are not necessary to entitle the holder of a note made by a partner, and indorsed by the bankrupt firm, maturing after their bankruptcy, to prove it against the joint assets.—Ex parte Russell, Case No. 12,148.

The holder of a note, signed by a partner and indorsed by the firm, may prove the same against the assets of the firm without first applying to its payment securities pledged by the partner to secure it.—In re Norris, Case No. 10,302.

A creditor of a firm holding security from one partner may prove against the joint estate without surrendering, selling, or valuing his security.—In re Holbrook, Case No. 6,588; In re Thomas, Id. 13,886.

A firm note given by one partner without authority, after dissolution, to pay a firm debt, received under a mistake of facts, may be surrendered, and the original claim proved.—In re Golder, Case No. 5,510.

§ 450. Claims against individual members.

A joint and several obligation by partners under seal is provable as a several obligation against one of the parties.—Ex parte Miller, Case No. 9,550.

Upon the bankruptcy of one member of a firm, a joint creditor has a right to prove his joint debt.—Wilkins v. Davis, Case No. 17,664; In re Webb, Id. 17,317.

A creditor who has proved a joint and several claim against the bankrupt members of a firm separately, and not against the firm, is entitled to dividends out of the several assets of the individual bankrupts.—In re Bigelow, Case No. 1,397.

Separate proofs of same debt to its full amount may be filed against individual members of a firm.—In re Beers, Case No. 1,229.

Creditors holding individual obligations of the members of a firm, although given for a consideration moving to the firm, are entitled to a dividend out of the individual estates.—In re Bucyrus Mach. Co., Case No. 2,100.

The solvent partner in a firm of four partners, two of whom were insolvent, and the other bankrupt, who pays the firm debts out of his separate estate, is entitled to prove half the amount against the separate estate of the bankrupt.—In re Dell, Case No. 3,774.

The claim of a firm against one of its bankrupt members, who acted as treasurer under the articles of copartnership, may be proved against his separate estate.—Brown v. Curtis, Case No. 2,000.

Where a surviving partner converts the property of the deceased partner to his own use, and the administrators of the latter consent, they may prove a claim therefor against the estate of the former in bankruptcy.—In re Mills, Case No. 9,611.

The bankrupt partner's proportion of the debts of the firm cannot be proved by his co-partner unless it appear that the latter had paid such debts.—Hester v. Baldwin, Case No. 6,438.

The assignee cannot prove against the separate estate of a partner for moneys withdrawn by the latter from the firm without fraud against his co-partners, though such moneys were withdrawn with knowledge of insolvency of the firm.—In re May, Case No. 9,328.

Money advanced by a firm to a member beyond his share of the capital is a separate debt of the firm against such member, and the assignee of the firm may prove it.—In re McLean, Case No. 8,879.

A debt due by one partner for money advanced to him by the firm cannot be enforced against the estate of such partner for the use of the creditor co-partners until all the joint creditors are fully satisfied, though provable as a separate debt of the firm.—In re McLean, Case No. 8,879.

No proof can be made between the joint and separate estates of partners in respect of money drawn out without fraud by one partner, or of goods sold to him by the firm, though he was to sell them again.—In re Lane, Case No. 8,044.

When a debt from one partner to a bankrupt firm was incurred by the consent or privity of the other partners, proof of the joint creditors against the separate estate will not be admitted.—In re McEwen, Case No. 8,783.

A decree against a firm upon a suretyship obligation was paid from the firm assets. The firm having been dissolved, a balance was due from one partner to the other, but the amount was not ascertained by judgment. The partner owing the balance afterwards went into bankruptcy. *Held*, that the solvent partner had no right of subrogation to the rights of the creditor who obtained the decree against the firm.—In re Smith, Case No. 12,991.

Copartnership debts may be proved in proceedings instituted by a single partner, on an individual petition, whether there are any assets of the copartnership or not.—In re Frear, Case No. 5,074.

§ 451. Claims against both firm and individual members.

Proof of a debt against a partnership should not be joined with proof of a debt against an individual partner.—In re Walton, Case No. 17,129.

A holder of different notes, all made for partnership debts, but some executed by the firm, and indorsed by the partners, and others made by individual partners, may prove the former against the firm, and the latter against the individual, assets.—Mead v. National Bank of Fayetteville, Case No. 9,366.

A note made by a firm, and indorsed by one of the partners individually, may be proved against both the estate of the firm and the individual estate of the indorser.—In re Farnum, Case No. 4,674; In re Bradley, Id. 1,772; Emery v. Canal Nat. Bank, Id. 4,446; Stephenson v. Jackson, Id. 13,374.

The form of the contract or obligation of the maker and indorser of a note will not prejudice the legal rights of a creditor claiming distribution of assets in bankruptcy.—In re Bradley, Case No. 1,772.

The beneficiaries of a trust fund, invested by the executor in his partnership business with the knowledge and consent of his copartner, may prove their claim against the partnership, although they have proved it against the estate of the executor.—In re Tesson, Case No. 13,844.

Where there are individual creditors, and a partnership creditor has a lien on both the partnership and the individual assets, he must first exhaust the partnership fund, before resorting

to the individual fund.—In re Lewis, Case No. 8,313.

A firm creditor, whose debt is secured by pledge of individual property, is bound, on request of the individual creditors, to prove his whole debt against the joint assets.—In re May, Case No. 9,327.

§ 452. Separate firms composed in whole or in part of same members.

Where the same partners carry on the same business at different places, under different partnership names, there are not two distinct firms. The assets of both nominal firms are equally applicable to the payment of all the creditors of both.—In re Williams, Case No. 17,707.

In the case of bankrupts doing business in different places under different firm names, the two firms are to be treated as one, and no notice will be taken of the indebtedness of the one to the other.—In re Vetterlein,, Case No. 16,927.

Where all the members of one firm are partners in another, they cannot prove its debt against the latter.—In re Savage, Case No. 12,381.

Where a member of a bankrupt firm is also a member of another firm, his partner, as the remaining member of the latter firm settling its affairs, may prove a debt against the bankrupt firm.—In re Buckhause, Case No. 2,086.

A draft drawn by a firm upon one who is a partner with its members in another firm cannot be proved against the joint estate on the bankruptcy of the latter firm.—In re Savage, Case No. 12,381.

The fact of the identity of partners in firms of different names and different localities does not operate to give the claims by one firm against another firm the character of individual, as distinguished from partnership, demands against the others.—In re Stanton, Case No. 13,295.

Where a bankrupt partner is a member of two firms, the assets of the bankrupt firm should be applied to the payment of the firm debts, and any surplus of the individual assets that may remain, after paying the individual debts in full, distributed pro rata among the creditors of both firms.—In re Dunkerson, Case No. 4,159.

A bank holding a draft drawn by one firm, and accepted by another, where both are adjudged bankrupts, cannot share equally with the individual creditors in the separate assets of one who was a partner of both firms.—In re Dunkerson, Case No. 4,158.

§ 453. Liability of firm for act of partner.

Where a member of a firm, which is general agent of a corporation, misappropriates funds thereof to the uses of the firm, which is known by the firm, both are liable, and proof may be made against both estates.—In re Baxter, Case No. 1,119.

The holder of notes drawn by one partner in the firm name, apparently in the course of the firm business, who has no knowledge of the want of authority or intended misapplication, is entitled to their allowance against the bankrupt estate of the firm.—Bush v. Crawford, Case No. 2,224.

A note given in the firm name in an individual transaction of one member in no manner for the benefit of the firm is not provable against the joint estate.—In re Forsyth, Case No. 4,948.

A firm note given by one partner of an insolvent firm without the assent of the others, is a fraud upon the firm creditors, and cannot be proved against the firm assets.—In re Golder, Case No. 5,510.

§ 454. Effect of assumption of debts by continuing partner.

A continuing partner, having authority to collect debts due the firm, debited a debtor with the amount, and continued his account. *Held*, on his bankruptcy, that the balance due did not belong to the new firm.—Oxley v. Willis, Case No. 10,639.

A firm note proved against the estate of continuing partners, who agreed to pay the firm debts, may be proved for any balance due against the estate of the retiring partner.—In re Pease, Case No. 10,881.

When partners dissolve, and one assumes the debts and subsequently becomes bankrupt, the other is thereafter only a surety, and cannot make proof for the respective differences between the total amount of the firm debts and the dividend which the firm will pay thereon, as a contingent debt, under Rev. St. § 5068, when he has not paid any part of such differences.—In re Phelps, Case No. 11,070.

The joint creditors of a firm will share pro rata with the individual creditors of the partner who bought out the other members, agreeing to pay the firm debts, and failed a few months thereafter, without showing that they have exhausted the individual estates of the retiring partners.—In re Rice, Case No. 11,750.

In proceedings against a firm which has been dissolved, and all the property sold to the continuing partner, who agreed to pay the firm debts, Act 1867, § 36, applies even though there was no joint property.—In re Long, Case No. 8,476.

Where a member of a co-partnership, upon the dissolution of the firm, takes the assets and agrees to pay the firm debts, on the subsequent bankruptcy of the firm, the firm creditors may, at their election, prove as separate creditors of the estate of the liquidating co-partner, and share pari passu with the individual creditors.—In re Long, Case No. 8,476.

Individual creditors and partnership creditors share equally in the estate of a partner who, on dissolution of the firm, purchased all the assets of the firm, and agreed to pay all the debts, where both partners are individualy put into bankruptcy.—In re Downing, Case No. 4,044.

The taking out of the amount of firm notes, which had been issued by one partner to pay his individual obligations, from such partner's interest on an agreement of dissolution, is not a ratification, but an assumption of such notes as a separate debt by the other partner.—In re Dunkle, Case No. 4,161.

§ 455. Priorities of firm and individual creditors.

Provisions of Act 1841, § 14, relating to the settlement and distribution of assets in cases of partnership, are in affirmance of the principle on which equity proceeds,—that the firm creditors are entitled to have their debts paid out of the firm funds before the private creditors of any partner.—Collins v. Hood, Case No. 3,015.

The individual and firm creditors have the primary right to resort to the respective estates, and neither class has a right to go on the funds primarily belonging to the other, until the creditors having priority are fully satisfied.—In re Williams, Case No. 17,702; Collins v. Hood, Id. 3,015; In re Warren, Id. 17,191; In re McLean, Id. 8,879.

Partnership assets must be applied to partnership debts, without reference to any disproportion between the interests of the individual partners therein.—In re Lowe, Case No. 8,564.

On an adjudication against a member of a firm, where both joint and separate assets come to the assignee's hands, the separate and joint

creditors must be paid out of the different funds.—In re Ingalls, Case No. 7,032.

Where there are both joint and separate debts, proved on a separate petition, the separate creditors must first be paid in full.—In re Byrne, Case No. 2,270.

Where there are partnership assets, the firm creditors cannot share in the individual estate until the individual creditors are paid in full.—In re Smith, Case No. 12,987.

If there is any joint fund, however small, even if purposely created by separate creditors by purchasing worthless partnership assets, partnership creditors cannot prove against the separate estate concurrently with separate creditors.—In re Marwick, Case No. 9,181.

A firm creditor cannot share in the assets of a bankrupt partner until his creditors are paid if the other partners are solvent, even if there be no firm assets.—In re Dunham, Case No. 4,144.

Where there are no partnership assets and no solvent partner, both partnership and individual debts may be proved, and the estate distributed pari passu.—In re Knight, Case No. 7,880.

Firm and individual creditors are paid pari passu out of the separate estates of the partners, where the joint estate is all expended in payment of costs.—In re McEwen, Case No. 8,783; In re Slocum, Id. 12,951, affirmed in Case No. 12,950.

The rule that the joint estate must be applied to the joint debts, and the separate estate to the separate debts, is only applicable where both the estates are before the court for distribution.—In re Downing, Case No. 4,044; United States v. Lewis, Id. 15,595; In re Pease, Id. 10,881.

Where partners file separate petitions, the firm creditors must be postponed to the separate creditors in the distribution of the separate estate, whether there are joint assets or not.—In re Morse, Case No. 9,854.

Partnership creditors are entitled to be paid pari passu with individual creditors where the individual assets consist principally of goods purchased from the partnership on its dissolution, in the original purchase of which the partnership debts originated.—In re Jewett, Case No. 7,304.

A partner who has taken notes on the sale of his interest to his copartner cannot receive a dividend from the estate of the latter in bankruptcy until all partnership debts have been paid.—In re Jewett, Case No. 7,309.

Debts arising out of internal revenue bonds, signed by the members of a firm as sureties, are not entitled to the priority of the United States out of the firm assets, but only against individual assets.—In re Webb, Case No. 17,313.

If the United States have a demand against a firm, some of whose partners reside in a foreign country, they are entitled to priority out of the separate estate of the resident partners. —United States v. Lewis, Case No. 15,595.

A judgment creditor of firm is not entitled to dividends out of separate estate of each member on an equal footing with separate creditors.—In re Berrian, Case No. 1,351.

Individual creditors of partner who contributed most of the property to the firm, which was all of his property, *held* entitled to share equally with firm creditors.—In re Goedde, Case No. 5,500.

A lien acquired before bankruptcy by execution on the individual property of a member of a bankrupt firm, under a judgment against the firm, will not yield to the equities of the separate creditors of such partner.—In re Sandusky, Case No. 12,308.

§ 456. Priorities between creditors of old and creditors of new firm.

Where a firm failing without assets resumed business under the name of one of its members as "agent," and again failed, the debts contracted under the former name were not entitled to share in assets of the second failure. (Rev. St. § 5121.) Case No. 10,268 reversed.—In re Nims, Case No. 10,269.

The fact that a member and his share of property of an old firm went into a new firm, which became bankrupt, does not give the old firm creditors a right to payment out of the assets until after the new firm creditors are satisfied and the accounts are adjusted between the partners.—Crane v. Morrison, Case No. 3,355.

Where a partner carries on the business with the consent of the administrators of the deceased partner, upon the surviving partner being adjudged a bankrupt, there is no priority of payment between debts contracted before, and those contracted after, the death of the partner. —In re Mills, Case No. 9,611.

(G) ACCOUNTING AND DISCHARGE OF ASSIGNEE.

§ 457. Liability to account.

The assignee of a bankrupt partner in possession of firm assets must account to the creditors of the firm for the proceeds.—Jones v. Newsom, Case No. 7,484.

Assignees are chargeable with interest on all moneys which they have collected, if not paid into the registry within 60 days after it is received. Act 1841.—In re Thorp, Case No. 14,002.

An assignee is accountable only to the court appointing him.—In re Bowie, Case No. 1,728.

§ 458. Compelling accounting.

Under Act 1800, the district courts are not invested with exclusive jurisdiction over the entire execution of the law, and the circuit court has jurisdiction of a bill to compel the assignees to account.—Lucas v. Morris, Case No. 8,587.

Before the bankruptcy court can take action on the failure of an assignee to make a report of funds received, it must be shown, at least by prima facie evidence, that he has received funds.—In re Goodwin, Case No. 5,550.

The register may make the order requiring the assignee to file the account required by section 28, Act 1867.—In re Bellamy, Case No. 1,266.

The register can order an assignee to furnish him with all necessary information as to funds in his hands.—In re Clark, Case No. 2,807.

§ 459. Investigating accounts.

The district judge has jurisdiction to investigate the condition of the assignee's accounts on petition of a creditor to ascertain what, if any, dividends are due and payable. Act 1800. —Sands' Case, Case No. 12,302.

Neither the act of 1800 nor the judiciary act of 1789 confers jurisdiction upon the circuit court in bankruptcy cases, and it cannot enjoin parties to a proceeding from seeking an investigation of the assignee's accounts in a summary manner by petition to the district court. —In re Sands' Case, Case No. 12,302.

§ 460. Notice to creditors.

A register may properly refuse to audit the accounts of the assignee filed at a second meeting, where no notice of such auditing had been given to the creditors, as required by Act 1867, § 28.—In re Clark, Case No. 2,809.

§ 461. Auditing and settling accounts.

The accounts of the assignee must be presented at the second meeting of the creditors, and audited by the register, under Act 1867, § 27.—In re Clark, Case No. 2,799.

Creditors' meetings have no power over the accounts or fees of the assignee, but, if submitted to them by the register, their action thereon will be sanctioned by the court, unless there are grave reasons to the contrary.—In re Merchants' Ins. Co., Case No. 9,442.

The final meeting of creditors may, by vote, dispense with the reading and exhibition of the assignee's accounts and vouchers, where the same have been on file for a reasonable time.—In re Merchants' Ins. Co., Case No. 9,442.

Money paid by an assignee to his counsel should be included in his account, and submitted to the meeting of the creditors, and audited as a part of the assignee's accounts.—In re Hubbel, Case No. 6,820.

On the auditing of an assignee's accounts, an attorney's bill is evidence of the services and disbursements, but must be supported by evidence of the occasion, necessity, and value of such services.—In re Staff, Case No. 13,273.

In such case the register is charged with the duty of ascertaining what sum, in fairness, ought to be allowed.—In re Staff, Case No. 13,273.

The register should examine and regulate the charges and expenses of assignees and counsel, whether any creditor objects to the account or not.—In re Sawyer, Case No. 12,396.

Where all of the assignee's attorney's bill, except four items amounting to about one-fifth of the bill, have been presented to a third meeting of the creditors, and no objection made thereto, and as to these four items the court has ordered a reference, and the register reports in favor of their payment if the assignee makes no objection, the court will refuse to pass upon them, but will order a general meeting of the creditors to be called for them to act thereon.—In re Hubbel, Case No. 6,820.

The bankruptcy court, being always open, and having no separate terms, may vacate orders and decrees if no vested rights are disturbed.—Boutwell v. Allderdice, Case No. 1,708.

§ 462. Objections by creditors.

Misconduct of the assignee in respect to the estate is a proper subject for examination on application by him for a discharge.—In re Peabody, Case No. 10,866.

Every fact which is relied on by a creditor to establish fraud in the assignee should be distinctly stated and verified.—In re Peabody, Case No. 10,866.

A creditor raising an issue of fraud should distinctly state and verify the facts, and should give security for costs.—In re Peabody, Case No. 10,866.

Creditors need not object to the assignee's account, except at the meeting called under section 28, Act 1867.—In re Clark, Case No. 2,810

§ 463. Compensation and expenses of assignee.

Under Act 1867, § 47, the assignee is entitled to his disbursements and a reasonable compensation for his services, and he may retain the amount allowed out of any funds which he has in his hands.—In re Dean, Case No. 3,699.

The assignee is entitled to make a charge for recording the assignment.—In re Pegues, Case No. 10,907.

An attorney, in performing the ordinary duties of the assignee, cannot claim from the estate compensation as for professional services.—In re Drake, Case No. 4,058.

An assignee is entitled to a charge for publishing his notice of appointment.—In re Pegues, Case No. 10,907; In re Tulley, Id. 14,235.

And also for advertising and posting handbills.—In re Pegues, Case No. 10,907.

But a charge by the assignee for making a deed of conveyance is unauthorized, and will not be allowed.—In re Tulley, Case No. 14,235.

A charge by the assignee of court fees in drafting an order of compromise is proper where such fees were actually paid.—In re Davenport, Case No. 3,587.

The assignee can only properly charge commission on the amount of debt canceled by compromise with a lienholder.—In re Davenport, Case No. 3,587.

Special charges by the assignee for making sale of real property and making out his report are not authorized, but a reasonable compensation will be allowed.—In re Tulley, Case No. 14,235.

The assignee has no authority to make specific charges for drafting a certificate of exempted property, for drafting the acceptance and notice of appointment, for drafting petition for sale of property, or for drafting application for order of compromise; but for such acts and services the court may allow reasonable compensation in its discretion.—In re Davenport, Case No. 3,587; In re Pegues, Id. 10,907; In re Tulley, Id. 14,235.

A charge by the assignee of $42 for six days' services in collecting notes and accounts will be disallowed, but he is entitled to a reasonable compensation for such services.—In re Pegues, Case No. 10,907.

A charge by an assignee of $14 for two days' services in examining papers will be allowed, provided the services are actual, and not constructive.—In re Pegues, Case No. 10,907.

A charge by an assignee of $7 for one day making out a report, and $7 for one day making application for order of court to obtain the sale, are excessive, but a reasonable compensation will be allowed.—In re Pegues, Case No. 10,907.

Legal charges for printing advertisements for sale of real estate by order of the bankruptcy court are to be computed as follows: Each square of eight lines, first time, one dollar; each subsequent insertion, 50 cents per square.—In re Downing, Case No. 4,045.

The assignee must act as salesman unless leave of court is obtained to employ an auctioneer; and, where he employs the latter without authority, he will not be allowed a charge made for the amount paid for such services.—In re Pegues, Case No. 10,907.

The assignee will not be allowed for auctioneer's charges in making a sale, unless he show affirmatively a necessity for his services.—In re Sweet, Case No. 13,688.

The assignee must apply to the court for authority to incur expenses for professional services and clerk hire.—In re Noyes, Case No. 10,371.

The assignee's accounts for professional and clerical services not duly authorized must be allowed by the court on separate application, on which the assignee is subject to examination.—In re Noyes, Case No. 10,371.

The "expenses" provided for by Act 1867, § 28, of an examination of the bankrupt, do not include any compensation to the assignee.—In re Hughes, Case No. 6,841.

Both actual attention to the business of the trust and the necessity therefor must be shown to entitle the assignee to the per diem allowance. (Act 1867, § 17.)—In re Jones, Case No. 7,451.

Assignees intending to charge for services beyond the fees mentioned in rule 30 must notify creditors of their intention in the notices of the meeting at which their account is to be presented.—Ex parte Whitcomb, Case No. 17,529.

The allowance of reasonable compensation to the assignee for his services is discretionary with the bankruptcy court. Rev. St. § 5099.—Ex parte Whitcomb, Case No. 17,529.

The assignee cannot be allowed anything in addition to disbursements and the commissions provided for in Rev. St. § 5100, except for services, and at the rates set forth in general order No. 30 of April 12, 1875.—In re Muldaur, Case No. 9,905.

General order No. 30, as amended, does not alter the compensation to the assignee in an ordinary case, where the remuneration seems insufficient, but provides for an extra allowance to the assignee in a small class of cases where great care and exertions are shown, and a special inadequacy of compensation appears.—In re Many, Case No. 9,053.

Where the assignee is directed to join in a sale made by a trustee of mortgaged property, and no money is realized by the assignee thereunder, he is not entitled to commissions on the purchase price.—In re Slevin, Case No. 12,942.

§ 464. Allowance for counsel fees.

Counsel fees will not in general be allowed to the assignee where the services were rendered prior to his appointment.—In re New York Mail S. S. Co., Case No. 10,210.

Where two assignees are jointly appointed and employ competent counsel, a charge for professional services by another counsel, the son of one of them, will be disallowed as tending to abuses, where no necessity is shown for his employment.—In re New York Mail S. S. Co., Case No. 10,210.

An assignee has a right to seek professional advice and to employ counsel in necessary and proper cases, but a charge of $75 for counsel fees in simply compromising an inconsiderable debt with a lien creditor, under an order of court, will not be allowed.—In re Davenport, Case No. 3,587.

An assignee is not allowed an amount for attorney's fees unless the necessity of hiring an attorney appears; and, where he is an attorney at law, no allowance will be made, as he does not, as assignee, employ himself as attorney.—In re Muldaur, Case No. 9,905.

The compensation of the assignee's attorney must be reasonable, and proportioned to the value of the estate.—In re Drake, Case No. 4,058.

Suppression of material facts by the assignee while obtaining authority from the court to make a contract to pay counsel one-half the gross recovery in a cause makes the contract invalid, but a reasonable sum will be allowed.—Maybin v. Raymond, Case No. 9,338.

The bankruptcy court has power to determine the question in a summary manner as to the proper allowance of fees to an attorney employed by the assignee, and to order the attorney to pay over any amount in excess of that regarded by the court as reasonable which has been paid him by the assignee.—In re Brinker, Case No. 1,882.

Where a suit was brought for the joint benefit of two parties, and the assignee in bankruptcy of one of them is permitted to withdraw, and assign all his interest in the litigation to the other party, the counsel are only entitled to payment from the assignee for their services and disbursements after the assignee stipulated to be substituted; and the other party, by taking his interest, assumes all its burdens, and has no equity to demand reimbursement from the assignee.—In re Litchfield, Case No. 8,386.

Under general order No. 30, no allowance can be made to an assignee for fees of counsel for services in defending suits pending against the bankrupt, unless under employment by the assignee, although the same were proper and necessary to be rendered on the procurement of the bankrupt, and beneficial to the creditors and the assignee.—In re Hamburger, Case No. 5,974.

§ 465. Discharge.

The court may set aside a discharge of the assignee, which has inadvertently found its way into the court files, and order him to proceed.—Maybin v. Raymond, Case No. 9,338.

IV. COMPOSITION.

§ 466. When authorized.

Corporations, as well as natural persons, have the right to avail themselves of the provisions of the bankrupt law pertaining to composition.—In re Weber Furniture Co., Case No. 17,330.

A debtor can make a composition under Act June 22, 1874, § 17, though, by reason of preference or otherwise, he would not be able to obtain his discharge.—In re Haskell, Case No. 6,192.

To authorize proceedings for a composition, a case in bankruptcy must be pending.—In re Reiman, Case No. 11,673.

A valid composition may be proposed and made, though the verification of the petition be defective.—Ex parte Jewett, Case No. 7,303.

The pendency of a petition to review an order refusing a discharge does not deprive the court of jurisdiction to entertain proceedings for a composition.—In re Odell, Case No. 10,427.

§ 467. Petition and proposition for composition.

Act June 22, 1874, does not require a written proposition from the bankrupt preceding the notice to creditors, to lay the foundation for their acceptance or rejection of a composition.—In re Haskell, Case No. 6,192.

The petition for a composition must set forth its nature and terms, and the belief of its acceptance by two-thirds in number and one-half in value of the creditors.—In re Holmes, Case No. 6,632.

§ 468. Meeting of creditors—Notice.

A meeting will be reopened where creditors did not receive their notices in time, if prompt application is made, and it appear that their presence might affect the result of the vote.—In re Spencer, Case No. 13,229.

§ 469. —— Who entitled to vote.

The word "creditors" in the provisions of the bankruptcy act relating to composition means all whose debts are provable in bankruptcy.—Ex parte Trafton, Case No. 14,133.

Wards whose money has been loaned to a firm, from which their guardian, a member, took notes to himself as guardian, on coming of age, are entitled to vote in favor of a composition by the bankrupt firm.—In re Bailey, Case No. 729.

Only those creditors who prove their claims are competent to take part in proceedings at a composition meeting.—In re Scott, Case No. 12,519; In re Keller, Id. 7,654; In re Mathers, Id. 9,274; In re Bryce, Id. 2,069.

The creditors on whose motion an order to show cause has been issued need not prove their debts anew.—In re Scott, Case No. 12,519.

A creditor who has an attachment issued within four months before the filing of the petition cannot vote at a composition meeting.—In re Scott, Case No. 12,519.

A creditor buying up enough debts to prevent the acceptance of a resolution, and publicly of-

fering to take all other debts at the same rate, may vote upon debts so bought.—Ex parte Jewett, Case No. 7,303.

Where, after a decision by the register between two parties as to the right to vote upon a claim, the person aggrieved allows the vote to be taken without further objection, he cannot again reopen the question.—In re Spencer, Case No. 13,229.

Affidavit of husband that he had given his wife authority to vote in favor of a composition is a ratification and estoppel, validating the wife's act.—In re Bailey, Case No. 729.

A person acting under a power of attorney from creditors to accept composition to pay in twelve months from Feb. 16 cannot make composition to pay in twelve months from March 16. —In re Alexander, Case No. 159.

§ 470. —— Disputed claims.

The register who presides at a composition meeting may examine and pass upon a disputed claim, subject to review by the court.—In re Keller, Case No. 7,654.

§ 471. —— Number and value of consenting creditors.

A resolution signed by the debtors, and by two-thirds in number of the creditors, representing one-half in value of the debts, is sufficient.—In re Reiman, Case No. 11,673.

Creditors whose debts do not exceed $50 are to be disregarded in computing the majority who must pass a resolution of composition, as well as in ascertaining the number of those who are required to sign the confirmatory statement.—In re Wald, Case No. 17,054.

Creditors whose debts do not exceed $50 are counted in determining the value, but not the number of creditors.—In re Gilday, Case No. 5,422; In re Spades, Id. 13,196.

Damages for a tort not assessed cannot be considered in ascertaining the proportion of creditors voting for a composition.—In re Bailey, Case No. 729.

A creditor whose claim is more than offset by claims of the bankrupt against him cannot vote at a meeting in composition.—In re Purcell, Case No. 11,470.

§ 472. —— Secured creditors.

Secured creditors are those who hold a lien upon property which otherwise would go into the general fund, not those who have personal security; and the latter may vote in a composition proceeding as an unsecured creditor. — In re Spades, Case No. 13,196.

Secured creditors need not be reckoned in computing the portion who must join in a composition.—In re Van Auken, Case No. 16,828.

A creditor who considers himself fully secured, when in fact he is not, and is ready to renounce all claim, will not be counted as a creditor to defeat a composition.—In re Snelling, Case No. 13,140.

Privileged creditors, whose claims will be paid in full to the extent of $50, there being sufficient assets for the payment of them, should be permitted to vote for a composition only on the excess of their debts over $50.—In re O'Neil, Case No. 10,528.

§ 473. —— Conduct of meeting.

A vote should not be taken so long as creditors are prosecuting inquiries to aid in determining whether the composition proposed shall be accepted.—In re Holmes, Case No. 6,632.

A creditor who has regularly appeared at the first meeting, but is not present when the vote is taken, is to be counted as voting against the resolution, unless he has clearly indicated his intention not to be counted.—In re Richmond, Case No. 11,798.

The presiding officer at the meetings has power to regulate the form and order of proceedings, and to decide questions that arise subject to review by the court.—In re Holmes, Case No. 6,632.

The meeting to consider the debtor's offer of a composition must be kept open one hour, at the expiration of which time, if the register has not appeared or been heard from, any party may have the meeting adjourned.—In re Ewing, Case No. 4,587.

§ 474. —— Inquiries and examinations.

The right of a creditor present at a composition meeting to an examination of the bankrupt is waived by moving for a vote.—In re Little, Case No. 8,392.

Every creditor authorized to vote at a meeting for composition has a right to make suitable inquiries of the debtor.—In re Jewett, Case No. 7,303.

At the meeting of creditors called to take action on a resolution of composition, the register has no authority to require any person to testify except the debtor.—In re Dobbins, Case No. 3,943.

A bankrupt may be compelled to appear with his books before the register for examination as to a composition.—In re Ash, Case No. 571.

On an inquiry by creditors to aid in determining whether the composition should be accepted, the debtor's books must be produced, if desired, and a reasonable time allowed for their examination.—In re Holmes, Case No. 6,632.

The proceedings must be recorded, and the examination of the debtor should be conducted like that of a witness in court.—In re Holmes, Case No. 6,632.

The debtor, though present, may, by a vote of the creditors present, be excused from examination on account of illness.—In re Wilson, Case No. 17,785.

The debtor may be excused by the creditors from answering inquiries, even though he is present at the meeting of creditors.—In re Wilson, Case No. 17,781.

The register has power to conduct the inquiries to be made of the debtor, and to take down the substance of his answers, but not to conduct a written examination upon things in general, as in bankruptcy.—In re Proby, Case No. 11,439.

§ 475. —— Adjournment.

A register has power to adjourn a meeting of its creditors when, in his judgment, the interest of the whole body of creditors, or of sound policy, requires it.—In re Cheney, Case No. 2,637.

§ 476. —— Second meeting.

A second composition meeting will be ordered where the object of the first one failed by reason of the mistakes or misinstructions of attorneys for creditors.—In re McDowell, Case No. 8,776.

Where a composition providing for giving indorsed notes is defective in not naming the indorser, an additional resolution providing for such security may be adopted at another meeting of creditors, and presented to the court in the same way as the original resolution.—In re Reiman, Case No. 11,673.

No second meeting of creditors, as such, is necessary to confirm the resolution of composition.—In re Scott, Case No. 12,519.

The debtor is not required to be present at a meeting of creditors called to consider a resolution to vary a composition which has been accepted.—In re Dumahaut, Case No. 4,124.

At a second meeting either party may furnish competent testimony on the question whether the

composition is for the best interests of all concerned.—In re Keller, Case No. 7,654.

§ 477. Signing composition.

It is only necessary that the confirmatory signatures should be attached at or before the hearing for a ratification of the resolution.—In re Scott, Case No. 12,519.

§ 478. Extra inducement to sign composition.

Payment of larger sum to one creditor or his agent, as a condition of accepting a compromise is void.—Bullene v. Blain, Case No. 2,124.

A promise to pay an agent, whose principal was a creditor and was to be paid a larger amount than others as a condition of accepting a compromise, a certain sum as services to urge the compromise on the ground of the general interest of all creditors is valid.—Bullene v. Blain, Case No. 2,124.

Where a bookkeeper is the person actually employed to obtain the assent of creditors to a composition, the bankrupt is chargeable with what he did in the matter, without having actual knowledge thereof.—In re Bennett, Case No. 1,312.

Where a bookkeeper of a bankrupt, without the latter's knowledge, made an offer to induce the consent of a creditor to a composition, but such creditor refused, and it appears that the bookkeeper paid money to another creditor who did assent, with no explanation other than the denial of the bookkeeper that it had any relation to the matter of composition, such evidence is sufficient to warrant the inference that unfair advantage has been offered to induce the creditors to assent to the composition, and for that reason it must fail.—In re Bennett, Case No. 1,312.

Payment to induce consent will impeach a composition, though the requisite number of creditors signed without counting the one to whom payment was made.—In re Bennett, Case No. 1,312.

Creditors who join a composition cannot complain of a payment to one of their number to induce him to join out of a fund reserved, and not included in the schedule.—National Park Bank v. People's Bank, Case No. 10,049.

A signature of a creditor to a resolution of composition obtained upon the promise of another creditor to give him the promisor's trade in the future will invalidate the resolution.—In re Shine, Case No. 12,788.

Where the holder of the bankrupt's note was induced to sign the resolution of composition by an undefined expectation of advantage held out by the indorser, the composition will be set aside, though it does not appear that the bankrupt had anything to do with it.—In re Sawyer, Case No. 12,395.

A resolution of composition is avoided by the fact that a creditor was paid to give up a threatened opposition though a sufficient number of creditors had accepted it, and there was no evidence that their action was influenced thereby, or that the debtor procured the payment to be made.—In re Sawyer, Case No. 12,395.

Secret preferences, paid as inducements to obtain signatures to composition deeds, can be recovered by the debtor or by injured creditors or by the assignee.—Bean v. Brookmire, Case No. 1,170.

A composition will not be set aside after two years, as procured by preferences to certain creditors, where the debtor has entered into new business relations and contracted new debts, and the creditors have failed to move promptly after knowledge of the wrong.—In re Herman, Case No. 6,405.

§ 479. Effect of irregularities.

Irregularities which are the effects of mistake, and not of fraud, are not fatal to the validity of composition proceedings.—In re Henry, Case No. 6,370.

Creditors will be held bound by the proceedings had in the pursuance of the resolution of composition, though they are irregular as regards other parties.—In re Rodger, Case No. 11,992.

§ 480. Schedule of bankrupt.

Under the amendatory act of June 22, 1874, in cases of composition, a schedule of assets, such as is required in bankruptcy proceedings, is a sufficient statement.—In re Haskell, Case No. 6,192.

A contingent liability as stockholder in a failed savings bank need not be scheduled where it does not appear that the bank will not pay in full.—In re Greenebaum, Case No. 5,769.

The failure to schedule all debts will not prevent confirmation of a composition, for the discharge will only operate as to debts scheduled.—In re Greenebaum, Case No. 5,769.

A concealment of assets or a failure to name all the creditors does not necessarily render the proceedings void.—In re Scott, Case No. 12,519.

A mistake without fraud in the statement of the amount due a creditor will not vitiate the composition.—Ex parte Trafton, Case No. 14,133.

The fact that the schedules stated the real estate of the bankrupt as of unknown or uncertain value is not a good objection to a composition.—In re Welles, Case No. 17,377.

The schedule cannot be corrected on motion to record a resolution of composition, so as to show that the requisite number of creditors joined, but confirmation will be denied, with leave to renew the motion.—In re Asten, Case No. 594.

§ 481. Reference to register.

After a motion to confirm a compromise has been brought on for final hearing, the judge has power to refer the matter back to the register to report all the facts of the case touching the proposed compromise.—In re Walshe, Case No. 17,118.

Where an order refers a proposition of compromise to a register, it should require him to report as to whether the resolution of composition has been legally passed at the first meeting, and whether it has been confirmed by the required signatures, and whether the terms as to the composition are for the best interests of all concerned.—In re Scott, Case No. 12,519.

On application to confirm a proposed composition, the report of the register must be taken to be full and true.—In re Spencer, Case No. 13,229.

§ 482. Terms and provisions—In general.

Any composition is allowable which is satisfactory to the requisite majority of the creditors, and which is for the best interests of all concerned. Act 1867.—In re Purcell, Case No. 11,470.

A provision in a composition agreement, that it is not to be binding on any one unless signed by all creditors, includes secured as well as unsecured creditors.—Kinsing's Assignee v. Bartholew, Case No. 7,831.

A provision of the agreement that the proceedings may be discontinued at any time without notice to the creditors is not binding on the court.—In re McNab & H. Mfg. Co., Case No. 8,906.

A provision of the resolution of composition that upon delivery of the composition notes the assignee shall deliver all the property in his hands to the bankrupt, and be wholly discharged, is nugatory, and is not validated by a confirma-

tion by the court.—In re Hyman, Case No. 6,985.

A resolution proposing composition of 70 cents, to be paid within 30 days, on condition that all the bankrupt's property be surrendered and all pending suits discontinued, is proper.—In re Cavan, Case No. 2,528.

§ 483. —— Amount and form of payment.

The decision of the majority creditors is conclusive as to the amount of the compromise where their judgment is exercised in good faith, and there is nothing to indicate fraud, accident, or mistake.—In re Weber Furniture Co., Case No. 17,331.

A composition agreement, whereby creditors accept payment in notes, is defective, and will not be ratified, though payment by installments secured by notes would be valid.—In re Langdon, Case No. 8,058.

A composition of 20 per cent. in money, secured by time notes, leaving certain realty in the hands of the assignee, to be converted into money, and paid to the creditors, is a lawful composition.—In re Wronkow, Case No. 18,105.

It is no valid objection to a composition that it is unsecured and payable in installments, and that the property of the debtor is restored to him, to be dealt with at his pleasure.—In re Wilson, Case No. 17,781.

A composition is none the less payable in money because the payment is postponed to a future day by giving notes.—In re McNab & H. Mfg. Co., Case No. 8,906.

§ 484. —— Time of payment.

The question as to the time for the payment of the composition is one for the creditors to settle, and their judgment will not be reversed except for valid reasons.—In re Wilson, Case No. 17,785.

§ 485. —— Security for payment.

A composition agreed upon under the provisions of Act 1867, providing that payment should be made in indorsed promissory notes, will be sustained, as such transaction is a payment of money under the statute.—In re Hurst, Case No. 6,925.

A composition for a payment of a certain sum on the dollar in installments—the first in cash, and the others secured by notes indorsed by persons named—is valid. Act June 22, 1874.—In re Reiman, Case No. 11,673; Id. 11,675, affirming Case No. 11,674.

A resolution of composition providing for the giving of notes "satisfactorily indorsed" is defective in not naming the indorser, or providing for his being named.—In re Reiman, Case No. 11,673.

A resolution accepting a composition on condition that payment shall be guarantied by the giving of a satisfactory bond, in a penalty named, to a committee appointed by the creditors, will be confirmed.—In re Lewis, Case No. 8,314; In re Louis, Id. 8,528.

Security for the payment of the composition is not always essential to its validity. This is merely one of the facts to be considered in light of all the other facts on the question as to whether the composition is for the best interests of all concerned.—In re Wilson, Case No. 17,785.

The fact that security provided for a composition does not certainly secure the full payment of the composition does not make the composition uncertain.—In re Wilson, Case No. 17,785.

§ 486. —— Possession by debtor pending payment.

It is no ground for refusing to ratify a composition that the debtor retains possession of his assets, and that there is a provision that he may so retain possession.—In re Van Auken, Case No. 16,828.

The confirmation of the resolution of composition which provides that, upon a certain amount being paid, the property should revert to the debtor, will be denied where it appeared that the debtor, who was given possession of the creditor's property, had misappropriated the same, as a person proved once to have misappropriated funds of another is incompetent to be trustee of property for the benefit of creditors.—In re Bloch, Case No. 1,551.

The confirmation of a resolution of composition for 75 per cent., the last installment payable in three years, with no other security than the notes of the debtor corporation, will be refused where it appears that the president has been retained after his defalcation as treasurer has been discovered, and that the trustees have manifested no disposition to punish him or compel him to make restitution.—In re McNab & H. Mfg. Co., Case No. 8,906.

The bankruptcy court will refuse to confirm a composition under which all the property of the bankrupts is to be restored to them on their giving their individual notes, unsecured and unindorsed, for 75 per cent. of their debts.—In re Janeway, Case No. 7,207.

§ 487. Objections to confirmation of resolution.

Objections can be presented at the hearing for the ratification of a resolution of composition, as to the legality of its passage, as to the confirmatory signatures, etc., but only unsecured creditors can make such objections.—In re Scott, Case No. 12,519.

Objections that the claim of a creditor voting for the composition is fictitious or invalid cannot be raised for the first time upon motion for confirmation.—In re Bloch, Case No. 1,551.

The refusal of the register to proceed with the examination of the debtor until his fees are paid or secured is no ground of opposition to the recording of a resolution of composition.—In re Tifft, Case No. 14,033.

The refusal by the register of permission to take a copy of the inventory, which is at all times accessible to the creditor, is not prejudicial to him, and is no ground of opposition to the recording of a resolution of composition.—In re Tifft, Case No. 14,033.

A resolution of composition will not be recorded where a creditor's right to make suitable inquiries of the debtor has been denied or postponed by a vote of the meeting.—Ex parte Jewett, Case No. 7,303.

Mere delay, without laches, in obtaining requisite number of signatures to a composition, is not ground for refusing to record it.—In re Cavan, Case No. 2,528.

The objection that the estate could pay more will not avail unless very clearly made out, and the disparity is evident.—In re Welles, Case No. 17,377.

The satisfaction by the bankrupt of claims at large discounts, and the purchase by his brother of other claims, where the transactions are open, is no reason for refusing confirmation of the composition where two-thirds in number and amount of the other creditors consent to the composition.—In re Walshe, Case No. 17,118.

The court will not refuse to confirm, nor will it set aside, a composition, because certain property, located in another state, claimed by the bankrupt, was not reckoned, where the bankrupt had been advised by counsel that his claim was baseless, and it appeared that it could not be recovered, except by a long and expensive litigation. Case No. 11,674 affirmed.—In re Reiman, Case No. 11,675.

The court may confirm a resolution of composition in cases of voluntary bankruptcy, although the bankrupt has by his own acts and conduct deprived himself of the right to obtain a discharge.—In re Troth, Case No. 14,188.

The mere fact that a bankrupt has been refused a discharge on a specification of objection is not an absolute bar to a composition. A composition is not a discharge.—In re Odell, Case No. 10,427.

The presence and vote of a creditor who is not lawfully to be counted as such, in favor of a composition, will not nullify the proceedings unless the absence of his vote would change the result.—In re Walshe, Case No. 17,118.

Where the requisite majority of creditors agree to a composition, the mere fact that some of that majority signed in a representative capacity, as assignees in bankruptcy, administrators, etc., is not a valid objection to the composition.—In re Greenebaum, Case No. 5,769.

The omission of the court in a voluntary case to adjudicate the debtor a bankrupt does not defeat a composition made before such adjudication.—In re Van Auken, Case No. 16,828.

A composition to pay more than the estate is able to pay, where the balance is made up by friends, is not evidence of fraud.—In re Snelling, Case No. 13,140.

The bankruptcy court will interfere where the vote would have been otherwise had the facts been honestly and fairly laid before the creditors.—In re Keiler, Case No. 7,648.

§ 488. Hearing and determination.

Though there are indicia of fraud in composition proceedings, the court should not refuse to record the resolution without giving the debtor and majority creditors an opportunity to be heard.—In re Weber Furniture Co., Case No. 17,331.

Any creditor may testify that he has been induced to sign the resolution of composition by the false statements or evil practices of the debtor.—In re Keller, Case No. 7,654.

In deciding whether a composition should be approved or rejected, it should be compared with what the creditors would receive through an assignee, not with what the debtor might possibly be able to pay them.—In re Whipple, Case No. 17,513.

In deciding a motion to confirm a resolution of compromise, the court will take into account the relations of the creditors favoring the compromise to the debtor, and the relative number of creditors whose individual opinions are expressed in person by the resolution, as compared with those who dissent.—In re Weber Furniture Co., Case No. 17,330.

A resolution of compromise which is palpably opposed to the best interests of all concerned will not be confirmed.—In re Weber Furniture Co., Case No. 17,330.

Upon the submission of a resolution of composition duly accepted and confirmed by the requisite number of creditors, the bankruptcy court is not limited to the determination of the mathematical result.—In re Jacobs, Case No. 7,159.

The court will not confirm a composition duly accepted by the requisite number of creditors where fraudulent preferences to some of the creditors have not been taken into consideration.—In re Jacobs, Case No. 7,159.

Where it appears that a creditor will not receive any more under the ordinary administration, the composition will be confirmed, in the absence of proof of collusion.—In re Keiler, Case No. 7,648.

Where the requisite number of creditors consent to a composition in bankruptcy, and it appears that the composition is advantageous to the creditors, it must be confirmed, though the proceeding in bankruptcy was fraudulently brought about by the bankrupts, and though they will profit by the composition.—In re Allen, Cases Nos. 209, 210.

In accepting a composition of creditors all the court requires is to be satisfied that the creditors have been fully and honestly advised of the true condition of the debtor's affairs, so that the creditors have acted intelligently and understandingly in full view of the facts, and with a knowledge of their own rights in the premises.—In re Greenebaum, Case No. 5,769.

The composition should be accepted if made by the necessary quorum of creditors, acting intelligently, and without undue influence.—In re Greenebaum, Case No. 5,769.

A resolution of composition cannot be defeated on the mere ground that by such defeat some peculiar benefit may accrue to the objecting creditor.—In re Scott, Case No. 12,519.

The bankruptcy court will withhold its assent to the composition, if satisfied from evidence that the proceedings are collusive, although there is only one dissenting creditor.—In re Keiler, Case No. 7,648.

Resolution of composition passed by the requisite number of creditors, but opposed by two creditors, who, prior thereto, successfully opposed a discharge, will not be confirmed, where it appears that the composition is not for the best interests of the creditors who defeated the discharge.—In re Hannahs, Case No. 6,033.

The absence of the debtor is no ground for refusing to confirm the proceedings, where it does not appear that creditors' rights were injuriously affected by his absence.—In re Dumahaut, Case No. 4,124.

In confirming a composition the court may order the bankrupt to pay the expenses and disbursements of a creditor in successfully opposing a prior application for a discharge.—In re Odell, Case No. 10,427.

§ 489. Change of composition.

A composition ratifying an assignment under the state law may be varied by creditors at a subsequent meeting by providing for distribution of the assets in bankruptcy, where no creditors are prejudiced thereby.—In re Dumahaut, Case No. 4,124.

§ 490. Conduct of bankrupt's business by committee.

Where, during the continuance of the bankrupt's business under the direction of a committee, as provided in the resolution of composition, such committee writes, without authority, to one who afterwards sold goods to the firm, that it was understood that all debts incurred after the composition should be paid in full before any payments should be made on the old indebtedness, but that the committee were not to be personally liable, no new assets being acquired under the arrangement, the new debts will not be paid in full in preference to the old creditors, as the action of such committee did not work an estoppel as to such creditors.—In re Brightman, Case No. 1,879.

§ 491. Dividends and payment.

Creditors receiving their respective shares of a composition are not bound to see that other creditors receive their shares. — Ex parte Hamlin, Case No. 5,993.

Where, in composition proceedings, the amount of the claim of one of the creditors is disputed by the debtor, and the estimate is made to be used merely as showing on what sum said creditor is entitled to vote, such estimate does not estop the debtor from questioning the amount of the claim on which the percentage of the composition shall be calculated

in paying said composition.—In re Holmes, Case No. 6,632a.

A creditor who is entitled to performance under Rev. St. § 5101, can have priority in payment only out of the assets that should go to the debtor's assignee, as the composition statute does not impose on the debtor, as a condition precedent to a composition, that he shall pay in full all claims entitled to priority under such section.—In re Chamberlin, Case No. 2,580.

Where notes given upon a composition settlement fall due pending action upon a petition to review the order of confirmation, and petitioners refuse to receive payment, the money must be paid into court, or the bankrupt will be liable to a summary order for payment.—In re Reynolds, Case No. 11,725.

The court will not suspend or deny a creditor's right to receive his composition, except in favor of one who claims a specific lien thereon, or who has procured the appointment of a receiver to take the creditor's title.—In re Kohlsaat, Case No. 7,918.

Moneys payable under a composition cannot be attached, or their payment obstructed, by proceedings of another court for the security of a suitor therein.—In re Kohlsaat, Case No. 7,918.

One who advanced money with a mere understanding that it was not to be pressed for payment *held* entitled to share in the debtor's estate under a composition deed in the usual form.—In re Lane, Case No. 8,044.

The court may provide for an unliquidated claim in composition cases by permitting the prosecution of a pending suit in the state court, or by ordering an inquiry in the matter at the bar of the bankruptcy court.—Ex parte Trafton, Case No. 14,133.

A creditor who knows that a composition is being carried out, and that the creditors are being paid, and makes no effort to obtain his own share, will be estopped to object to these payments.—Ex parte Hamlin, Case No. 5,993.

§ 492. Set-off.

In composition cases, in which no assignee has been appointed, the debtor stands in the position of the assignee, in respect to set-off.—Ex parte Howard Nat. Bank, Case No. 6,764.

A creditor who receives a composition with full knowledge of all facts cannot afterwards require a set-off to be enforced against the debtor by a court of equity, which he had opportunity to assert at the time the composition was made.—Hunt v. Holmes, Case No. 6,890.

Where a manufacturer consigns goods to factors who advance him their notes to an amount larger than is ultimately realized on the goods, which notes are indorsed by him and discounted, and both parties become bankrupt, and the factors, employing the goods then in their possession, make a composition with their creditors, including the holders of the notes, who reserve the right to prove in full against all other parties to them, such creditors, in proving against the estate of the manufacturer, will not be required to give credit for the full amount received by them on the composition, but will be required to abate their proof by giving credit for the property of such manufacturer so employed by the factors, which might, upon their application, have been applied towards paying their debts.—Ex parte Harris, Case No. 6,109.

§ 493. In case of partnerships.

In the case of individual and partnership creditors, there can be a general composition only in the absence of objection by a creditor.—In re Spades, Case No. 13,196.

Where creditors of a bankrupt firm accepted their proposition with the knowledge that the members had received a sum out of the partnership fund, the resolution will not be set aside.—In re South Boston Iron Co., Case No. 13,183.

Individual creditors cannot participate in a meeting of partnership creditors held to determine whether an offer of compromise by the bankrupt firm shall be accepted.—In re South Boston Iron Co., Case No. 13,183.

Refusal or neglect to sign a petition for a composition by one of the partners, unless fraudulent, will not render the proceeding invalid as against the other partners.—In re Henry, Case No. 6,370.

One member of a firm which has been adjudicated bankrupt may submit a proposition of composition to the creditors of the firm and his individual creditors.—Pool v. McDonald, Case No. 11,268.

§ 494. Operation and effect.

Provable debts created by fraud are bound by a composition.—In re Shafer, Case No. 12,695.

Fiduciary debts are not discharged by a composition in bankruptcy, as the latter is not included in "proceedings in bankruptcy" mentioned in Rev. St. § 5117.—In re Rodger, Case No. 11,991.

A bankrupt is discharged by a composition accepted and approved only from claims of creditors whose names, addresses, and debts are placed on the statement produced at the meeting of creditors, but, as to the claims of the creditors whose names do so appear, a discharge granted by the court is neither necessary nor proper.—In re Becket, Case No. 1,210.

The confirmation of a composition between the bankrupt and his creditors, and the bankrupt's compliance with its conditions, suspend the functions of the assignee as to the administering of the estate; and the delivery of any property to the bankrupt, pursuant to the terms of the composition, discharges the assignee from further liability therefor, since the creditors have waived their right to call him to account for it as long as the composition remains in force.—In re August, Case No. 645.

A ratified composition confines a secured debtor to his security, and discharges the debtor from personal liability for the debt.—In re Lytle, Case No. 8,650.

Where, in a composition proceeding, the statement of liabilities represents a claim as being fully secured, and the creditor is in attendance, but does not participate in the proceedings, nor raise any objection to such representation, the claim is not discharged by the composition; but the creditor is entitled to the percentage agreed upon in such proceeding on the deficit left unpaid on realizing such security, whenever ascertained.—Paret v. Ticknor, Case No. 10,711.

A composition agreement, where no assignee is appointed, will bind creditors in another state whose names were entered on the schedule, but will not affect their rights in rem against property attached.—McGehee v. Hentz, Case No. 8,794.

A composition under the bankrupt law, without an adjudication and assignment, does not operate to displace or dissolve an attachment in a state court, levied within four months of the proceedings in bankruptcy, as against a creditor who took no part in the composition proceedings.—In re Clapp, Case No. 2,785; In re Scott, Id. 12,519; In re Shields, Id. 12,784.

A resolution of composition is not effectual to discharge the debtor until the dividend is in fact paid to the creditor.—In re Hurst, Case No. 6,925.

An adjudication will not be made, at the instance of creditors, in opposition to debtor in voluntary proceedings, after he has begun pro-

ceedings for composition under Act June 22, 1874.—In re Alsberg, Case No. 260.

In a voluntary proceeding in which a composition has been agreed upon for payment of 30 per cent. in cash, a discontinuance and restoration of the property will not be decreed on petition of the bankrupts joined in by a majority of creditors until the terms of the composition have been carried out.—In re McKeon, Case No. 8,858.

The bankruptcy court may enjoin creditors from harassing the debtor by proceedings at law while his composition proceeding is pending, except as to proceedings to enforce a valid security.—In re Hinsdale, Case No. 6,526.

Pending the composition the court may enjoin a creditor from suing on an unsecured debt; otherwise after the time for paying the composition has passed.—In re Hinsdale, Case No. 6,526.

After the discharge of a debtor by recording the resolution of composition, the court loses all control over his property, and cannot, by injunction, protect it from seizure by a secured creditor through the instrumentality of state courts.—In re Lytle, Case No. 8,650.

An injunction to restrain creditors from interfering with the bankrupt cannot be granted after lapse of the time provided by the terms of a composition, not even where the bankrupt put in his answer to a suit in a state court before the composition could be set up as a defense, and had to apply to set up the composition by supplemental answer, provided he had time to apply for an injunction during the composition proceedings.—In re Nebenzahl, Case No. 10,074.

§ 495. Effect of failure to perform composition.

The dismissal of proceedings in bankruptcy will not be vacated on the failure of the debtors to perform the agreement of composition, where the rights of third parties have intervened.—In re Ewing, Case No. 4,588.

The debtor's default under the composition does not entitle the creditor to the dissolution of an injunction against his judgment, obtained pending the bankruptcy proceedings.—In re Bayly, Case No. 1,144.

Delay in paying composition notes, occasioned by legal or other difficulties, does not ipso facto avoid the composition, nor does failure to pay one creditor according to the composition forfeit the bankrupt's rights as to creditors punctually paid.—In re Kohlsaat, Case No. 7,918.

Where, in bankruptcy proceedings, a composition is arranged and confirmed, the case is not thereby taken out of the jurisdiction of the court; and, where the debtor fails to carry out the terms of the composition, a creditor cannot thereupon claim the right to proceed against him for the collection of the whole debt. The bankruptcy proceedings are still pending, and his remedy is to be sought therein.—In re Bayly, Case No. 1,144.

§ 496. Enforcing composition.

A party interested is not entitled, as matter of right, to ask the summary enforcement of a composition by order of court.—In re Remsen, Case No. 11,698.

The performance by the bankrupt of an ex parte order after default will not be compelled, where there is no proof of service in a manner required.—In re Remsen, Case No. 11,698.

An order will not be made, directing the bankrupt to comply with the terms of composition after default by him, where it does not appear that the creditors are willing to proceed with the composition.—In re Remsen, Case No. 11,698.

One who has agreed to become a surety on a composition will not be summarily compelled to give security, where it appears that the bankrupt has abandoned the composition, and has not given the notes agreed.—In re Remsen, Case No. 11,698.

The bankruptcy court will not enforce the provisions of a composition in favor of the debtor, and as against a creditor who has obtained a judgment by default in the state court (the bankruptcy proceeding not being set up as a defense) upon a debt contracted by fraud.—In re Tooker, Case No. 14,096.

A creditor cannot be compelled summarily to take money and notes provided for by the composition, as a bankruptcy court can enforce in a summary manner only the executory provisions of the composition, under Act June 22, 1874, § 17.—In re Hinsdale, Case No. 6,526.

The bankruptcy court has no jurisdiction, under its summary power to enforce compositions, to take cognizance of and determine questions of title between the debtor and persons not parties to the proceedings.—In re Waitzfelder, Case No. 17,048.

§ 497. Vacating and setting aside composition.

When an application is made to set aside a composition once recorded, and to proceed in bankruptcy, notice should be given to all the creditors, as well as to the debtor.—Ex parte Hamlin, Case No. 5,993.

When a composition, partly carried out, is set aside, all acts which have been regularly done in pursuance of the resolutions are valid, and the assignment to an assignee should contain a proviso to that effect.—Ex parte Hamlin, Case No. 5,993.

The fraud of a member of a firm in effecting a composition with creditors cannot be alleged by him as ground of proceedings in bankruptcy after the firm is dissolved, but such composition can be set aside only by the creditors who are wronged.—In re Hamlin, Case No. 5,994.

On a petition to set aside a composition for alleged greater payments to other creditors, testimony will be ordered to be taken on notice to all creditors and the debtor, stating the time and object of the meeting.—In re Diggles, Case No. 3,905.

§ 498. Action by bankrupt.

An order made in composition proceedings appointing the bankrupts custodians of their property does not permit them to maintain a suit under Rev. St. § 4979.—McGehee v. Hentz, Case No. 8,794.

§ 499. Payment of surplus to bankrupt.

Where a composition between a bankrupt and his creditors has been confirmed, and its terms complied with, any question as to what amount the assignee should pay over to the bankrupt as the balance in his hands should be determined by the register under a special order of the court, and not upon a final accounting or creditors' meeting pursuant to Rev. St. § 5096.—In re August, Case No. 645.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

(A) RIGHTS AND REMEDIES OF BANKRUPT IN GENERAL.

§ 500. Privilege from arrest.

Under Act 1841 the bankrupt is privileged from arrest on execution for a debt pending the bankruptcy proceedings.—Anonymous, Case No. 450; United States v. Dobbins, Id. 14,971; In re Winthrop, Id. 17,900.

Under Act 1841 the bankruptcy, until after the decree and certificate of discharge, cannot release the bankrupt from arrest or imprisonment for a debt which is provable, but has not been proved against his estate, where the bank-

rupt was arrested before the petition in bankruptcy was filed.—In re Cheney, Case No. 2,636; In re Comstock, Id. 3,073; Ex parte Hoskins, Id. 6,712.

Where a party is arrested on a process from a state court, and is released on giving bonds to apply to be discharged under the state insolvent laws, and files a petition in bankruptcy, and is decreed a bankrupt, the bankruptcy court, before his discharge, will not enjoin the proceedings in the state court.—Ex parte Rank, Case No. 11,566.

The freedom from arrest granted to bankrupts "during the pendency of the proceedings in bankruptcy" by Act 1867, § 26, does not relieve them from arrests existing at the commencement of the proceedings.—Hazleton v. Valentine, Case No. 6,287; In re Walker, Id. 17,060; Minon v. Van Nostrand, Id. 9,641, affirming Case No. 9,642.

A stay of proceedings, subsequent to final judgment, for the purpose of putting in motion the remedy of arrest which is reserved to the creditor, is not allowable under Rev. St. §§ 5106, 5107.—In re Whitney, Case No. 17,581.

Where a bankrupt is arrested under mesne process in New Brunswick and gives bail, and, after judgment is entered up against him, is surrendered in exoneration of his bail and imprisoned, and subsequently files a petition in bankruptcy in Massachusetts, and still later is charged in execution in accordance with the laws of New Brunswick, such charging in execution is not an arrest during the pendency of the proceedings in bankruptcy under Act 1867, § 26.—Hazleton v. Valentine, Case No. 6,287.

Where a bankrupt is under arrest under process from a state court, he should make application to that court before coming into the court of bankruptcy to obtain his release.—In re O'Mara, Case No. 10,509.

The district court has jurisdiction to enforce the protection from arrest given the bankrupt (Act 1867, § 26), by releasing him from imprisonment by habeas corpus.—In re Glaser, Case No. 5,474.

A bankrupt cannot be held in the custody of the sheriff of the county on account of a judgment obtained against him for costs in an action in a state court.—In re Borst, Case No. 1,665.

The bankrupt, pending proceedings against him, may be held under arrest in a civil action founded on a debt or claim from which his discharge in bankruptcy would not release him, though the same is provable in bankruptcy.—In re Seymour, Case No. 12,684; In re Glaser, Id. 5,474; In re Alsberg, Id. 261.

An order of arrest by a state court, at the instance of a creditor whose debt is alleged to have been fraudulently contracted, cannot be vacated by the bankruptcy court; but the state court's proceedings may be stayed until the question of discharge is determined.—In re Migel, Case No. 9,538.

A judgment based upon a fraud of the bankrupt or upon a debt contracted by fraud is not affected by a discharge in bankruptcy (Act 1867, § 33), and the bankrupt is not exempt from arrest on an execution issued thereon.—In re Devoe, Case No. 3,843; In re Patterson, Id. 10,817; In re Pettis, Id. 11,046; In re Whitehouse, Id. 17,564; In re Pitts, Id. 11,190.

A bankrupt is not entitled to be discharged from arrest under process of a state court where the claim there sued for was created by defalcation while acting in a fiduciary capacity. Case No. 7,768 affirmed.—In re Kimball, Case No. 7,769.

Money collected by an agent under an agreement to account and pay over the proceeds monthly to his principal is not a debt created in a "fiduciary character."—Grover & Baker Sewing Mach. Co. v. Clinton, Case No. 5,845.

An agent who fails to remit the proceeds of flour, according to an agreement with his principal that he would remit the same, less his commissions, may be arrested in an action founded on the transaction, although he has been adjudged a bankrupt, the debt having been created by his defalcation while acting in a fiduciary character, within the meaning of Act 1867, § 33.—In re Kimball, Case No. 7,769.

A claim for the proceeds of goods consigned to the bankrupts as factors would be discharged by a discharge in bankruptcy; and hence, if the bankrupt is arrested therefor in a state court, he will be released by the bankruptcy court.—In re Smith, Case No. 12,976. CONTRA, see In re Seymour, Case No. 12,684.

A bankrupt arrested under a ca. sa. issued upon such a judgment will be released by this court, even though the state court had refused so to do.—In re Wiggers, Case No. 17,623.

The question whether a bankrupt can be discharged from arrest under Act 1867, § 26, depends upon the case presented on which the arrest was made.—In re Kimball, Case No. 7,769.

Where a bankrupt is arrested on an order issuing out of a state court, the bankruptcy court, on habeas corpus, can only inquire whether or not the papers on their face are sufficient to show that the debt was one created by fraud or in a fiduciary capacity.—In re Valk, Case No. 16,814.

In determining whether the arrest of the bankrupt on process of a state court after adjudication of bankruptcy was founded on a debt or claim from which his discharge would not release him (Act 1867, § 26), the court can only look to the affidavits on which the order for arrest was granted, and not to a complaint which was not before the state court at that time. Case No. 7,768 affirmed.—In re Kimball, Case No. 7,769.

A bankrupt is not exempt from arrest under Act 1867, §§ 26, 33, exempting the bankrupt from arrest in certain cases, where the affidavits upon which an order for his arrest was issued in the state court show a fraudulent contract, although the complaint is simply for goods sold and delivered.—In re Kimball, Case No. 7,767.

Evidence cannot be received to contradict the declaration in the action in which the order of arrest was granted, and to show that no such cause of action really exists as is therein set forth.—In re Devoe, Case No. 3,843.

The federal court, on habeas corpus to release bankrupt arrested on process in state court, is not bound by a case made in state court as to whether debt sued on was contracted in fraud, but may consider all legal evidence brought before it.—In re Alsberg, Case No. 261.

A judgment against the bankrupt by default in a state court, recovered upon a complaint which showed that the debt was contracted by fraud, is conclusive upon that question.—In re Patterson, Case No. 10,817.

Proceedings in a suit against the bankrupt by creditors who have joined in the petition, in which he was arrested on the ground that the debt was fraudulently contracted, will be enjoined pending the discharge.—In re Goldstein, Case No. 5,523.

A bankrupt who is held in custody under orders of arrest made in actions in a state court, and against whom other actions are pending in the state court, will be discharged from arrest, and proceedings will be stayed by the bankruptcy court until the question of his discharge shall be passed upon by the bankruptcy court, and a referee will be appointed to take testimony

as to whether such actions are for claims that will be discharged in bankruptcy.—In re Jacoby, Case No. 7,165.

A bankrupt, surrendered by his bail during the time allowed for his examination, will not be committed in execution.—Foxall v. Levi, Case No. 5,015.

§ 501. Supersedeas and stay.

A supersedeas may issue after a bankrupt has obtained his certificate.—In re Morris, Case No. 9,825.

A district judge has power to supersede a commission of bankruptcy under Act April 4, 1800, without express grant of such power therein.—In re Morris, Case No. 9,825.

The effect of a supersedeas, lawfully ordered, is to annihilate a commission of bankruptcy, and to place the bankrupt, with his estate and effects, in the same situation they would have been in had it never existed.—In re Morris, Case No. 9,825.

An order of supersedeas will annul a commission of bankruptcy without a formal writ being issued.—In re Morris, Case No. 9,825.

A supersedeas of a commission in bankruptcy will not be revoked to allow petitioner to prove debts against which there is a prima facie presumption of payment, unless it appear that he has a reasonable expectation of rebutting such presumption.—In re Morris, Case No. 9,825.

Where a certified bankrupt dies pending the commission, having devised all his property, and all that he might afterwards acquire, to his wife, who subsequently dies, devising her property to her daughter, and appoints her son executor, and real property of the bankrupt is afterwards discovered, the son has sufficient interest therein to entitle him to apply for a supersedeas.—In re Morris, Case No. 9,825.

If a bankrupt files two petitions setting forth the same debts, and the first one is still pending, proceedings under the second one will be stayed. —In re Wielarski, Case No. 17,619.

Where bankrupt partners reside in different states, and proceedings are commenced in each state, the proceedings in one state will be stayed until further order.—In re Smith, Case No. 12,983.

§ 502. Transactions and property acquired after adjudication.

The bankrupt, after the adjudication, may enter into business, and hold property, subject to the contingency of obtaining a discharge. Act 1841.—In re Grant, Case No. 5,693.

Whether property subsequently discovered will pass under a general devise by a certified bankrupt, query.—In re Morris, Case No. 9,825.

Property recovered after the bankrupt's discharge, by means of a suit in which the assignee was substituted as plaintiff more than two years after his appointment, cannot be claimed by the bankrupt on the ground that the action was barred.—Maybin v. Raymond, Case No. 9,338.

§ 503. Delay of proceedings.

Act 1800 requires extraordinary promptness on the part of the creditors to bring the proceedings to a close, and countenances no neglect or delay.—In re Morris, Case No. 9,825.

§ 504. Surplus funds.

The surplus funds in the hands of the assignee after settlement of the estate are to be paid to the bankrupt on his petition on oath showing that further debts will not be proved. —In re Hoyt, Case No. 6,806.

See, also, ante, § 499.

(B) ACTIONS BY AND AGAINST BANKRUPT.

See, also, ante, § 498.

§ 505. Right to maintain in general.

No lien can be acquired or enforced by any proceeding in a state court commenced after petition is filed in bankruptcy, though, in cases where jurisdiction has been previously acquired by state courts of a suit brought in good faith to enforce a valid lien upon property, such jurisdiction will not be devested.—In re Wynne, Case No. 18,117.

After the bankruptcy of defendant, against whom a decree has been obtained in a state court operating as a lien upon his property, plaintiff cannot proceed under a state statute for a discovery of assets.—Ex parte Taylor, Case No. 13,773.

A general creditors' bill in a state court filed after proceedings in bankruptcy commenced gives no jurisdiction, nor can jurisdiction be conferred by consent of the assignee.—In re Anderson, Case No. 351.

A creditor who has not received notice of the proceedings, nor any dividend, nor proved his debt, cannot sue on his debt pending the discharge. His remedy is to oppose the discharge. Act 1867.—In re Archenbrown, Case No. 504.

Irregularities in the bankruptcy proceedings do not deprive the court of its jurisdiction over the bankrupts and their estate, nor justify creditors in proceeding in the state courts.—In re Williams, Case No. 17,700.

When the United States courts, under the bankrupt act, have acquired jurisdiction of the bankrupt's estate, the state courts lose jurisdiction of all claims against him provable under Act 1867.—Woolfolk v. Murray, Case No. 18,028.

An assignment under the bankrupt law, and the appointment of an assignee, may be pleaded in abatement to a suit brought in the name of the bankrupt, upon a demand which passes to his assignee.—Cook v. Lansing, Case No. 3,162.

§ 506. Effect of bankruptcy on pending suits.

A judgment in a state court against a bankrupt, which has been duly appealed from by him, is not a final judgment (Act 1867, § 21). and the creditor cannot proceed therein after petition filed.—In re Metcalf, Case No. 9,494.

A motion to compel the bankrupt to furnish new security on such appeal is within the prohibition of section 21.—In re Metcalf, Case No. 9,494.

The prohibition of "further proceedings" under Act 1867, § 40, last clause, applies only to the direct proceedings upon the petition, and not to collateral proceedings by or against third persons, or even the debtor.—In re Muller, Case No. 9,912.

The jurisdiction of ordinary tribunals over suits against the bankrupt is not impaired by an adjudication in bankruptcy, and their judgments are valid in the absence of interference by the bankruptcy court.—In re Davis, Case No. 3,620.

A suit commenced in a state court before bankruptcy, in which title to property surrendered by the bankrupt is in controversy, will not be abated by the bankruptcy proceedings.—Hewett v. Norton, Case No. 6,441.

The bankruptcy of the patentee pending suit for infringement will not abate the suit, and the assignee need not be brought in if he reconveys the patent to the patentee pending the suit.—Gear v. Fitch, Case No. 5,290.

Where, during the pendency of a suit, one of the defendants is released under the bankrupt

law, the suit abates as to him, and the assignee should be made a party.—Fellows v. Hall, Case No. 4,723.

The jurisdiction of the district court of condemnation proceedings against a distillery is not defeated by the subsequent bankruptcy of the owners of the distillery.—United States v. Mackoy, Case No. 15,696.

In equity, the bankruptcy of the complainant and appointment of an assignee, pending a suit on a patent, would not abate the suit, but would only necessitate the filing of a supplemental bill making the assignee a party; and the reconveyance of the patent to the complainant, pending suit, would render such a proceeding unnecessary.—Gear v. Fitch, Case No. 5,290.

§ 507. Leave to continue suit.

It is not necessary to obtain leave of the bankruptcy court to continue to judgment a suit for assault and battery commenced before the petition in bankruptcy was filed, as the claim was not provable until the judgment was obtained. (Act 1867, § 21)—In re Hennocksburgh, Case No. 6,367.

Where the amount due a creditor is in dispute in the state court, the bankruptcy court may allow the suit to proceed for the purpose of ascertaining the amount due, but execution will be stayed if the debt is such as will be affected by the discharge.—In re Rundle, Case No. 12,138.

Where suit is pending against the bankrupt in the court of another state, the federal court may allow the debt to be proved provisionally, and authorize the suit to proceed for the purposes of liquidation; securing to the trustee of the creditors the right to resist the claim, either in the pending suit or by a proceeding in equity.—In re Cooke, Case No. 3,172.

Where leave has been granted (Rev. St. § 5106) to proceed in a pending cause, a judgment obtained therein is valid, although the assignee is not made a party.—In re Bousfield & Poole Mfg. Co., Case No. 1,704.

§ 508. Injunction—Power to grant.

Under the act of 1841, the district courts are possessed of the full jurisdiction of courts of equity over all subject-matters arising in bankruptcy.—Ex parte Foster, Case No. 4,960.

The federal district court sitting in bankruptcy has power by injunction to enjoin the prosecution of suits pending in the state courts against the bankrupt, during the pendency of bankruptcy proceedings.—In re Reed, Case No. 11,637; Sedgwick v. Menck, Id. 12,617; In re Citizens' Sav. Bank, Id. 2,735; Penny v. Taylor, Id. 10,957; Fowler v. Dillon, Id. 5,000; In re Whipple, Id. 17,512; In re Schwartz, Id. 12,502. CONTRA, see In re Dudley, Case No. 4,114; Campbell's Case, Id. 2,349; In re Burns, Id. 2,182.

The district court has the same power to restrain creditors in judgments at law against a bankrupt that a state court would have in case the debtor were not a bankrupt.—Fowler v. Dillon, Case No. 5,000.

Where a creditor has filed a creditors' bill in a state court, and obtained the appointment of a receiver, prior to the commencement of the bankruptcy proceedings, he may be enjoined from proceeding further in the state court, and the priority which he has acquired by his diligence will be determined by the bankruptcy court upon the distribution of the estate.—In re Whipple, Case No. 17,512.

An action in a state court to recover a provable debt may be stayed until a determination is had as to the discharge, though the debt be one that will not be discharged. Act 1867, § 21.—In re Rosenberg, Case No. 12,054; In re Schwartz, Id. 12,502; In re Van Buren, Id. 16,833. CONTRA, see In re Seymour, Case No. 12,684; In re Leibenstein, Id. 8,218.

A statement in the declaration filed in the state court of facts which would, if true, prevent the discharge of the debt in bankruptcy, is not binding upon the bankrupt court, nor does it prevent the full jurisdiction of that court over the person and estate of the bankrupt.—In re Williams, Case No. 17,700.

Charges of fraud in opposition to a discharge under the state poor debtor law, though filed after the bankruptcy of the debtor, do not make a new suit under Act 1867, § 21, which will enable the bankruptcy court to interfere. Case No. 9,642 affirmed.—Minon v. Van Nostrand, Case No. 9,641.

In proceedings in bankruptcy against a firm of partners, some of whom are foreigners, the members of the firm residing here may be restrained from prosecuting actions at the residence of the foreign members for the collection of debts.—In re Schepeler, Case No. 12,453.

A bankruptcy court, having no jurisdiction of divorce and alimony, will not interfere with a decree of a state court clothed with such jurisdiction, providing alimony to the bankrupt's wife, so as to increase, diminish, or in any direct way affect such alimony.—In re Garrett, Case No. 5,252.

The bankruptcy court has no authority to withdraw from the state court suits pending therein between the bankrupt and other parties, and compel their trial in the district court.—Samson v. Burton, Case No. 12,285.

The circuit or district court of the district in which the bankruptcy proceedings are pending, and only such courts, can enjoin the prosecution of a suit in a state court of another state, commenced after the bankruptcy proceedings are instituted.—Markson v. Heaney, Case No. 9,098; In re Richardson, Id. 11,774. CONTRA, see In re Tifft, Case No. 14,034.

The district court of a district other than that in which bankruptcy proceedings are pending may stay the enforcement of a judgment within its jurisdiction, obtained in an action in the state court, commenced after the filing of the petition in bankruptcy.—In re Tifft, Case No. 14,034.

The circuit court of a district other than that in which the bankruptcy proceedings are pending has not similar powers.—Tifft v. Iron Clad Mfg. Co., Case No. 14,035.

A district court of another district than that in which the original petition was filed may make all lawful orders and decrees in bankruptcy as to persons and property within the reach of its process and out of the reach of the process of the other court.—McGehee v. Hentz, Case No. 8,794.

The equity jurisdiction of the federal district court is not confined to cases originally arising in the particular court where the relief is sought; and, where a creditor living in Massachusetts commences suit in such state and in two other states against a party proceeded against as a bankrupt in Pennsylvania, an injunction will issue from the district court of Massachusetts against the creditor, within whose territorial jurisdiction he is, from prosecuting the suits in such state and in the other states.—Ex parte Martin, Case No. 9,149.

§ 509. —— When granted.

Contempt proceedings in a state court for failure to appear for examination on proceedings supplementary to execution will not be stayed by the bankruptcy court, under Act 1867.—In re Hill, Case No. 6,486.

Proceedings by the creditors on an appeal from a judgment against the bankrupt, taken by him before filing his petition, will be stayed.

pending the proceedings, on motion of the bankrupt to the bankruptcy court.—In re Leszynsky, Case No. 8,278.

The bankruptcy court will not interfere with the creditor who has obtained judgment after the process of the state court has been executed by a sale of the bankrupt's property.—In re Fuller, Case No. 5,148.

The jurisdiction acquired before proceedings in bankruptcy by a state court in proceedings for partition of an estate in which the bankrupt is interested will not be interfered with by the bankruptcy court.—In re Caldwell, Case No. 2,300.

Where, in the case of property claimed by both the bankrupt's wife and the trustees in bankruptcy, a suit is brought in the state court by the wife against the holders of the property for conversion, and the trustees, not being allowed to be substituted as defendants, bring a suit in a bankruptcy court to determine the ownership of the property, the prosecution of the suit in the state court will be enjoined pending determination of the suit in the bankruptcy court.—Wilkinson v. Barnard, Case No. 17,669.

A suit against the bankrupt in the state court by a creditor included in the composition will be enjoined pending completion of the composition.—In re Shafer, Case No. 12,695.

After 10 years from the entry of a judgment before the passage of Act 1867, in favor of a receiver appointed in a creditors' suit, adjudging an assignment to be fraudulent and void, the bankruptcy court will not interfere at the suit of an assignee in bankruptcy, though an appeal is still pending.—Sedgwick v. Menck, Case No. 12,616.

Where proceedings between a bankrupt and another in a state court are collusive, whereby such other is given an advantage over other creditors, the bankruptcy court will enjoin the parties from further proceedings therein. Samson v. Burton, Case No. 12,286, affirmed.—In re Clark, Case No. 2,801.

A debtor who has filed a voluntary petition, but objects to an adjudication, has no standing in the bankruptcy court on an application to enjoin a creditor from enforcing his claim by attachment.—In re Tifft, Case No. 14,031.

An action of replevin against a bankrupt in the state court, founded upon disaffirmance of a sale of goods for fraud, commenced after his adjudication, will be enjoined by the bankruptcy court pending his discharge.—In re Cohen, Case No. 2,961.

§ 510. —— Procedure.

For form of affidavit to stay proceedings in state court, see In re Glaser, Case No. 5,475.

§ 511. —— Violation of injunction.

An attachment for contempt lies against a state execution creditor for proceeding upon his execution in violation of an injunction issued by a federal court sitting as a court of bankruptcy.—In re Atkinson, Case No. 606.

The dismissal of the bankrupt's appeal in the state court by a judgment creditor for want of prosecution on its being called in its order, which would have been ineffectual, so far as the assignee is concerned, had it been successful, is not a violation of the order of the bankruptcy court forbidding further proceedings to enforce such creditor's claim.—In re Hirsch, Case No. 6,529.

No judgment can be rendered against a third person for contempt in disobeying an injunction issued in aid of the writ of bankruptcy, without proper proceedings taken against him, distinct from those against the bankrupt.—Creditors v. Cozzens, Case No. 3,378.

§ 512. —— Dissolution of injunction.

An injunction issued by the bankruptcy court, staying proceedings against the bankrupt in a state court until the question of final discharge should be determined, is ipso facto dissolved by the granting of the final discharge.—In re Thomas, Case No. 13,890.

Failure by a bankrupt for over a year to bring petition for a review to a hearing shows unreasonable delay in obtaining a discharge within the meaning of Act 1867, § 21.—In re Belden, Case No. 1,239.

§ 513. Leave to sue bankrupt.

The bankruptcy court may authorize a creditor to proceed in the usual way to collect his debt.—In re McGilton, Case No. 8,798.

Where a bankrupt has unreasonably delayed his application for a discharge, leave will be granted creditors, upon personal notice to the bankrupt of the application, to sue him in the same manner as if the proceedings had not been instituted.—In re Whiting, Case No. 17,574.

An application for leave to sue the bankrupt in a state court after the lapse of a year from the adjudication, where no discharge has been had by the bankrupt, must be on notice to him.—In re Scott, Case No. 12,520.

On application for leave to sue the bankrupt in the state court, the court will not inquire whether the debt be one from which the bankrupt would be relieved by his discharge.—In re Ghirardelli, Case No. 5,376.

§ 514. Evidence.

Where the defendant alleges in an action, as a defense, the bankruptcy of the plaintiff and an assignment of his effects, such facts cannot be proved by parol.—Moore v. Voss, Case No. 9,778.

In debt on a bond conditioned to prove plaintiff a bankrupt, evidence cannot be given to show that the commissioners of bankruptcy erred in their judgment.—Sutton v. Mandeville, Case No. 13,651.

(C) EXEMPTIONS.

§ 515. Constitutionality of acts.

The provision of the bankruptcy act of 1867 (section 14) adopting state exemption laws is uniform in its operations.—In re Beckerford, Case No. 1,209.

Act March 3, 1873 (17 Stat. 577), prescribing what property shall be allowed the bankrupt as exempt from the operation of the bankrupt law, is uniform and constitutional.—In re Smith, Cases Nos. 12,986, 12,996.

Act March 3, 1873, so far as it is declaratory of the meaning of Act June, 1872, is null and void, for to declare what a law is or has been is a judicial function.—In re Dillard, Case No. 3,912.

The provisions of a state constitution giving a homestead and other exemptions apply to contracts existing before the adoption of the constitution, and do not violate the obligation of contracts (Act June 8, 1872.)—In re Vogler, Case No. 16,986.

Act March 3, 1873, in so far as it attempts to exempt property specified in the state laws in a different manner or with different effect from that of the laws themselves, is in violation of the constitutional requirement of uniformity of the bankrupt laws throughout the United States.—In re Deckert, Case No. 3,728.

§ 516. Operation and effect of exemptions in general.

The right of exemption must exist, if at all, at the date of the commencement of proceedings in bankruptcy.—In re Duerson, Case No. 4,117.

Assignees do not acquire title to the exempt property by assignment; it remains in the bankrupt, and at his death his widow is not entitled to such property, but it passes to his legal representatives.—In re Hester, Case No. 6,437.

A bankrupt against whom judgments were rendered before his bankruptcy upon debts contracted prior to the adoption of a constitutional provision granting a homestead exemption is not entitled to the exemption as against such judgment.—In re Shipman, Case No. 12,791.

§ 517. Wearing apparel.

Articles of jewelry belonging to the bankrupt do not come under the description of wearing apparel, and, if not set apart by the assignee, must be surrendered to him. Act 1841.—In re Kasson, Case No. 7,616.

A watch and breastpin of the bankrupt are not exempt as wearing apparel.—In re Ludlow, Case No. 8,599.

§ 518. Allowance of "other articles and necessaries."

The words "other articles and necessaries" in Act 1841, c. 9, § 3, are to be construed as permitting the allowance of necessary articles only. —In re Williams, Case No. 17,701.

A clock and silver watch are not such furniture, articles, or necessaries as the assignee may, in his discretion, allow to the bankrupt. Silver spoons and a cow may or may not be necessaries, according to circumstances.—In re Williams, Case No. 17,701.

A fowling piece, pistol, fishing tackle, paintings, etc., are not exempt, as necessaries, under the act of 1842; nor are a watch and breastpin exempt, either as necessaries or wearing apparel.—In re Ludlow, Case No. 8,599.

A pew in a church cannot be included in property set apart to the bankrupt as necessaries. —In re Comstock, Case No. 3,076.

The discretion of the assignee in setting apart property as exempt under act 1867, § 14, is limited to the "other articles and necessaries."—In re Feely, Case No. 4,714.

The assignee has a discretionary power, under Act 1867, § 14, in setting apart "other articles and necessaries," and his action will not be reversed unless an abuse of authority plainly appears.—In re Thiell, Case No. 13,882.

Real estate cannot be set apart as exempt under the head of "articles or necessaries."—In re Thornton, Case No. 13,994.

Real estate may be set apart as a portion of the bankrupt's exemption where it will not injure the sale of other real estate, or work adversely to the interest of the creditors.—In re Edwards, Case No. 4,293.

The exemption of "other articles and necessaries" cannot include manufactured articles kept for sale by the bankrupt. (Act 1867, § 14). —In re Thiell, Case No. 13,882.

A family sewing machine is properly exempt under Act 1867, § 14.—In re Graham, Case No. 5,660.

A watch, not being exempt by the statute of the state, does not properly come within the discretionary articles contemplated by Act 1867, § 14.—In re Graham, Case No. 5,660.

A bankrupt engaged in commerce is properly allowed a watch of a small value, as a necessary article. (Act 1867).—In re Steele, Case No. 13,346.

§ 519. Value of exemptions.

Exemptions to the amount of $300, under Act 1841, c. 9, § 3, are not allowed in all cases, but only where the family, circumstances, and condition of the bankrupt warrant it.—In re Williams, Case No. 17,701.

Exemption in favor of a bankrupt is not affected by the fact that his wife owns the household and kitchen furniture.—In re Cobb, Case No. 2,920.

Under Act 1867, § 14, the assignee, in addition to necessary household and kitchen furniture, can exempt, in favor of the bankrupt, "such other articles and necessaries" as he may think right, the whole exemption not to exceed $500. —In re Cobb, Case No. 2,920.

Household and kitchen furniture and other articles and necessaries, to the amount of $500, may be set apart as exemptions in Pennsylvania. (Act 1867, § 14).—In re Feely, Case No. 4,714.

Where the wife of a bankrupt is the owner of a house, not occupied as a homestead by the family, nor allowed to be so by the wife, such bankrupt is entitled to exemption of property to the value of $500, notwithstanding such ownership by the wife. Act 1867, § 14.—In re Tonne, Case No. 14,095.

§ 520. Allowance of money.

The assignee may make the bankrupt an allowance, not exceeding $300, and he may also allow him any reasonable sum for taking charge of the property.—In re Grant, Case No. 5,693.

Money cannot be set apart as "articles" and "necessaries," under section 14, unless it is the proceeds of specific things which ought to be set apart under such head.—In re Welch, Case No. 17,366. CONTRA, see In re Hay, Case No. 6,253.

Under Rev. St. § 5045, the assignee cannot set apart money which is not the proceeds of exempt property, or which is not necessary for temporary support where the bankrupt's family is entirely destitute.—In re Tucker, Case No. 14,215.

When the bankrupt and his family do not keep house, but are boarding, money may be allowed by the assignee for their temporary subsistence. (Act 1867).—In re Thornton, Case No. 13,994.

The assignee cannot set apart assets to take the place of property sold under execution and distress for rent, which might have been exempted.—In re Lawson, Case No. 8,149.

§ 521. Allowance to wife of bankrupt.

Jewelry acquired by the wife of the bankrupt either before or after her marriage, if suitable to her condition, may be retained by her. Act 1841.—In re Kasson, Case No. 7,616.

An allowance will be made to the wife out of property descended to her before the decree of bankruptcy against her husband, but not reduced to possession by him.—Shaw v. Mitchell, Case No. 12,722.

§ 522. Exemptions under state laws—In general.

The bankrupt, in addition to the exemption allowed by bankrupt act, is entitled to exemption under the law of his domicile, and he may select the property exempt under the state law. —In re Cobb, Case No. 2,920.

Where no property is claimed under the specific exemptions of Act 1867, the claim for an allowance must stand upon the exemption granted by the state laws.—In re Friend, Case No. 5,120.

Congress, in adopting the exemption laws of a state as part of the bankrupt law, cannot dispense with any of the limitations imposed by that law.—In re Duerson, Case No. 4,117.

A failure to comply with the requirements of the state law giving an exemption will prevent the exemption under the bankrupt act.—In re Farish, Case No. 4,647; In re Jackson, Id. 7,127.

The state exemption must be ascertained by the mode designated by the state law.—In re Feely, Case No. 4,714.

The state exemption laws, as interpreted and settled by the adjudication of its highest courts, are controlling on the bankruptcy court (Act June 8, 1872).—In re Wyllie, Case No. 18,112.

Property exempt by the laws of the state where the bankrupt resides and where the petition is filed will be secured to him, wherever it may be situated, and whether exempt by the law of its situs or not.—In re Stevens, Case No. 13,392.

Growing crops are exempted under Rev. St. Me. 1871, c. 81, § 59.—In re Hussey, Case No. 6,945.

Where the bankrupt elects to occupy his farm and cultivate the crops, which are exempt under the state law, until harvested, he must secure to the assignee a reasonable rental.—In re Hussey, Case No. 6,945.

In Indiana a judgment for the costs of the opposite party is not a debt growing out of a contract, express or implied, and as against such costs the Indiana statute does not allow exemptions.—In re Owens, Case No. 10,632.

A policy of life insurance exempt from execution under the state law is to the same extent exempted under the bankrupt act.—In re Sawyer, Case No. 12,393.

§ 523. —— As affected by time of passage of law.

The approval by congress of the new constitution of North Carolina did not operate as an amendment of the bankrupt law with respect to exemptions therein provided for.—In re McLean, Case No. 8,878.

The filing of a petition by a bankrupt under Act 1867, which expressly limits the exemptions to be allowed to bankrupts to those allowed by state laws in force in 1864, is an election to take the exemption allowed by the state law in force in 1864, and the setting apart by the wife of the bankrupt an exemption under a later state law is void.—In re Askew, Case No. 585.

Exemptions created by a state statute are void as to creditors whose debts were contracted previous to the passage of such statutes.—In re Hester, Case No. 6,437.

Where no homestead was allowed by the state laws at the date of the adjudication, none can be allowed under Act 1867, as the rights of parties are fixed at the date of the adjudication.—In re Kerr, Case No. 7,729.

Under the provision of Act March 3, 1873, permitting the exemption allowed by the state law "existing in the year 1871," where there was a change in the law during the year the statute existing at the close of the year will control all proceedings commenced after the change of the state law.—In re Baer, Case No. 723.

Act March 3, 1873, only allows the exemptions granted by state laws in 1871, as against judgments of state courts when such judgments are rendered after the passage of such act.—In re Dillard, Case No. 3,912.

The bankrupt is entitled to the exemption as allowed by the law of the state as existing in 1871, though subsequently, and before the proceedings in bankruptcy, such exemption was reduced. (Rev. St. § 5045.)—In re Cohen, Case No. 2,960.

§ 524. —— What property may be set apart.

A vested expectant interest of a bankrupt in a sum of money payable at his death, or at the death of another person, may, in Pennsylvania, be set apart for the use of the bankrupt, providing that its estimated present value does not exceed $300.—In re Bennett, Case No. 1,315.

§ 525. —— Amount of exemption.

The exemption under the state law of property of the value of a certain amount cannot include the same species of property as is named in Act 1867, § 14.—In re Feely, Case No. 4,714.

The bankrupt may retain all his necessary household and kitchen furniture exempted by the state law from forced sale. (Act 1867, § 14.)—In re Davis, Case No. 3,621.

Under Act 1868, art. 12, § 1, which exempts personal property to the value of $2,000, and Act 1867, § 14, as amended by Act June 8, 1872, a bankrupt is not entitled to claim, as exempt, property to the value of $2,000, in addition to his household and kitchen furniture.—In re Hezekiah, Case No. 6,448.

The exemption in Pennsylvania of property worth $300 is additional to the exemption of necessary household and other articles, not exceeding in value $500, allowed by Act 1867.—In re Ruth, Case No. 12,172.

In Ohio, a head of a family, who has no homestead, and all of whose personalty is covered by a chattel mortgage, is entitled to an exemption of $500, out of the proceeds of such personalty, after the satisfaction of the mortgage.—In re May, Case No. 9,326.

§ 526. Homestead exemptions — Nature and right of exemption.

The removal of the bankrupt out of the state after his adjudication does not defeat his right to the homestead.—In re Radway, Case No. 11,523.

The homestead of a debtor in Michigan is protected, though he has absconded, where his family still resides thereon.—In re Pratt, Case No. 11,370.

In Kentucky, an undivided interest in land on which there are no improvements, appurtenances, or dwelling houses, although the debtor has expressed an intention to make it a homestead, will not be allowed as exemption.—In re Duerson, Case No. 4,117.

In Kansas the title to property occupied by the bankrupt and his family as a residence at the time of the filing of the petition in bankruptcy does not pass to the assignee, and he cannot maintain a suit in relation thereto.—Rix v. Capitol Bank, Case No. 11,869.

The homestead secured to the head of a family by the state law, though not ascertained and set out, does not pass to the assignee, and is not subject to the jurisdiction of the bankrupt court.—In re Bass, Case No. 1,091.

Whether a claim for a homestead exemption under a state law is provable in bankruptcy can be determined only by the bankruptcy court.—Woolfolk v. Murray, Case No. 18,028.

The bankruptcy court will not entertain a petition by the bankrupt to have real estate set apart as a homestead, and for an injunction to restrain a creditor from selling the same on execution issued before the bankruptcy; the remedy, if any, being in the state court.—In re Hunt, Case No. 6,883.

Under Code Va. c. 183, §§ 1, 5, 16, 17, the homestead exemption is good against the lien of an execution on personal property, and will be allowed by the bankruptcy court.—In re Peebles, Case No. 10,902.

The right to a homestead in land revives, where the conveyance of such land is set aside as an illegal preference under the bankrupt law, or is surrendered by the creditor under Act 1867, § 23.—Bartholomew v. West, Case No. 1,071; Cox v. Wilder, Id. 3,308, reversing Case No. 3,309; McFarland v. Goodman, Case No. 8,789; Penny v. Taylor, Id. 10,957; In re Detert, Id. 3,829. CONTRA, see In re Graham, Case No. 5,660.

Where a deed of trust by a husband creating a separate estate in his wife is declared void as

being voluntary, both as to antecedent and subsequent creditors, it is good as between the parties, and the wife is entitled to a homestead allowance out of the proceeds of the property.—Smith v. Kehr, Case No. 13,071.

The bankrupt cannot invoke the protection of the act of March 3, 1873, in favor of one to whom he sold a homestead, exempted under the state laws, before the filing of his petition.—In re Everitt, Case No. 4,579.

§ 527. —— Waiver of exemption.

A creditor holding a homestead-waiving bond or note may have payment thereof out of the homestead when it has been set apart without notice to him.—In re Judkins, Case No. 7,560.

The bankrupt is entitled to a homestead exemption in property occupied by him as a homestead, even though he had previously waived his homestead rights in favor of a particular creditor.—In re Poleman, Case No. 11,247.

The waiver of a homestead exemption only applies to persons claiming under the instrument in which it is made, and does not inure to the benefit of the assignee or other creditors.—In re Poleman, Case No. 11,247.

Homestead exemption, under the laws of Virginia, is a personal privilege which the landowner may waive, by a stipulation to that effect in an evidence of debt given by him; and such stipulation will be enforced in subsequent proceedings in bankruptcy.—In re Solomon, Case No. 13,166.

§ 528. —— Allotment of homestead.

Where homesteads have been duly allotted under the state law, in the absence of fraud, such allotment will be recognized, and allowed to the bankrupt.—In re Vogler, Case No. 16,986.

The bankrupt is not entitled to a homestead exemption in property taken in exchange for goods transferred in fraud of creditors.—Pratt v. Burr, Case No. 11,372.

The bankrupt is not entitled to the exemption of a homestead out of land mortgaged by him at the time of its purchase to secure the payment of the purchase money until the said mortgage is satisfied.—In re Whitehead, Case No. 17,562.

Though the vendor of land has recovered judgment on notes given by the bankrupt for the purchase price, his equitable lien on the land will be upheld by the bankruptcy court, and the property cannot be set aside as exempt.—In re Perdue, Case No. 10,975.

Exemption of a homestead allowed out of land mortgaged to secure the payment of borrowed money, prior to the time of claiming such homestead.—In re Brown, Case No. 1,980.

In granting an exemption, the court will order that it shall not affect or prejudice the wife's rights to alimony chargeable upon real estate claimed as homestead.—In re Garrett, Case No. 5,252.

The bankrupt court will not order a reassessment for mere excess of value, where a homestead has duly been laid off and allotted under the local law, and no fraud or irregularity is shown.—In re Hall, Case No. 5,921.

§ 529. When allowance to be made.

The application for the exemption allowed by the act can only be made before obtaining the discharge.—In re Kean, Case No. 7,630.

The exemption is not allowable until after the bankrupt has passed his last examination.—In re Mastbaum, Case No. 9,265.

§ 530. Selection, how made.

The assignee must select the property exempted under the bankrupt law, and should refuse to set apart articles of mere luxury.—In re Cobb, Case No. 2,920.

If the bankrupt has selected his furniture under the state law, there can be no second allowance. If he has selected real estate, the assignees may, in their discretion, make an additional allowance of furniture, etc., not exceeding $500 in value.—In re Noakes, Case No. 10,281.

In setting apart exempt property for the use of the bankrupt, the assignee is not obliged to designate articles on which there is no lien.—In re Preston, Case No. 11,394.

A register has no authority to set off exempt property to the bankrupt, nor to direct the assignee in the matter.—In re Peabody, Case No. 10,866.

If the bankrupt makes an erroneous claim to property mentioned in the schedule as being exempt from operation of the bankrupt act, it is the duty of the assignee to correct or disregard it.—In re Whetmore, Case No. 17,508.

§ 531. Report of exempt property.

The time to make a report of exempted property may be extended by the court.—In re Shields, Case No. 12,785.

The value of the articles should be stated in the list of exemptions.—In re Graham, Case No. 5,660.

The assignee should include the homestead in his report of exempt property.—In re Sinnett, Case No. 12,907.

Where the schedule of exempt property is not filed within 20 days after the assignment, creditors are not bound to except to it within 20 days after it is filed.—In re Peabody, Case No. 10,866.

§ 532. Exceptions to allowance or disallowance.

Where the bankrupt's application to the assignee for an exemption is refused, the proper way of bringing the matter up is by exception to his decision.—In re Thiell, Case No. 13,882.

Where the bankrupt is dissatisfied with the exemption allowed by the assignee, the only remedy is to except to his ruling, and have the question certified to the court.—In re Pryor, Case No. 11,457.

Where no exceptions are taken to the action of the assignee in setting apart property as exempt, such property passes to the bankrupt free from the jurisdiction of the bankrupt court; and, where the right to such exempt property is in dispute, the parties must resort to the state tribunal under whose laws the property was claimed.—In re Fetherston, Case No. 4,753.

Unauthorized exemptions of real estate are void, but, in the case of personalty, exception must be made to the allowance within the requisite time, under general order 19.—In re Gainey, Case No. 5,181.

An ex parte order approving the schedule of exemptions, made on the day it is filed, is irregular, and will be set aside at any time during the pendency of the proceedings, if the creditor acts with diligence after notice.—In re Peabody, Case No. 10,866.

§ 533. Sale of exempt property by assignee.

Where a bankrupt sets apart and claims specific goods as exempt under the law of Georgia, which exempts personal property to the value of $1,000, and the assignee mixes such goods with others, and sells all indiscriminately, and allots to the bankrupt $1,000 out of the proceeds, the assignee is in error, as all the bankrupt is entitled to under such circumstances is the proceeds of the specific goods claimed and set apart by him, which were not to exceed $1,000.—In re Friend, Case No. 5,120.

Where it is objected to the exemption of a homestead under the state laws that it exceeds in value the amount limited, the court will order it to be sold subject to the estate of the bankrupt.—In re Watson, Case No. 17,271.

Bankrupt *held* entitled to homestead exemption out of proceeds of equity of redemption of mortgaged farm, sold free of such right.—In re Beede, Case No. 1,226.

Where the equity of redemption (in Illinois) exceeds $1,000, the assignee may sell the property and pay over such amount to the bankrupt, where the situation of the property is such that a homestead cannot be set apart without injury to the rest of the estate.—In re Poleman, Case No. 11,247.

§ 534. Rights of purchasers and mortgagees from bankrupt.

A mortgage or sale of property which is excepted under section 14, Act 1867, is not in violation of the act.—Schlitz v. Schatz, Case No. 12,459.

An assignee cannot recover property excepted under Act 1867, § 14.—Schlitz v. Schatz, Case No. 12,459.

A purchaser of property improperly exempted to the vendor and sold by him without joining his wife, as required by the state law, takes no title, and will be required to relinquish the same to the assignee in bankruptcy.—In re Smith, Case No. 12,979.

The exemption from execution is a privilege which the bankrupt may waive; and, where a bankrupt does not choose to assert any claim to property that is exempted from execution under the law of the state where he resides, the bankrupt's mortgagee of that property cannot claim it as against the assignee in bankruptcy.—Edmondson v. Hyde, Case No. 4,285.

The bankrupt's homestead never comes within the jurisdiction of the bankruptcy court, and a creditor may enforce his lien thereon pending the proceedings.—In re Sinnett, Case No. 12,907.

One taking a mortgage upon lot claimed as homestead after decree declaring it not exempt as such will be ordered summarily to release his security.—In re Boothroyd, Case No. 1,653.

§ 535. Execution against exempt property.

Property exempt, both by state and bankrupt law, from levy and sale, cannot be sold after the owner has filed his petition in bankruptcy, although then levied on by a United States marshal.—In re Griffin, Case No. 5,813.

A debtor is entitled to the full benefit of the exemptions allowed by the bankrupt act, even though an execution had become a perfected lien upon his property before the filing of the petition.—In re Owens, Case No. 10,632.

A bankrupt is entitled to an exemption of his household furniture and other necessary articles, although they were taken under an execution prior to the commencement of proceedings, and the sheriff will be ordered to pay into the bankruptcy court, for the benefit of the bankrupt, the money derived from the sale of such property.—In re Martin, Case No. 9,152.

§ 536. Exemptions in cases of partnerships.

An adjudication of bankruptcy against a partnership operates as a dissolution, and nothing can be set apart as exempt to the bankrupts as a firm.—In re Blodgett, Case No. 1,555.

The individual members of a partnership are not entitled to exemptions out of the partnership property under Act 1867, § 14.—In re Hafer, Case No. 5,896; In re Price, Id. 11,410; In re Blodgett, Id. 1,555; In re Handlin, Id. 6,018; In re Stewart, Id. 13,420; In re Tonne, Id. 14,095; In re Boothroyd, Id. 1,652; In re Corbett, Id. 3,220; In re Croft, Id. 3,404. CONTRA, see In re Rupp, Case No. 12,141.

Nor are they entitled to such exemption under the laws of Pennsylvania.—In re Hafer, Case No. 5,896.

Nor under the laws of North Carolina.—In re Jackson, Case No. 7,127.

Nor under the laws of Michigan.—In re Blodgett, Case No. 1,555.

Nor under the laws of Virginia.—In re Smith, Case No. 12,979.

Nor under the constitution of Arkansas of 1868.—In re Handlin, Case No. 6,018.

Nor under Code Ga. §§ 2002–2039.—In re Stewart, Case No. 13,420.

Nor under the laws of Ohio.—In re Tonne, Case No. 14,095.

Nor under Rev. St. Wis. c. 34, § 30, subd. 9.—In re Hughes, Case No. 6,842.

But they are entitled to exemptions out of the partnership assets under the laws of Missouri.—In re Young, Case No. 18,148; In re Richardson, Id. 11,776.

The right of exemption attaches, as against partnership creditors, to partnership property transferred to one of the partners after dissolution.—In re Bjornstad, Case No. 1,453.

A house built on the separate property of a member of a bankrupt firm, with funds of the firm, at a time when the firm is indebted to such member to an amount exceeding the cost of the house, and occupied by the partner as his home, is subject to exemption under the Michigan laws and Act 1867.—In re Parks, Case No. 10,765.

Where a partner takes notes belonging to the firm, and with these purchases a homestead three days before the bankruptcy of the firm, and with a knowledge of its insolvency, he is not entitled to retain the homestead as exempt.—In re Boothroyd, Case No. 1,652.

Assets withdrawn by a retiring partner are subject to the payment of the firm debts, where the remaining assets are insufficient, and may be reached for the benefit of the creditors, though invested in a homestead.—In re Sauthoff, Case No. 12,380.

Subsequent dealings of the creditors with the remaining partner, and sales and credits by them, do not estop them from enforcing their claim against the assets withdrawn.—In re Sauthoff, Case No. 12,380.

(D) RIGHT TO DISCHARGE IN GENERAL.

§ 537. In general.

A petitioner under the act of 1890 was discharged on taking the prescribed oath, after the making of an order that the clerk should execute an assignment in trust for the creditors generally of his interest in a certain legacy.—Case of Humphreys, Case No. 6,868.

Where the act has been complied with, a discharge can be refused only on some ground set forth in Act 1867, § 29.—In re Clark, Case No. 2,800; In re Elliott, Id. 4,391.

The trial of all questions relating to the discharge will be postponed until the hearing of the petition.—In re Brisco, Case No. 1,886.

The right to a discharge becomes fixed upon application, due notice given, and failure to object, though an order granting the discharge was not procured.—In re Fowler, Case No. 4,999.

§ 538. Death of bankrupt.

Under Act 1867, § 12, which provides that, "if the debtor dies after the issuing of the warrant, the proceedings may be continued and con-

cluded," a discharge cannot be granted, where the bankrupt dies during the proceedings, without having taken the final oath prescribed by section 29.—In re Gunike, Case No. 5,868; In re Quinike, Id. 11,514; In re O'Farrell, Id. 10,446.

On the death of the bankrupt, after his uncontested application for a discharge had been submitted to the court, and a favorable report of the master had been made, the court has power to order the discharge to be entered nunc pro tunc.—Young v. Ridenbaugh, Case No. 18,173.

See, also, ante, § 127.

§ 539. Assent of creditors and amount of assets necessary in general.

An involuntary bankrupt is not entitled to a discharge unless his assets equal 50 per cent. of the proved debts, or he files the consent or a majority of creditors in number and value, as required by Act 1867, § 33, as amended Act July 27, 1868, and Act July 14, 1870.—In re Bunster, Case No. 2,136.

A partner who is in bankruptcy upon the petition of his co-partner cannot obtain his discharge without the assent of creditors or the amount of assets required in voluntary proceedings, as such proceeding by a partner against his co-partner is not an involuntary proceeding, within Act 1874, c. 390, § 9.—In re Wilson, Case No. 17,784.

Under the amendment of 1874, in any case where there were no assets equal to 30 per cent., if the bankrupt secured the assent of one-fourth of his creditors in number, and one-third in value, he is entitled to his discharge, without regard to the time when the debts were incurred. Case No. 17,489 reversed.—In re Wheeler, Case No. 17,491.

§ 540. Consent of creditors necessary.

The only remedy of a bankrupt, where a majority of his creditors file their written dissent to his discharge, is to demand a trial by jury.—In re Lothrop, Case No. 8,518.

Preferences given by confession of judgments prior to passage of Act 1841 will prevent a discharge not assented to by a majority of unpreferred creditors, but the bankrupt will be given time to procure such assent, and need not come prepared with the same on the day to show cause.—Anonymous, Case No. 463.

A creditor may consent to a discharge by his attorney in fact or counsel in open court.—In re Balmer, Case No. 820.

The assent of creditors to the discharge (Act June 22, 1874, § 9) must be in writing, and it is sufficient if filed any time before the hearing of the application.—In re Derby, Case No. 3,816.

A consent by a creditor to a discharge, acted upon and filed, cannot be withdrawn, though the right be claimed on the day fixed for the hearing.—In re Brent, Case No. 1,832.

A discharge will be refused where the assent of a creditor has been influenced by the purchase of a debt of another creditor for more than its value by a relative of one of the bankrupts.—In re Whitney, Case No. 17,580.

The assent of a majority in number of creditors, whose debts were contracted since January 1, 1869, and in amount of such debts, is the only assent required, where the bankrupt pays 30 per cent.—In re Pierson, Case No. 11,154; In re Wheeler, Id. 17,489, reversed in Case No. 17,491.

A creditor whose debt was contracted before January 1, 1869, will not be allowed to vote on the question of a bankrupt's discharge as to debts contracted since January 1, 1869 (Act 1867, § 33, as amended Act July 17, 1870).—In re Parrish, Case No. 10,769.

§ 541. Amount and number of consenting creditors.

The one-fourth of creditors in number and one-third in value whose assent is necessary (Act June 22, 1874, § 9) are those to whom the bankrupt is liable as principal debtor, and who have proved their debts against the estate.—In re Derby, Case No. 3,816.

When a majority in number and value of the aggregate of both partnership and individual creditors who have proved their debts assent, a discharge should be granted, though such majority of either class do not assent.—In re Morrill, Case No. 9,820.

The existence of the proper number of creditors filing assent may be proved on the hearing, where the record does not disclose the fact.—In re Pierson, Case No. 11,154.

§ 542. Amount of debts, how computed.

A bankrupt member of a firm which indorses notes of a third person used by such third person in purchasing outstanding claims against the firm is not liable as a principal debtor, within Act 1867, § 33, as amended Act July 27, 1867, requiring the assets to equal 50 per cent. of the claims proved, etc.—In re Loder, Cases Nos. 8,457, 8,458.

None of the contingent liabilities mentioned in Act 1867, § 19, can be regarded as liabilities of a principal debtor, within § 33 of said act, until they have been put in judgment, or undergone some other change than merely becoming absolute and fixed, in contradistinction to being contingent.—In re Loder, Case No. 8,457.

An indorser does not become liable as a principal debtor by the mere fixing of his liability as indorser. (Act 1867, § 19).—In re Loder, Case No. 8,457.

§ 543. Time when debts were contracted.

Within the meaning of Act 1867, the liability of the principal to the surety must be considered as having been contracted when the instrument was signed, and not when the surety made payment.—In re Perkins, Case No. 10,983.

The debt of a surety of the bankrupt against whom a judgment is rendered after January 1, 1869, is "contracted" after such date, within the meaning of Act 1867, § 33.—In re Parrish, Case No. 10,769.

Where a renewal note is given each year for seven years, the debt will be considered as contracted when the last note is given.—In re Schumpert, Case No. 12,491.

In the case of a renewal note, the bankrupt may show when the debt originated; and if before January 1, 1869, it should be classed as a debt contracted before that date.—In re Perkins, Case No. 10,983.

In a case of a judgment obtained upon another judgment, which latter was obtained upon a note indorsed by the bankrupt, the date of the indorsement is the date when the debt was contracted under Act June 22, 1874, § 9.—In re Sheldon, Case No. 12,747.

A debt due from a bankrupt under an agreement made on the surrender of a lease for a term, that he would pay any deficiency arising on a reletting by the landlord, will be considered as contracted at the time of such agreement (Act July 14, 1870), and not at the time a judgment was obtained therefor.—In re Swift, Case No. 13,693.

§ 544. Amount of assets necessary.

To entitle a bankrupt to discharge, under Act 1867, § 33, without the assent of his creditors, the proceeds of his property to be delivered among his creditors must be equal to 50 per cent. of the amount of the claims proved against his estate, upon which he is liable

as principal debtor at the time of the hearing of the application for the discharge before the register.—In re Freiderick, Case No. 5,092; In re Webb, Id. 17,314.

The bankrupt is entitled to a discharge without the assent of his creditors under Act July 27, 1868, if his gross assets equal 50 per cent. of proved debts, without deducting costs or expenses.—In re Kahley, Case No. 7,594.

Under Act July 14, 1870, the assets, after payment of valid liens, must equal 50 per cent. of proved debts contracted subsequent to January 1, 1869, to entitle the bankrupt to a discharge without consent of creditors.—In re Graham, Case No. 5,661.

In proceedings commenced after January 1, 1869, where the assets are not equal to 50 per cent. of the proved claims on which the bankrupt is liable as principal debtor, or where the requisite number of creditors have not assented, a discharge will be granted only from debts contracted prior to that date, although the assets equal 50 per cent. of the claims contracted after said date.—In re Shower, Case No. 12,816.

Under Rev. St. § 5112, the assets coming into the hands of the assignee in bankruptcy, exclusive of exemptions, must be equal to 30 per cent. of the claims proved against the bankrupt's estate, to entitle him to a discharge.—In re Cerf, Case No. 2,556; In re Wilson, Id. 17,782.

Under such statute, the bankrupt is not entitled to his discharge unless assets have come to the assignee's hands amounting to 30 per cent. of all claims proved at any time before the final hearing of the petition for discharge.—In re Longest, Case No. 8,485.

Under Act June 22, 1874, in voluntary cases, the assets must pay 30 per cent. of debts, regardless of when contracted, or when proceedings were commenced, in the absence of consent of creditors, to entitle the bankrupt to a discharge.—In re Gifford, Case No. 5,408.

Where the assets are not equal to 50 per cent. of the proved claims contracted since January 1, 1869, the discharge will be granted only as to all provable debts contracted prior to that time.—In re Seay, Case No. 12,597.

§ 545. Value of assets, how computed.

The word "assets," as used in Act July 14, 1870, amending Act 1867, § 33, requiring the same to be equal to 50 per cent. of the debts proved, does not mean the whole estate and effects of whatsoever nature before being reduced to money, but means money received by the assignee.—In re Van Riper, Case No. 16,874.

Assets in bankruptcy are the proceeds of the bankrupt's property which come into the hands of the assignee, and are applicable to the payment of his debts.—In re Wilson, Case No. 17,782.

The amount actually realized by the assignee is to be taken as the value of the assets under Act 1867, as amended by Act July 27, 1868, requiring the written assent of a majority of the creditors in number and value, where the bankrupt's assets are not equal to 50 per cent. of the claims proved against the estate.—In re Borden, Case No. 1,654.

In determining the right to a discharge, the value of the bankrupt's assets at the time he filed his petition is to be considered. The fact that they subsequently sold at a less value will not prejudice the right to a discharge, for, after the appointment of an assignee, the bankrupt had no further control over the property or of its disposal.—In re Thompson, Case No. 13,937; In re Lincoln, Id. 8,353; In re Taggert. Id. 13,725.

Though the bankrupt's assets exceed the amount of the proved claims, if, after payment of costs and expenses, the amount remaining does not equal 50 per cent. of such claims, he is not entitled to a discharge, under Act July 27, 1868, without the assent of a majority in number and value of his creditors.—In re Vinton, Case No. 16,951.

Amounts paid to lien creditors are not to be deducted before ascertaining the requisite percentage of assets to entitle the bankrupt to a discharge.—In re Taggert, Case No. 13,725.

§ 546. Reference to ascertain amount of assets.

The debtor cannot have his assets appraised and determined as being in excess of 50 per cent. of provable claims, before debts are proved or an assignee appointed.—In re Freiderick, Case No. 5,092.

Where the register to whom the matter upon a proceeding for a discharge was referred to ascertain the extent of the assets did not make his report until after the passage of the amendment of July 14, 1870, the order of reference may be amended so as to comply therewith.—In re Rockwell, Case No. 11,987.

§ 547. Effect of irregularity.

The bankrupt is made responsible for the regularity of the proceedings, and is bound to see that all the necessary steps are regularly taken, or he cannot have his discharge.—In re Bellamy, Case No. 1,267.

Due notice of the appointment of the assignee is not essential to the debtor's discharge.—In re Littlefield, Case No. 8,398.

A discharge will not be refused for neglect of the assignee to have the deed recorded, where he knew that no property passed under the assignment, and he duly qualified.—In re Pierson, Case No. 11,153.

It is no objection to a discharge that the second and third general meetings of creditors were not held at the expiration of three months and six months, respectively, from the date of the adjudication (Act 1867).—In re Littlefield, Case No. 8,398.

Proper notice should be given by the assignee to creditors upon the settlement of his accounts, and the allowance by a bankrupt of the omission of such notice is a ground for refusing his discharge.—In re Bushey, Case No. 2,227.

§ 548. Effect of prior application or decision.

The refusal of a judge to discharge a debtor, if the proceedings were irregular, is no bar to his discharge upon a subsequent application.—Connelly's Case, Case No. 3,111.

The refusal of the court to grant a discharge, on the ground that the application was not made within a year of the adjudication, is no bar to a new proceeding.—In re Farrell, Case No. 4,680.

The pendency of a prior petition for discharge which was not seasonably made is no ground of objection to the jurisdiction of the court on a subsequent petition.—In re White, Case No. 17,533.

(E) APPLICATION AND PROCEEDINGS TO OBTAIN DISCHARGE.

§ 549. Time of application.

Under Act 1867, § 29 (Rev. St. § 5108), providing that, "at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or no assets have come to the hands of the assignee, at any time after the expiration of 60 days, and within one year

from the adjudication," the bankrupt may apply for a discharge, the application for a discharge must be made within one year from the adjudication, whether or not debts are proved or assets received, and it is not discretionary with the court to grant a discharge applied for after such time where there are assets or debts proved.—In re Wilmott, Case No. 17,778; In re Martin, Id. 9,153; In re Sloan, Id. 12,945; In re Wood, Id. 17,936; In re Watson, Id. 17,275. CONTRA, see In re Canady, Id. 2,377; In re Greenfield, Id. 5,775, reversing Cases Nos. 5,773, 5,774; In re Vorbeck, Case No. 17,002; In re Donaldson, Id. 3,982; In re Holmes, Id. 6,634.

The bankrupt may apply for a discharge within 60 days after the adjudication, where debts have been proved, but no assets have come to the hands of the assignee.—In re Woolums, Case No. 18,034.

It is a case of "no assets" where the assignee 60 days after the adjudication has collected nothing on notes which constituted the bankrupt's entire assets.—In re Dodge, Case No. 3,947.

An order to show cause why a discharge should not be granted may be made after the expiration of sixty days, and within one year from the adjudication of bankruptcy, where it appears that the assets are absolutely worthless.—In re Solis, Case No. 13,165.

Where there are debts proved and assets, application for a discharge cannot be filed before the expiration of six months from the issue of the warrant of adjudication.—In re Bodenheim, Case No. 1,594.

Where there are no assets, bankrupt cannot be discharged, unless he applies after the expiration of sixty days and within one year from the adjudication.—In re Barrett, Case No. 1,044.

A discharge will be refused where the bankrupt failed to apply therefor within one year of the adjudication, where a small amount of assets has come into the assignee's hands, but no debts have been proved. Act 1867, § 29.—In re Schenck, Case No. 12,447.

Application of the provision in section 48 of the act of 1867, in respect to excluding from computation of time Sundays or holidays, when the last day falls thereon.—In re Lang, Case No. 8,056.

Application must be made before the final report and discharge of the assignee.—In re Cross, Case No. 3,427.

The application by a bankrupt for his discharge is too late when made after the assignee has been discharged from all liability as to any creditor. Act 1867, as amended by Act July, 1876.—In re Brightman, Case No. 1,878.

The failure of the assignee to make a return of "No assets" will not cure the laches of the bankrupt in applying for a discharge.—In re Potteiger, Case No. 11,320.

Where discharge was barred by limitation prior to the act of 1874, the bankrupt could not avail himself of the less stringent provisions of the latter act by alleging inability to procure the assent of sufficient creditors as an excuse for not applying for discharge under the old act.—In re Lowenstone, Case No. 8,576.

§ 550. Application by creditor.

A creditor, after a year, may require the bankrupt to have the question of his discharge determined.—In re Fowler, Case No. 4,999.

§ 551. Return by assignee.

The fact that the assignee has reason to expect that he may receive money for the estate is no ground of denying a return, under Form 35, when requested by the bankrupt.—In re Hughes, Case No. 6,841.

The assignee will not be ordered to amend his return when no reason is shown why the proposed amendment should be made.—In re Kingon, Case No. 7,815.

§ 552. Order to show cause.

A register has power to make the order to show cause, there being no opposition, if, under Act 1867, § 4, he is directed to make it by the judge, and the order referring the case to him may be considered as giving such direction.—In re Bellamy, Case No. 1,266.

Where no assets have come to the hands of the assignee, a return by him is not necessary before an order to show cause why a discharge should not be granted can be made under Act 1867, § 29.—In re Bellamy, Case No 1,266.

On a petition, according to form No. 51, Act 1867, the register to whom the case is referred may direct the making of the order.—In re Bellamy, Cases Nos. 1,266, 1,267.

The order to show cause (form No. 51) is to have the signature of the clerk and the seal of the court.—In re Bellamy, Case No. 1,268.

When a register directs an order to show cause (form No. 51) to issue, he is at once to transmit to the clerk a list of all the proofs of debt in the case, which have been furnished to the register or assignee, containing the names, residences, and post-office addresses of the creditors, with sufficient particularity to enable the notices to be served properly.—In re Bellamy, Case No. 1,268.

§ 553. Notice to creditors.

The words "other persons in interest," in Act 1841, to whom notice of the application for discharge is required to be given, apply to creditors who have ulterior or contingent claims against the bankrupt, and to cases in which the bankrupt stands under a liability to a party not amounting to a debt or coming within the class of claims authorized by such act to be proved as debts.—In re King, Case No. 7,784.

A creditor cannot be prejudiced by the loss from the files of his proof of debt. He is still entitled to notice of application for a discharge.—In re Friedlob, Case No. 5,118.

The clerk must mail the notices (form No. 52) when they are to be served by mail.—In re Bellamy, Case No. 1,268.

Where, at the time a bankrupt applies for his discharge, no creditors have proved their debts, and no assets have come to the hands of the assignee, notice to show cause why a discharge should not be granted must be by publication in such number of newspapers and for such length of time as the court may direct.—Anonymous, Case No. 457.

If the bankrupt does not apply for his discharge within three months from the time of his being adjudged a bankrupt, the notice need say nothing about the second or third meeting of creditors, which should be left to be regulated by Act 1867, §§ 27, 28.—Anonymous, Case No. 461.

On application after 60 days from the adjudication, the notice, form No. 52, need be served only on creditors who proved their debts, though containing a notice of the second and third general meetings of creditors.—In re McIntire, Case No. 8,822.

It is not necessary, in such case, that the request of the assignee, form No. 28, should be furnished the register.—In re McIntire, Case No. 8,822.

§ 554. Adjournment of proceedings.

The pendency of an examination of the bankrupt is good cause for an adjournment of the proceedings on an order to show cause why the

bankrupt should not be discharged.—In re Mawson, Case No. 9,320; In re Thompson, Id. 13,935.

Proceedings under a petition for a discharge are terminated by an adjournment without day, unless a new order is issued.—In re Seckendorf, Case No. 12,600.

§ 555. Continuance.

Where there is no opposing party, the proceedings for discharge may be continued from day to day to suit the convenience of the bankrupt.—In re Sutherland, Case No. 13,640.

§ 556. Filing papers.

No discharge can be granted until all papers relating to the case are filed by the register in the clerk's office.—In re Bellamy, Case No. 1,267.

Where proofs of debts have been lost, they must be supplied under Rev. St. §§ 899, 900, before the bankrupt can be legally discharged.—In re Friedlob, Case No. 5,118.

§ 557. Reference to register.

Form No. 4 in bankruptcy is not a special order, but a "general order," under rule 5 of the general orders in bankruptcy.—In re Bellamy, Case No. 1,268.

Where there is no opposing counsel, on an application for discharge made more than two years after the adjudication, and after Act June 23, 1874, and the assent of majority creditors has not been obtained, the court will refer the case to a register to report as to all the facts.—In re Watson, Case No. 17,273.

Where the delay is not sufficiently accounted for, the application will be dismissed.—In re Watson, Case No. 17,274.

§ 558. Examination of bankrupt and others.

Manner of procuring examination of bankrupt before granting the discharge, and its conduct generally.—In re Brandt, Case No. 1,813.

A register has power to fill up a blank order for the examination of the bankrupt, issue the summons, and appoint the day and place.—In re Brandt, Case No. 1,812.

The filing of specifications in opposition to a discharge is not a necessary prerequisite to making of order for examination of bankrupt or other persons (Act 1867, § 26).—In re Baum, Case No. 1,116.

On filing specifications in opposition, the hearing upon the petition is at once transferred to the court, under Act 1867, § 4, and there cannot be any examination of the bankrupt by the creditors before a register, on the application by the bankrupt for a discharge.—In re Frizelle, Case No. 5,132.

A register has no authority to summon witnesses for the purpose of eliciting facts that may assist the creditors in preparing their specifications in opposition to the bankrupt's discharge, but it is proper to call the bankrupt to answer any questions regarding his bankruptcy.—In re Brandt, Case No. 1,812.

The bankrupt is not entitled to notice or an opportunity to attend and cross-examine a witness subpœnaed by a creditor pending application for a discharge.—In re Duncan, Case No. 4,132.

After ample opportunity for an examination of the bankrupt is afforded, and it is apparently full, further examination will be refused unless a specific defect or collusion is shown.—In re Frisbie, Case No. 5,131.

The bankrupt's discharge will not be refused on the ground that he did not procure an appointment from the register for the time and place for his examination, where it appears that he was ready to attend and be examined on due notice, for the duty of procuring such appointment from the register devolves upon the creditor.—In re Littlefield, Case No. 8,398.

§ 559. Hearing.

An unopposed petition for discharge is to be submitted upon the state of the case existing on the return day.—In re Seaman, Case No. 12,580.

§ 560. Oath of conformity.

The oath required by Act 1867, § 29, must be taken, and produced to the register, on the return day of the order to show cause, and he must then certify conformity or nonconformity, though the creditors ask time to file specifications of objections.—In re Pulver, Case No. 11,467.

The oath of conformity (Rev. St. § 5113) may be taken before any register or any court commissioner at any place within the district of such register or commissioner. Such oath is evidence, within Rev. St. § 5003.—In re Comstock, Case No. 3,072.

The final oath of the bankrupt need not be made or filed until the hearing.—In re Sutherland, Case No. 13,640.

On withdrawal of specifications in opposition to his discharge, the bankrupt must take anew the oath required by Act 1867, § 29.—In re Machado, Case No. 8,819.

The presumption that the final oath required by Act 1867, § 29, was duly taken, is not overcome by the mere fact that such oath is not upon file.—Young v. Ridenbaugh, Case No. 18,173.

§ 561. Certificate of register.

The register must make his certificate as to examination, whether there be opposition to the discharge or not.—In re Bellamy, Case No. 1,267.

Certificate of conformity by the register is not conclusive on the court, and it may resort to other sources to ascertain whether or not the bankrupt has complied with the law.—In re Longest, Case No. 8,485.

§ 562. Order granting or refusing.

Where the bankrupt was about to lose all remedy by the repeal of the bankrupt law, the court permitted a default to be opened on terms.—In re Young, Case No. 18,146.

An order refusing a discharge may be entered nunc pro tunc where the parties have acted on the theory that the order was in force, and the rights of third parties will not be prejudiced. Case No. 4,090 affirmed.—In re Drisko, Case No. 4,086.

§ 563. Schedules.

In the case of involuntary bankruptcy, the bankrupt is not bound to file an inventory of his estate and effects, or a list of his creditors, in order to obtain a discharge, under Act 1841.—In re Ely, Case No. 4,429.

The bankrupt must amend his schedule so as to make it conform to the facts, and the filing of specifications does not deprive him of that right or release him from that duty.—In re Heller, Case No. 6,339.

A discharge will be denied until the amendment of the schedule so as to set out an interest in expectancy omitted by the bankrupt.—Connelly's Case, Case No. 3,110.

The case will be referred back to the register where the bankrupt has omitted from his schedule, as outlawed, claims of creditors who had no notice of the proceedings.—In re Cushman, Case No. 3,512.

(F) PROCEEDINGS IN OPPOSITION TO DISCHARGE.

§ 564. Powers and duties of register.

Where a creditor opposes the discharge, the register must make a certificate of his proceed-

ings, and return the papers into court.—In re Hughes, Case No. 6,841.

Whether the bankrupt is entitled to a discharge is a question which cannot be certified, at the instance of a creditor, to the court by the register under Act 1867, § 6.—In re Mawson, Case No. 9,317.

A register has no authority to decide questions arising upon objections properly urged against a bankrupt's discharge. Whether objections are sufficient or insufficient, the register must, notwithstanding, proceed with the case.—In re Puffer, Case No. 11,459.

§ 565. Who may oppose discharge.

Any creditor whose debt is provable may oppose the discharge, although the debt has not been proved.—In re Butelle, Case No. 1,705; In re Shepard, Id. 12,750; In re Murdock, Id. 9,939; In re Smith, Id. 12,977. CONTRA, see In re Cohaus, Case No. 2,959b; In re King, Id. 7,784; In re Burk, Id. 2,156; In re Levy, Id. 8,297; In re Brisco, Id. 1,886.

No other persons can oppose the discharge.—In re Boutelle, Case No. 1,705.

Any one interested in the administration of the effects of the bankrupt may object, under Act 1841, though technically he is not a creditor.—In re Book, Case No. 1,637.

A creditor may come in at any time before the hearing of the petition for a discharge, to prove his claim and file objections.—In re Longest, Case No. 8,485.

Claims against a bankrupt cannot, as a matter of course, be proven to bar his discharge at any time subsequent to the day fixed for the creditors to show cause against the discharge.—Hester v. Baldwin, Case No. 6,438.

After time for hearing application for discharge is expired, and a creditor proves his debt, he cannot be heard in opposition to such discharge, or have his debt counted among the claims proved, so as to affect it.—In re Borst, Case No. 1,666.

Creditors who have not proved their claims until after the day fixed for showing cause against a discharge can then object to the discharge only on the ground of fraud.—In re Balmer, Case No. 820.

A debt proved in the firm name of A., B., C. & Co. cannot be the foundation of proceedings in opposition by B., C. & Co.—In re Palmer, Case No. 10,682.

Specifications in opposition filed by other than the attorneys appointed by the creditor, where there has been no lawful substitution, will be overruled.—In re Palmer, Case No. 10,682.

A creditor cannot oppose a bankrupt's discharge on the ground that the bankrupt, with intent to prefer such opposing creditor, made an assignment for his benefit, he having knowledge of such purpose, as such creditor cannot receive aid from his own wrong.—In re Jones, Case No. 7,452.

A former partner of the bankrupt cannot object to the latter's discharge on the ground that he failed to keep a cash account, except as to matters occurring after the dissolution of the partnership, where it appears that such creditor had knowledge of the manner in which the business of the partnership was run.—In re Sawyer, Case No. 12,394.

Creditors who have agreed that the bankrupt's property shall be transferred by the assignee to a certain person, to be distributed according to the terms of a previous general assignment for creditors, are estopped from setting up such assignment in bar of the discharge.—In re Schuyler, Case No. 12,494.

A conveyance by a merchant in failing circumstances to his wife will not ordinarily be supported on the ground that many years previously she, without security, advanced him money, under a verbal promise of repayment, which money he invested in his own name, and used to obtain credit in his business. But where, on a creditors' bill, brought in the name of a cashier of a bank, such conveyance was sustained by a state supreme court, the bank is estopped to oppose the discharge of the husband in bankruptcy on that ground.—In re Antisdel, Case No. 490.

A person having an equitable claim against the estate may oppose the discharge under Act 1841.—In re Tebbetts, Case No. 13,817.

A person having a contingent and unliquidated claim not capable of being proved as a debt comes within the class of "other persons in interest" (Act 1841, § 4), and may show cause against a discharge.—Ex parte Traphagen, Case No. 14,140.

A mortgagee of the bankrupt is entitled as a creditor to take part in the proceedings, notwithstanding an assignment of the mortgage to a third person to secure a debt, and a general assignment of all his property to a receiver appointed in suit against him.—In re Ely, Case No. 4,428.

Copartnership creditors, being entitled to the individual assets of one copartner, who has no individual creditors, may oppose his discharge.—In re Leavitt, Case No. 8,169.

A judgment recovered pending bankruptcy proceedings in a suit begun before, and based upon a provable debt, is released by a discharge; therefore a creditor holding such judgment has an interest in the question of discharge and a right to be heard thereon.—In re Stansfield, Case No. 13,294. CONTRA, see In re Gallison, Case No. 5,203.

Where a creditor, who has obtained judgment for his debt after an adjudication against his debtor, has proved his debt, and afterwards obtained an unconditional judgment, and takes out execution, and appeared to oppose the discharge, no one having moved to expunge his proof, he will be heard against the discharge on filing a stipulation to cancel his judgment if the discharge should be granted.—In re Gallison, Case No. 5,203.

Creditors of debts contracted before January 1, 1869, cannot oppose a discharge as to debts contracted since that date.—In re Pierson, Case No. 11,154.

§ 566. Contesting right to oppose discharge.

An exception to the competency of a creditor to present objections to the discharge, on the ground that he had not proved his debt, should be taken before the court when the objection was offered, and if presented for the first time to the commissioner he may disregard the same. (Act 1841).—In re King, Case No. 7,784.

Both the bankrupt and creditors who have duly come in under the law may contest the right of a creditor who has not proved his debt to oppose the bankrupt's discharge.—In re Cohaus, Case No. 2,959b.

§ 567. Intervention and substitution.

Creditors will not be allowed to intervene, after the return day, to prosecute specifications filed by a creditor whose claim was stricken out after the filing of such specifications.—In re McDonald, Case No. 8,753.

Where a creditor has duly filed specifications of opposition to the discharge, and is about to withdraw them, other creditors may be substituted and carry on the opposition.—In re Houghton, Case No. 6,730.

§ 568. Appearance of creditor.

A creditor cannot oppose the discharge unless he enter his appearance in opposition thereto within the day appointed for showing cause

against the petition therefor.—In re Sutherland, Case No. 13,640; In re Smith, Id. 12,985.

An appearance for a creditor, entered on an adjourned day of the hearing on the order to show cause, after several previous adjournments, is not too late.—In re Seabury, Case No. 12,573.

§ 569. Specifications in opposition—Time to file.

No objection to any proceedings can be considered an opposition to the discharge until application is made for a discharge.—In re Hill, Case No. 6,481.

A creditor who has proved his claim may, at any time thereafter, and before the expiration of the time limited by rule 24 of the general orders in bankruptcy, file specifications of the grounds of his opposition to a bankrupt's discharge.—In re Baum, Case No. 1,116.

Creditors' specifications of grounds of opposition to a discharge, filed with the register on the day after the final hearing, are not filed in accordance with the provisions of Act 1867, and will not be considered.—In re Buxbaum, Case No. 2,259.

A creditor who has not entered his opposition and filed his specifications within a proper time and according to rule cannot oppose the discharge.—In re McVey, Case No. 8,932.

The district court has discretion to enlarge the time for entering appearance and filing specifications in opposition, as well after as before the expiration of the time allowed by rule 24.—In re Levin, Case No. 8,291; In re Jacobs, Id. 7,160.

The time to file objections to a discharge should be kept open by adjournments until full opportunity is given for the examination of the bankrupt and witnesses.—In re Seckendorf, Case No. 12,600.

In the case of an adjournment on the return day of the order to show cause why the bankrupt should not be discharged, the time to file specifications of objection will run from the adjourned day.—In re Tallman, Case No. 13,740.

Where creditors, against whose claim a protest has been filed by the bankrupt, apply to the register, on petition alleging fraud in the bankrupt's proceedings, for an order directing the examination of the bankrupt and of witnesses, and the extending of time to show cause against the discharge until the examination, such order should be granted, under Act 1867, § 26.—In re Belden, Case No. 1,238.

It is discretionary with the court to permit opposition to the discharge after the return day of the order to show cause, where the proceedings have been adjourned for other purposes.—In re Houghton, Case No. 6,730.

Specifications in opposition inadvertently omitted to be filed within 10 days after the return day to show cause may be filed nunc pro tunc.—In re Grefe, Case No. 5,794.

§ 570. —— Form and contents.

Objections filed against the decree of bankruptcy cannot, without an express order at the time, be continued and employed against the application for a discharge.—In re Livermore, Case No. 8,404.

Specifications of opposition to the discharge must be in writing, and must disclose the name of the opposing creditor or creditors.—In re Shoemaker, Case No. 12,799.

The strictness of common-law pleading is not required in specification opposing discharge, but the bankrupt is entitled to such particularity as will give him reasonable notice of what is intended to be proved against him.—In re Smith, Case No. 12,985.

Under Act 1867, allegations in opposition to discharge are not sufficient when they simply follow the words of the statute. They must be as exact as the specifications in an indictment.—In re Butterfield, Case No. 2,247.

No intendment will be made in favor of the pleader. The construction is more strict than in common-law proceedings.—In re Butterfield, Case No. 2,247.

Specifications of objections to a discharge furnish no ground for refusing it which are merely the language of Act 1867, § 29, and are so vague and general that it is impossible for the court or bankrupt to ascertain from them what specific acts or omissions are relied on by the opposing creditors.—In re Son, Case No. 13,174.

Vague and general specifications filed in opposition to a discharge, reciting fraud, etc., will be disregarded. The creditor must specify the particular matter of which he complains.—In re Hill, Cases Nos. 6,481, 6,482; In re Dreyer, Id. 4,082; In re Tyrrel, Id. 14,314; In re Hansen, Id. 6,039; In re Connell, Id. 3,110; In re Condict, Id. 3,094.

In order to enable an opposing creditor to obtain an order for trial under Act 1867, § 31, the specification of objections must be sufficiently definite to enable the court to see that there exists a fair question of fact necessary to the determination upon evidence outside of the paper.—In re Waggoner, Case No. 17,037.

Where an objection to a discharge rests on facts, there must be a specification, in order that the bankrupt may produce evidence for the purpose of the trial on the question of facts.—In re White, Case No. 17,533.

Specifications opposing a discharge must particularize facts constituting the grounds of opposition, setting forth time, place, person, etc.—In re Eidom, Case No. 4,314.

Specifications of opposition under Act 1867, § 31, and general order No. 24, must be as specific as the grounds for avoiding a discharge required by § 34 of such act.—In re Rathbone, Case No. 11,580.

False swearing, if alleged, must be charged to have been willful.—In re Smith, Case No. 12,985.

A specification alleging that the bankrupt fraudulently neglected, or willfully omitted, to include certain specified property in his schedules, is insufficient, without an accompanying allegation of willful false swearing.—In re Keefer, Case No. 7,636.

Specifications alleging concealment of property should specify the property, and that the omissions from the schedules were willful, fraudulent, or negligent.—In re Beardsley, Case No. 1,183.

An allegation that the bankrupt in May, 1865, removed a part of his property from the district, with intent, etc., is too vague and general.—In re Burk, Case No. 2,156.

A specification which simply charges that the bankrupt concealed his estate and effects, and concealed and removed, altered, and destroyed the books and writings relating thereto, is insufficient.—In re Condict, Case No. 3,094.

Specifications stating that the bankrupt has placed his property in the hands of his wife, and withheld his books, papers, and documents, are too general, unless intended to apply to all his property, books, papers, and documents.—In re Hill, Case No. 6,482.

Specifications of opposition merely charging concealment, transfer, etc., of property by the bankrupt, without specifying the property, are too vague.—In re Mawson, Case No. 9,318.

An allegation, in specifications of opposition to discharge, of destruction, mutilation, and falsification of papers and documents showing his business and financial transactions by the bankrupt, is defective, unless an intent to defraud

creditors is averred.—In re Marston, Case No. 9,142.

Charges in a specification of objection to discharge, in general terms, of the destruction and removal of books and papers to defraud creditors, and of procurement of certain creditors' assent by pecuniary consideration, are too vague. —In re Freeman, Case No. 5,082.

A specification of opposition stating that the bankrupt procured the assent of certain creditors, without stating that he did so by means of a pecuniary consideration, is insufficient.—In re Mawson, Case No. 9,318.

In the specifications against discharge, where fraudulent payments are charged, it is not necessary to state that the persons receiving such payments were creditors.—In re Smith, Case No. 12,985.

§ 571. —— Issues and proof.

Until the bankrupt has made full and sufficient disclosure, the assignees or creditors cannot be required to specify objections, or definitely abide by objections which have been specified.—In re Long, Case No. 8,477.

A specification in opposition that the bankrupt concealed the title to land is not sustained by proof of the omission of an equity of redemption from his schedule.—In re Moore, Case No. 9,751.

An allegation that the bankrupt "is entitled" to certain real estate *held* sufficient to show that he was guilty, under section 29, of negligence, in delivering to the assignee property belonging to him.—In re Rathbone, Case No. 11,580.

The creditors cannot give proof of other payments than those mentioned in the specification, as alleged fraudulent preferences.—In re Rosenfeld, Case No. 12,057.

Specification averring want of proper books of account showing receipt and disposal of money will admit evidence of want of cash book.—In re Bellis, Case No. 1,275.

§ 572. —— Amendment.

The court has discretionary power to permit amendment of defective specifications.—In re Bellis, Case No. 1,275; In re Jacobs, Id. 7,160.

Leave to amend defective specifications will not be granted on application after lapse of a month from the granting of the discharge.—In re McIntire, Case No. 8,823.

§ 573. Demurrer and exceptions by bankrupt.

When the grounds of opposition are insufficient in law to prevent the discharge, the bankrupt may demur to the specification thereof.—In re Burk, Case No. 2,156.

All objections to specifications should be raised by the exceptions first filed.—In re Duncan, Case No. 4,133.

The sustaining of exceptions to specifications in certain respects will be deemed a disallowance of them in all other respects preventing their renewal, in the absence of an amendment making the specifications substantially different from the former ones.—In re Duncan, Case No. 4,133.

§ 574. Remedy on failure to prosecute petition.

A creditor who has duly appeared in opposition cannot move to dismiss the petition for want of prosecution, but should move to set it down for hearing.—In re Sutherland, Case No. 13,640.

§ 575. Taking testimony.

After specifications of objection are filed, further proof may be taken by either party if desired, by a reference to the register.—In re Hill, Case No. 6,482.

Where specifications have been filed, and the creditors move for leave to take testimony, the court will not on such motion pass upon the question whether the secret possession of property fraudulently assigned before the bankrupt act would amount to a fraud under Act 1867, § 29.—In re Moore, Case No. 9,749.

§ 576. Burden of proof.

The burden of proof is upon the opposing creditor to establish the grounds of opposition.—In re O'Kell, Case No. 10,475.

Where the bankrupt has taken the oath required by Act 1867, § 29, the creditor filing specifications has the burden of showing that he has forfeited his right to a discharge.—In re Hill, Case No. 6,482.

The burden is on the creditor to prove that a debt included in the schedule and not proved was false or fictitious.—In re Orcutt, Case No. 10,550.

Before the bankruptcy of one who had an interest in a business from which he received half of the profits as compensation, notes given by the owner were paid out of the proceeds of the business. *Held*, that the burden was on the creditors to show that the notes were paid out of the net profits, in which the bankrupt had an interest.—In re Beardsley, Case No. 1,184.

§ 577. Admissibility of evidence.

The bankrupt's sworn answer in chancery is evidence against him in bankruptcy.—Anonymous, Case No. 463.

Separate depositions made by bankrupt partners in an equity suit brought by the assignee against them and others are inadmissible against each other.—In re Leland, Case No. 8,232.

A deposition by the bankrupt in a suit by the assignee against him and others, and the decree therein, are admissible against the bankrupt upon a proceeding by him for his discharge.—In re Leland, Case No. 8,232.

Proceedings by the assignee in a suit against third persons are inadmissible as evidence against the bankrupts in proceedings for a discharge.—In re Leland, Case No. 8,232.

§ 578. Weight and sufficiency of evidence.

A specification charging willful false swearing in the bankrupt's examination must be proved beyond a reasonable doubt. Evidence of verbal admissions is not sufficient.—In re Moore, Case No. 9,751.

Where 11 objections to a discharge are filed and pressed by opposing creditors, and under each an issue of fact is raised, and evidence and argument submitted, the opposing creditors having established a prima facie case of fraud, the petitioner is not entitled to his discharge. —In re Doyle, Case No. 4,052.

Where specifications in opposition to a discharge allege that the bankrupt has concealed property in the hands of his brother, and the only evidence in support thereof is the testimony of the bankrupt and his brother from which badges and indicia of fraud are deduced, and such testimony is not overborne by positive testimony, the specification will be sustained and a discharge refused.—In re Goodridge, Case No. 5,547.

A decree in a suit in a state court between a creditor and defendants, of whom the bankrupt was one, declaring a conveyance by the bankrupt void as in fraud of creditors, is not conclusive when such conveyance is set up by the creditor in bar of the discharge.—In re Sumner, Case No. 13,607.

§ 579. Trial by jury.

On trial by jury to determine the right of a bankrupt to a discharge and certificate, the opposing creditor has the affirmative of the issue, and has consequently the right to begin.—Anonymous, Case No. 464.

Creditors are entitled to a jury trial where they allege that the bankrupt, being insolvent,

and in contemplation of bankruptcy, had made a fraudulent preference, without previously specially praying a jury trial.—In re Lawson, Case No. 8,151.

The trial of objections to the discharge of partners may be joint, but the verdicts and decrees must be several.—In re George, Case No. 5,325.

§ 580. Competency of witnesses.

Where the testator devised to the bankrupt the notes and obligations held against him, the executor must be considered as standing in the place of the bankrupt, and he may be a witness against him, if called by the objecting creditors upon a proceeding for a discharge.—In re Perley, Case No. 10,992.

A creditor of a voluntary bankrupt is a competent witness for other creditors opposing the bankrupt's discharge.—In re Day, Case No. 3,671a.

§ 581. Hearing and determination.

Hearing on specification of grounds of opposition is essentially different from hearing of application for discharge.—In re Borst, Case No. 1,666.

When the specifications are not sustained by the proofs, a discharge will be granted whenever the register shall certify that the bankrupt has conformed to the requirements of Act 1867. —In re Harris, Case No. 6,112.

§ 582. Waiver.

Strict diligence by the creditors will be enforced in supporting opposition to a discharge, and an omission to take the appropriate steps within a reasonable time will be deemed a waiver of the objections.—In re Livermore, Case No. 8,404.

(G) GROUNDS OF OPPOSING OR ACTS BARRING DISCHARGE.

§ 583. In general.

To make out a case against the bankrupt to justify the court in refusing him his discharge and certificate, under Act 1841, there must appear by indisputable evidence some act of fraud, willful concealment of property, etc., or facts from which such a deduction would be plain and palpable.—In re Banks, Case No. 958.

The acts enumerated in Rev. St. § 5110, are not in the nature of offenses or forfeitures of the right to a discharge, but are rather in the nature of violations of conditions precedent.—In re Seeley, Case No. 12,628.

Where creditors do not oppose discharge, the court will not of its own motion refuse it, notwithstanding commission of acts barring it.—In re Antisdel, Case No. 490; In re Clark, Id. 2,812. CONTRA, see In re Sohoo, Case No. 13,162; In re Wilkinson, Id. 17,667.

§ 584. Transactions before passage of bankruptcy acts.

Fraud consummated under an assignment for benefit of creditors before, and not in contemplation of, the passage of the act (1841), does not bar a discharge.—In re MacFarlan, Case No. 8,787.

A general assignment before the passage of Act 1841, with preference of fictitious debts, will not operate as a bar to the bankrupt's discharge.—In re Delavan, Case No. 3,758.

The second proviso, in Act 1841, § 2, is to be read as if pointed thus: "In case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignment or otherwise, given or secured any preference," etc., "he shall not receive a discharge," etc.—In re Irwine, Case No. 7,086.

Fraudulent transfers before the passage of the act (Aug. 19, 1841) are no bar to a discharge under §§ 2, 4.—In re Amory and Leeds, Case No. 336b.

Transactions occurring before the passage of Act 1867, unless otherwise specially limited by section 29, may be specified as grounds of opposition to a bankrupt's discharge.—In re Cretiew, Case No. 3,390. CONTRA, see In re Moore, Case No. 9,751; In re Keefer, Id. 7,636.

A fraudulent conveyance made, or a fraudulent preference given, before the passage of the bankrupt act, is a good ground for refusing a discharge under Act 1867, § 29.—In re Hussman, Case No. 6,951. CONTRA, see In re Hollenshade, Case No. 6,610; In re Rosenfield, Id. 12,058.

§ 585. Want of jurisdiction.

The application for a discharge in a voluntary proceeding may be opposed on the ground of want of jurisdiction by reason of the absence of jurisdictional averments in the petition.—In re Penn, Case No. 10,926.

The discharge cannot be opposed on the ground that the facts stated in the petition as to the length of petitioner's residence within the district are not true.—In re Ives, Case No. 7,115.

§ 586. False swearing—In general.

False testimony in the examination, and false statements in the schedule, must be alleged to have been willfully false, to bar a discharge.—In re Rathbone, Case No. 11,580.

Erroneous allegations in bankrupt's petition are not a sufficient objection to his discharge, unless sworn to with knowledge of their falsity. —In re Burk, Case No. 2,156.

Slight inaccuracies and a want of recollection will not warrant the belief of willful false swearing or false entries, where the bankrupt, a speculator in stocks, was obliged to rely mostly upon statements of his brokers.—In re Woodward, Case No. 18,001.

§ 587. —— As to property.

The bankrupt is only bound to set forth in his schedule such property as he has a right or interest in at the time of petitioning.—Ex parte Robertson, Case No. 11,921.

Property, the right or interest in which has passed out of the petitioner prior to petitioning, whether by negligence, extravagance, gaming, donation, or fraud, need not be set forth in the schedule.—Ex parte Robertson, Case No. 11,-921.

A voluntary conveyance by an insolvent prior to Act 1841, under circumstances rendering it fraudulent as to creditors, nevertheless devests the interest of the grantor, so that he need not set it forth in his inventory.—In re McCarty, Case No. 8,684.

The omission to schedule judgments obtained on notes of the bankrupt, sued on in the name of the third person, where fraudulently done, will defeat a discharge.—In re Perley, Case No. 10,992.

Interest in the business of another, which the bankrupt conducts in his own name, receiving half of profits as compensation, is not property to be set out in his inventory as a bankrupt.—In re Beardsley. Case No. 1,184.

The failure to schedule corporate stock standing in the name of another, in which the bankrupt had no interest, and the transfer of the same, made without collusion or fraud, will not prevent a discharge.—In re Penn, Case No. 10,-929.

Where the husband's equitable interest in his wife's property has been sold on execution, it

is not a false swearing for him to state that he has no interest or estate in such property.—In re Hummitsh, Case No. 6,866.

The omission to schedule property purchased by the bankrupt's wife on execution sales (with her separate funds) by judgment creditors will not bar a discharge.—In re Pomeroy, Case No. 11,258.

The omission from the schedule of the amount of money in the hands of a receiver appointed in a state court suit for an accounting between the bankrupt and his partner is no ground for refusing a discharge.—In re Shoemaker, Case No. 12,799.

A failure to insert in the schedule property fraudulently conveyed is not a false swearing where a receiver of all the bankrupt's property has been appointed by the state court, as whatever title the bankrupt had in such property had passed to the receiver.—In re Freeman, Case No. 5,082.

A discharge will be refused, where the bankrupt has sworn that he has no assets, when he has concealed his property derived from profits in the firm by having his interest held in his wife's name.—In re Rathbone, Case No. 11,583.

A bankrupt doing business in his wife's name is guilty of fraud in placing property in her name, where it appears that she was without means when he married her, a few years before, and had inherited no property, and where he does not include such property in his inventory, which he has sworn to, his discharge will be refused.—In re Hill, Case No. 6,483.

Growing crops unmatured must be entered on the schedule of personal property.—In re Schumpert, Case No. 12,491.

The concealment of assets and false swearing in the affidavit connected with the schedule must appear to have been intentional, to preclude a discharge.—In re Wilson, Case No. 17,783; In re Wyatt, Id. 18,106.

The bankrupt is not chargeable with false swearing or fraud in omitting from his schedule a judgment held by him which he honestly regards as worthless, or in unintentionally omitting a debt which he considers of value as an asset.—In re Winsor, Case No. 17,885.

An erroneous claim of certain articles mentioned as exempt does not affect the truth of the affidavit to the schedule which states that it contains a statement of all the bankrupt's estate.—In re Whetmore, Case No. 17,508.

§ 588. —— As to indebtedness.

The omission of a particular debt from the schedule, unless intentional and fraudulent, will not bar a discharge.—In re Tebbetts, Case No. 13,817.

The omission to include worthless debts in the schedule will not bar a discharge.—In re Pearce, Case No. 10,873.

A willful omission to state a debt due from the bankrupt in his schedule is ground for refusing a discharge.—In re Kallish, Case No. 7,599.

Where a bankrupt, in pursuance of an arrangement with a certain creditor, omits his debt from his schedule, such creditor will not be permitted to object to the bankrupt's discharge on that ground.—In re Whetmore, Case No. 17,508.

The omission from the schedule of the names of creditors who did not intend to take dividends with trade creditors will not bar a discharge.—In re Needham, Case No. 10,081.

§ 589. Concealment of property, etc.

The concealment denounced by Act 1867, § 29, embraces a concealment of title to property, as well as the hiding from view of the property itself.—In re Hussman, Case No. 6,951.

The bankrupt's omission to include all his property in the schedule is not of itself cause for refusing a discharge, but such omission must be for purposes of concealment or fraud.—In re Smith, Case No. 12,995.

Where a bankrupt, prior to the passage of Act 1841, causes notes to be sued in the name of a third person, and in his schedule makes no mention of the property, the court will consider such third party as trustee of the bankrupt, to the amount of his interest in the property.—In re Perley, Case No. 10,992.

The failure to schedule property in which the bankrupt did not at the time know that he had a substantial interest will not prevent a discharge. There must be an intention to conceal the property.—In re Parker, Case No. 10,720.

The absence of a certain note from the schedule is no ground of refusing a discharge, where it is doubtful if the bankrupt has any interest therein, and there is no concealment.—In re Murdock, Case No. 9,939.

A bankrupt is guilty of concealment in not including in his schedule property conveyed to him in fraud of the creditors of the grantor.—In re O'Bannon, Case No. 10,394.

Where a bankrupt has property in his possession, and has the use of it as his own, and willfully omits it from his schedules and keeps it from his assignee, it is not answer to a charge of concealment thereof that the property belonged of right to his assignees under an earlier assignment in insolvency, under the laws of the state of his residence.—In re Beal, Case No. 1,156.

Where the bankrupt's wife is made a partner in a business transacted without capital, by purchasing from a member an interest which he had previously purchased from the bankrupt, who all the time continues in the employ of the firm, receiving a percentage of profits in lieu of salary, the arrangement is fraudulent, and a discharge will be refused for concealment of the bankrupt's interest in the business.—In re Rathbone, Case No. 11,581.

It is a concealment, within Act 1867, § 29, for the bankrupt, having knowledge of the existence of his books, and of their place of deposit, to refuse to give them to his assignee, and to deny their existence.—In re Hammond, Case No. 5,999.

A bankrupt having actual possession of joint estate and joint books of account must disclose them to his separate assignees.—In re Beal, Case No. 1,156.

Declarations of a debtor, at the time of his failure, that he has means to pay all his debts, are not sufficient, by themselves, to show a fraudulent concealment of assets.—In re Delavan, Case No. 3,758.

The failure of a member of a bankrupt firm to file a schedule of his personal property is no ground of refusing a discharge to the other members.—In re Scofield, Case No. 12,509.

A discharge is not barred by the bankrupt's having concealed himself to avoid being arrested, such act not being of a fraudulent character. Act 1841.—In re Ely, Case No. 4,429.

§ 590. Waste.

A discharge will not be refused because the bankrupt has, before petition filed, misused and wasted his estate, and made fraudulent purchases.—In re Rogers, Case No. 12,001.

Bankrupts *held* not in complicity with uncle having entire charge of business, who wasted a capital of $120,000 in 22 months, and became their debtor to the amount of $640,000.—In re Beatty, Case No. 1,196.

§ 591. Procuring property to be seized.

Where property of a bankrupt is subject to an attachment upon mesne process at the time

he filed his petition, it is no objection to his discharge that he consented to the personal property being sold upon mesne process, or that he confessed judgment in the suit, it appearing that the debt was bona fide.—In re Reed, Case No. 11,640.

The procurement of the appointment of a receiver in a state court suit *held* not to amount to a fraudulent transfer of property.—In re Shoemaker, Case No. 12,799.

Suffering an adjudication of bankruptcy by default is without prejudice to the right of discharge.—In re Lathrop, Case No. 8,105.

§ 592. Mutilation of account books.

A mutilation of books of account by a bankrupt may be explained, and, where it appears that such mutilation was done without fraud, a discharge will be granted.—In re Nooman, Case No. 10,291.

§ 593. Removal of property from district.

Removal of property from the district, with intent to defraud creditors, either before or since the passage of Act 1867, is good ground of opposition by one who was a creditor of the bankrupt at the time of such removal and could have been defrauded by it.—In re Burk, Case No. 2,156.

An allegation of a consignment to one out of the district, in contemplation of bankruptcy, and with intent to keep the property from the assignee, is a sufficient charge of a removal of the goods from the district with intent to defraud creditors.—In re Hammond, Case No. 5,999.

§ 594. Preferences—In general.

See, also, ante, §§ 62–78, 214–250.

A retiring partner of an insolvent firm, receiving payment for his interest, is not a creditor (Act 1841, § 2). Case No. 336b affirmed.—In re Amory and Leeds, Case No. 336c.

It is no objection to discharge of a bankrupt that, at the time of filing his petition, he executed a quitclaim deed of his real estate to a creditor, who had attached the same under a mesne process, it appearing that the real estate was previously incumbered to nearly its entire value.—In re Reed, Case No. 11,640.

"Fraudulent preference," as used in item 9 of section 29 (Act 1867), means only a preference in fraud of the bankrupt act; that is, contrary to its provisions.—In re Rosenfield, Case No. 12,058.

Only those preferences which are forbidden and made void by Act 1867, § 35, and the clause of § 29 which refers to preferences in contemplation of bankruptcy, are grounds for refusing the bankrupt's discharge.—In re Locke, Case No. 8,439; In re Pierson, Id. 11,153.

A fraudulent preference, under Act 1867, § 29, which will bar a discharge, is not the same as a fraudulent preference under §§ 35, 39.—In re Perry, Case No. 10,999.

A preference may be given which will subject the debtor to proceedings in bankruptcy, and yet be no bar to his discharge.—In re Pierson, Case No. 11,153.

Conveyances by an alien while residing abroad, made within six months of filing the petition, if they would be preferences under Act 1867 or if fraudulent at common law, will prevent a discharge.—In re Goodfellow, Case No. 5,536.

A fraudulent preference, given by one member of a copartnership without the knowledge, authority, or consent of his copartner, does not bar a discharge to the latter.—In re Leavitt, Case No. 8,169.

§ 595. —— Intent of debtor.

Not every payment made by an insolvent, aware of his insolvency, is an act of bankruptcy, under Act 1841; to make it so, it must be with the intention to give a preference to the particular creditor.—Ex parte Garwood, Case No. 5,258.

Mere insolvency is not sufficient to show a payment to have been made in contemplation of bankruptcy.—In re Rowell, Case No. 12,095.

A payment to be voluntary must originate with the debtor; the first step being taken by him, and not by the creditor.—In re Rowell, Case No. 12,095.

A voluntary conveyance by an insolvent in the ordinary course of business will not justify an inference that the transfer was made in contemplation of bankruptcy, without proof of facts justifying an inference that it was made with intent to defeat Act 1841.—In re Pearce, Case No. 10,873.

A voluntary payment or transfer by an insolvent debtor, made with the bona fide intention and expectation of preventing bankruptcy, is not an unlawful preference (Act 1841).—In re Pearce, Case No. 10,873.

Bona fide payment by an insolvent with no intention of giving a preference in satisfaction of judgment is not in fraud of Act 1841, if thereby the debtor is enabled to continue his business.—Ex parte Garwood, Case No. 5,258.

Preferences made in contemplation of the passage of Act 1841 will bar a discharge thereunder only when made with a view of getting the benefit of the act.—Ex parte Quackenboss, Cases Nos. 11,489, 11,490.

Where a debtor irretrievably insolvent has failed, and stopped business, and when, under the immediate apprehension of being committed to jail for debt by one of his creditors, he transfers a part of his property to another creditor, without any request or demand of the latter, to an amount exceeding his debt, and becomes a voluntary bankrupt shortly after such transfer, an unlawful preference is created which will deprive the bankrupt of his discharge. Act 1841.—In re Pearce, Case No. 10,873.

A discharge will be refused where a confession of judgment was voluntarily made by the bankrupt, contemplating bankruptcy in order to compel a creditor upon whose farm the bankrupt resided to reduce his rent, and, if not, to defeat the debt of such creditor.—In re Chase, Case No. 2,624.

The question of intent to give a preference is not conclusively decided by showing a known insolvency, though it may be inferred from such insolvency, in the absence of controlling evidence.—In re Locke, Case No. 8,439.

The bankrupt's mere denial of intention of filing a petition, at the time of making a general assignment, is not sufficient to repel such presumption arising from the fact of a petition being filed four days later.—In re Brodhead, Case No. 1,918.

If the necessary effect of an act is to prefer one creditor, the intent to prefer is presumed, though other motives co-operated to induce the act.—In re Batchelder, Case No. 1,098.

Transfer of whole stock and book accounts to one creditor, three weeks before filing petition, is a preference, though made under threat of legal process.—In re Batchelder, Case No. 1,098.

Discharge denied where bankrupt, with knowledge of his insolvency, took, for a note against a relative, property which became exempt under the state laws.—In re Leavitt, Case No. 8,169.

Payments by a merchant to creditors, to procure extensions, with the belief that he could

keep afloat, is not in fraud of Act 1867, § 29.—In re Brent, Case No. 1,832.

A discharge will be refused in the case of a fraudulent preference, though the bankrupt had acted under advice of counsel, and the transferee had surrendered the goods without suit, it not appearing that the bankrupt had acted in good faith, believing he had a right to do what he did.—In re Finn, Case No. 4,795.

Where the property of a debtor was attached without his knowledge by a hostile creditor, his omission to have himself adjudged a voluntary bankrupt cannot have a retroactive effect, so as to supply an intent to give a preference by the attachment.—In re Belden, Case No. 1,240.

The design to give a preference must be established as a fact, and where a bankrupt testifies that the cause of his bankruptcy was an unforeseen increase of indebtedness, occurring after payment made in full to certain creditors, the fact that it is shown that he was insolvent at the time of such payment does not establish the fact that bankruptcy was then contemplated.—In re Chapman, Case No. 2,601.

Where members of a firm are also members of firms in a foreign country, which, being threatened with legal proceedings, mortgaged their property for advances to carry on their business and to secure payment of prior debts, *held*, that such transfers were not preferences.—In re White, Case No. 17,533.

Where the necessary effect of a transfer is to prefer a creditor, and there is no attempt to explain away the inference of an intent to prefer, though the same is denied, the presumption of such intent will be held conclusive as a matter of law.—In re Seeley, Case No. 12,628.

Where the circumstances tend to show that the party did not intend to prefer the creditor, the question of actual intent must be left to the jury, though he was insolvent, and the necessary effect of the payment was to prefer.—In re Seeley, Case No. 12,628.

§ 596. —— Knowledge of creditor.

The bankrupt must have designedly and intentionally given a preference; but the creditor receiving it need not have known that his debtor was insolvent.—In re Gay, Case No. 5,279.

A payment to a creditor out of the ordinary course of business, and within four months of filing the petition, by a debtor knowing himself to be insolvent, will prevent a discharge, although the preferred creditor had no knowledge or reasonable cause to believe the debtor to be then insolvent. Case No. 4,051 affirmed.—In re Doyle, Case No. 4,050.

§ 597. —— Insolvency.

A trader is insolvent, within Act 1867, when he is unable to pay his debts as they fall due, in the ordinary course of business.—In re Gay, Case No. 5,279; In re Doyle, Id. 4,050, affirming Case No. 4,051.

A transfer by a debtor, when solvent, of an estate greatly in excess of the debt, for which credit was given on the debtor's books, where a settlement was not had until after the insolvency of the grantor, is not a fraudulent preference.—In re Rosenfeld, Case No. 12,057.

A preference is committed when a trader, knowing or suspecting that he is insolvent, and must stop payment, pays or secures some creditors in full.—In re George, Case No. 5,325.

To bar a discharge for having given a preference, the bankrupt must have either contemplated bankruptcy or insolvency, or in fact have been insolvent, and knew it, or had good grounds for believing it, and have acted on such belief.—In re Gay, Case No. 5,279.

An assignment of a claim to secure a pre-existing indebtedness, made when insolvent, and forming no part of the transaction in which the indebtedness was created, is a fraudulent preference, barring a discharge.—In re Foster, Case No. 4,961.

A pledge, payment, transfer, assignment, or conveyance made when a debtor's liabilities exceed his assets, and he has ceased to meet his indebtedness as it falls due, is an act of bankruptcy, and a sufficient ground for refusing a discharge (Act 1867, § 29.)—In re Warner, Case No. 17,177.

§ 598. —— Payments.

The giving of instructions to a foreign agent to pay a particular creditor, not acted upon, is no ground for refusing discharge.—Ex parte Garwood, Case No. 5,258.

Payment of attorney's fees is not such a preference as will prevent a discharge.—In re Sidle, Case No. 12,844.

The payment by a bankrupt to counsel for services "rendered and to be rendered," without fraud, is no ground for refusing a discharge.—In re Rosenfeld, Case No. 12,057.

An insurance made upon house and furniture, in pursuance of covenants in lease, is not a fraudulent preference.—In re Rosenfeld, Case No. 12,057.

Where expenditures are incurred by a debtor while insolvent, in support of his family, and the evidence is silent as to their character, the court will not admit such expenditures as a ground for refusing a discharge.—In re Rosenfeld, Case No. 12,057.

It is no objection to a discharge that the wages of servants were paid after the passage of the act, where they were necessary family expenses.—In re Rosenfeld, Case No. 12,057.

Where one who has ceased to be a trader, and has disposed of all his property many years before Act 1867 was passed, but has not settled all his trade debts, and is living on his salary as a clerk, pays his rent and some other necessary expenses monthly, without intending to become bankrupt, such payments are not fraudulent preferences, within section 29 of said act, of which his trade creditors can take advantage in opposing his discharge, though made within four months of bankruptcy, and when the debtor knew himself to be insolvent.—In re Locke, Case No. 8,439.

Payments in full of certain debts, a short time before becoming bankrupt, appearing solely from the bankrupt's examination, will not prevent a discharge, where there is no evidence to show that they are fraudulent.—In re Burgess, Case No. 2,153.

Payments made in the course of business by debtors who were insolvent when they commenced business, and not in contemplation of bankruptcy, will not bar a discharge.—In re Perry, Case No. 10,999.

A payment by a surety of the bankrupt, without his knowledge, to an opposing creditor, *held* would not vitiate the discharge.—Ex parte Briggs, Case No. 1,868.

§ 599. —— General assignment.

A general assignment in trust to pay creditors without preference, made a few days before the filing of a petition against the bankrupt, will not bar a discharge under the act of 1841.—In re Ely, Case No. 4,429.

Creditors executing releases under terms of voluntary assignment are to be considered as preferred over other creditors, within meaning of provision denying discharge.—Aspinwall's Case, Case No. 592.

A general assignment for creditors without preferences, made 16 days before voluntary proceedings commenced, and when a creditor was about to obtain a judgment, in the absence of

actual fraud, will not bar a discharge (Act 1867, § 29).—In re Pierce, Case No. 11,141.

A general assignment by an insolvent without preferences 10 months before filing petition in bankruptcy *held* to have been made in fraud of the bankrupt act, and to prevent a discharge. —In re Goldschmidt, Case No. 5,520.

A general assignment for the benefit of creditors without preferences is an act of bankruptcy, and will defeat the discharge, irrespective of the time when made.—In re Kasson, Case No. 7,617.

Where an assignee under a voluntary general assignment by partners sets apart a portion of the assets as exemptions to one of the partners, a discharge was refused such partner.—In re Croft, Case No. 3,404.

See, also, ante, §§ 73, 249, 250.

§ 600. —— Time of transfer, payment, etc.

An assignment for the benefit of creditors by debtors after the passage of the bankrupt law, but before it took effect, will not prevent their discharge under the act of 1841.—In re Chadwick, Case No. 2,569.

The act of suffering a default in a case in which an attachment was made prior to the filing of the petition in bankruptcy is not the granting of an unlawful preference. Act 1841. —In re Rowell, Case No. 12,095.

A conveyance made without concealment by the bankrupt to his wife more than 10 years before the bankrupt act will not prevent a discharge, unless it appear that the property is held on a secret trust for him.—In re Murdock, Case No. 9,939.

A fraudulent conveyance, within section 29, Act 1867, must be a conveyance made as required by section 35, within four or six months before the filing of the petition by or against the debtor.—In re Freeman, Case No. 5,082.

The fraudulent preference or transfer which will bar a discharge must be such as is denominated a fraud by the terms of the law, and particularly described in Act 1867, § 35.—In re Harper, Case No. 6,085.

A fraud at common law or under a state law will bar a discharge if committed so recently that it would affect any of the creditors who can come in under the bankruptcy.—In re Jones, Case No. 7,446.

A mere preference given without contemplation of the proceedings in bankruptcy, and more than six months before the filing of the petition, is no ground for withholding a discharge (Act 1867).—In re Jones, Case No. 7,446.

A discharge will be refused on specification of objections showing a transfer made in contemplation of bankruptcy more than 16 months before petition filed (Rev. St. 5128).—In re Hannahs, Case No. 6,032.

A conveyance constituting a preference made 14 months before the commencement of bankruptcy proceedings will not prevent a discharge, as it cannot be said to have been made in contemplation of becoming bankrupt.—In re Wolfskill, Case No. 17,930.

See, also, ante, § 67.

§ 601. —— Surrender of preference.

A preference cannot be set up in bar of the discharge where the creditor abandons his security, and is admitted to prove the debt (Act 1867, § 23).—In re Connor, Case No. 3,118.

A bankrupt, claiming want of knowledge of his insolvency at time of conveying property to his wife, four months prior to voluntary proceedings, who does not repair his error, is not entitled to discharge.—In re Adams, Case No. 43.

§ 602. Losses by gaming.

Loss of property by gaming will bar a discharge, though it was acquired by gaming.—In re Marshall, Case No. 9,123.

§ 603. Admission of false debt.

Putting a fictitious debt upon the schedules of the bankrupt is admitting the same, within the meaning of Act 1841.—In re Delavan, Case No. 3,758.

Under Act 1867, § 29, the including by the bankrupt of a false or fictitious debt in his schedule will prevent a discharge, though the debt is not proved.—In re Orcutt, Case No. 10,550.

In order to bar a discharge because of a false affidavit of indebtedness, it must appear that the bankrupt knew that the claim was false.— In re Blumenthal, Case No. 1,575.

§ 604. Failure to keep books of account —In general.

Under Act 1867, § 29 (Rev. St. § 5,110), providing that a merchant or tradesman who has not, subsequently to the passage of the act, kept proper books of account, shall not be entitled to a discharge, a merchant who has failed to keep proper books of account is not entitled to a discharge in bankruptcy, although the fault is wholly with his bookkeeper. The law puts upon the merchant the duty of seeing that the books are properly kept.—In re Hammond, Case No. 5,999.

A failure to keep proper books of account is no ground for denying discharge where the bankrupt carried on a cash business, and had no debts, assets, or capital outstanding.—In re Keach, Case No. 7,629.

A discharge will not be granted where the bankrupt, being a merchant or trader, has failed, since the passage of the act of 1867, to keep proper books of account.—In re Bound, Case No. 1,697.

Failure to keep an account of cash business and of dealings with creditors for more than a year prior to bankruptcy will prevent a discharge under Act 1867.—In re Archenbrown, Case No. 505.

The failure to keep proper books of account in a business which has been entirely closed out, there being no debts or assets arising out of such business, will not prevent a discharge. —In re Friedberg, Case No. 5,116.

Where a bankrupt has sold out his entire interest in a business before his bankruptcy, in which he kept no books of account, he cannot clear himself of the objection to his discharge that he did not keep such books, unless he shows that everything in relation to the business has been so fully ended that no account therein can in any way affect the interest of his creditors at the time of his bankruptcy.— Tyler v. Angevine, Case No. 14,306.

A discharge will not be prevented by the failure of the bankrupt to keep proper books of account prior to the passage of Act 1867.—In re Friedberg, Case No. 5,116.

Failure to keep proper books of account will prevent a discharge without any reference to intent or harmless result.—In re Archenbrown, Case No. 505; In re Solomon, Id. 13,167.

The failure to keep proper books of account will prevent the discharge of both partners, though the fault may be wholly that of one of them.—In re George, Case No. 5,325.

The want of proper firm books of account will bar a discharge to a partner in a firm of tradesmen.—In re Colcord, Case No. 2,970a.

§ 605. —— Who are merchants or tradesmen.

The mere purchase and sale of articles will not make a person a tradesman (Act 1867, § 29)

where the articles were not bought for the purpose of selling again.—In re Rogers, Case No. 12,001.

A person engaged in soliciting freight, who also occasionally buys and sells grain for gain, is a merchant and trader within the act.—In re O'Bannon, Case No. 10,394.

One engaged for a year prior to bankruptcy in buying and selling furniture on his own account, and having a shop where his goods are displayed, is a merchant or tradesman within the act.—In re Newman, Case No. 10,175.

A baker who buys flour, which he makes into bread and sells to daily customers, is a tradesman within the act.—In re Cocks, Case No. 2,933.

A stairbuilder who made stairs on order from his own material *held* a tradesman or merchant within the act.—In re Garrison, Case No. 5,254.

"Tradesmen," as used in Act 1867, § 29, does not mean "trader," as used in the large sense of the old bankrupt law, and a farmer, who occasionally buys and sells horses, cattle, and hay, is not bound to keep books as a tradesman, within such section.—In re Cote, Case No. 3,267; In re Ragsdale, Id. 11,530; In re Ruggsdale, Id. 12,123.

A speculator in stocks who is not a member of an exchange, and buys and sells stocks exclusively through brokers, is not a merchant or tradesman, within the act.—In re Marston, Case No. 9,142; In re Woodward, Id. 18,001; In re Moss, Id. 9,877.

A person who buys and sells apples, partly on his own account and partly on joint account with another, is a tradesman within the act.—In re Tyler, Case No. 14,305.

A saloon keeper, who sells cigars and liquors at retail for cash and on credit, bought in quantities partly on credit, is a merchant or tradesman, within the act.—In re Sherwood, Case No. 12,773.

A person who keeps in his stable horses belonging to other persons, and feeds such horses with food which he buys, and receives pay for the food which such horses consume in the amount paid for keeping the horses on livery, is a merchant or tradesman.—In re Odell, Case No. 10,426.

The fact that a firm carrying on business and borrowing money in connection with a farm is a large stockholder in a manufacturing corporation does not make its members merchants or tradesmen—In re Stickney, Case No. 13,439.

A bank cashier who buys paintings from time to time, and sells them at auction, is not a merchant.—In re Chapman, Case No. 2,601.

A tinsmith, who also keeps a small stock of hardware, is a trader.—In re Sawyer, Case No. 12,394.

§ 606. —— What are proper books of account.

The law only requires that the books of account shall be an intelligent record of the merchant's or trader's affairs, kept with that reasonable degree of accuracy and care which is to be expected from an intelligent man in the business. Casual mistakes will not prevent a discharge.—In re Winsor, Case No. 17,885.

The test as to whether books are proper books of account is whether a competent accountant could, from the books themselves, ascertain the debtor's financial condition.—In re Gay, Case No. 5,279; In re Bellis, Id. 1,275; In re Schumpert, Id. 12,491; In re Bartenback, Id. 1,068.

Proper books of account for a tradesman are such as disclose the real condition of his affairs, and need not be in any particular form.—In re Gay, Case No. 5,279.

A discharge cannot be granted to the members of a firm where their entries of receipts and disbursements in the cash books are unintelligible.—In re Mackay, Cases Nos. 8,837, 8,838.

Memorandum books from which the tradesman cannot tell the amount of his business or the particulars and consideration of his principal debts are not proper books of account.—In re Newman, Case No. 10,175.

An omission to write up books for a reasonable time while they are wanted in court, the accounts being kept on slips of paper ready to be inserted in their proper places, is not a failure to keep the books.—In re Hammond, Case No. 5,999.

A discharge will be refused for failure to keep proper books of account, where a large part of the cash account is kept on slips of paper, and not recorded on the account book.—In re Perry, Case No. 10,999.

Books showing only aggregate monthly purchases and sales are not "proper books of account."—In re Anketell, Case No. 394.

The pass book of another containing accounts with the bankrupt, entered daily by the owner's bookkeeper, but kept in possession of the bankrupt, is a proper book of account of the bankrupt.—In re Blumenthal, Case No. 1,576.

Where the books of a firm doing an extensive business do not show the state of accounts between the members, they are not entitled to a discharge.—In re Jorey, Case No. 7,530.

A bankrupt who is a tradesman is not entitled to a discharge under the bankrupt act if he has not kept an invoice or stock book.—In re White, Case No. 17,532.

An invoice book by a retail grocer is not necessary where he has so kept his invoice bills that a complete account of all goods received by him can be made out from them.—In re Reed, Case No. 11,639.

A discharge will be refused where the bankrupt has failed for 10 months to keep a cash book, resulting in inability to determine his financial condition when he suspended business.—In re Bellis, Case No. 1,275.

A discharge will be refused for the failure to keep a cash book, subsequently to the passage of Act 1867, notwithstanding the other books were kept by a skillful clerk.—In re Littlefield, Case No. 8,398.

The absence of a cash book is no ground of refusing a discharge where the cash receipts and payments may be shown from other books.—In re Hannahs, Case No. 6,032.

The absence of a cash book by partners engaged in lumber dealing will not bar a discharge, where each partner kept a bank account and an account book of receipts and expenditures.—In re Marsh, Case No. 9,109.

An entry of notes upon the fly leaf of the blotter is sufficient.—In re Winsor, Case No. 17,885.

A memorandum book with entries only of men's time, kept by a stair builder, who made stairs to order, being paid therefor a gross sum, where he furnished the materials and labor, is insufficient.—In re Garrison, Case No. 5,254.

What are proper books of account to be kept by merchants or tradesmen is a question of evidence in each case.—In re Newman, Case No. 10,175.

§ 607. —— What transactions to be entered.

A chattel mortgage given to secure a debt need not be entered upon the account books.—In re Winsor, Case No. 17,885.

Failure of the bankrupts to enter on their books several transfers of property, made about the time their affairs became embarrassed, will,

in the absence of a sufficient excuse, prevent a discharge.—In re Grieves, Case No. 5,809.

If a tradesman kept true accounts of his business, and his books show how much he has drawn out for personal expenses, it is immaterial if he kept no account of his personal expenses.—In re McCarthy, Case No. 8,680.

The contents of account books kept by a trader before he becomes such need not be carried into the books which he keeps as a trader.—In re Winsor, Case No. 17,885.

The bankrupt must keep an account of dealings with another under an agreement to carry on his business, the same as dealings with customers.—In re Blumenthal, Case No. 1,575.

On a sale of firm assets to a new firm formed by taking in a new partner, the transaction must be entered upon the books of the old firm.—In re Colcord, Case No. 2,970a.

§ 608. —— Effect of errors and omissions.

The accidental omission of entries in a trader's book is not conclusive of his not having kept proper books of account.—In re Burgess, Case No. 2,153.

Where notwithstanding errors and erasures in books of account a competent accountant could gain a correct idea of the business, the discharge will not be refused.—In re Antisdel, Case No. 490.

§ 609. —— Evidence.

The bankrupt need not affirmatively show that he has kept proper books of account, etc., under Act 1841. It is for the creditor, impugning his right to a discharge and certificate, to make out, by satisfactory proof, such a case as will bar the bankrupt's right to an allowance thereof.—In re Banks, Case No. 958; In re Batchelder, Id. 1,098.

Where the creditor opposing the discharge has introduced in evidence the stump of a check in a check book, the detached check is admissible in evidence on behalf of the bankrupt, on the question as to whether the bankrupt has kept proper books of account.—In re Brockway, Case No. 1,917.

§ 610. Influencing acts of creditors.

Payment by the bankrupt of creditors' counsel fees does not show procurement of their assent by a pecuniary obligation, where such payment was not made a condition of their withdrawing further opposition, and they have previously announced that they would not oppose discharge.—In re Mawson, Case No. 9,319.

Where the assent of a creditor is procured by a pecuniary consideration moving from a third person with no conceivable motive but to benefit the debtor, there is a strong presumption that the payment was made in behalf of the bankrupt.—In re Whitney, Case No. 17,580.

A discharge will be refused where the consent of one creditor was purchased by the bankrupt, though after the required number had consented to the discharge.—In re Palmer, Case No. 10,678.

It is no objection to the discharge that the bankrupt paid the expenses of making proofs of claims against his estate.—In re Svenson, Case No. 13,659.

It is no objection to a discharge that the bankrupt requested his creditors to file the petition in bankruptcy, he having committed an act of bankruptcy.—In re Ordway, Case No. 10,552.

§ 611. Misdemeanors.

Any act of misdemeanor under Act 1867, § 44, may be set up in opposition to the discharge, though the bankrupt has never been tried criminally therefor.—In re George, Case No. 5,325.

§ 612. Debts contracted through fraud.

The fact that a debt was contracted by the bankrupt through fraud is no ground for refusing a discharge, as such debts are not affected by a discharge.—In re Bashford, Case No. 1,090; In re Clarke, Id. 2,844; In re Doody, Id. 3,995; In re Rathbone, Id. 11,580; In re Rosenfield, Id. 12,058; In re Stokes, Id. 13,476; In re Tallman, Id. 13,739; In re Wright, Id. 18,070.

See, also, post, § 627.

§ 613. Debts created in fiduciary capacity.

The existence of fiduciary debts, contracted by the bankrupt before the passage of the act of 1841, will not prevent his discharge under such act, as to all other debts not of a fiduciary character.—In re Brown, Case No. 1,979; In re Lord, Id. 8,501; In re Tebbetts, Id. 13,817; In re Young, Id. 18,147.

Misapplication of fiduciary funds after the passage of the act of 1841 deprives the bankrupt of all right to a discharge from any debts whatever.—In re Parker, Case No. 10,723; In re Tebbetts, Id. 13,817.

Debts due to persons arising out of the fact that the bankrupt, while register of the land office, converted to his own use money deposited with him by private parties for the purchase of public lands, are not discharged.—Ex parte Wright, Case No. 18,064.

Where the person to whom a debt of a fiduciary character is due from the bankrupt does not object to the discharge on that ground, other creditors cannot object under Act 1841.—In re Parker, Case No. 10,723.

It is no ground of opposition to a discharge, under Act 1867, that a debt was created by the bankrupt while acting in a fiduciary capacity, as such debts are not affected by the discharge.—In re Elliott, Case No. 4,391; In re Tracy, Id. 14,124.

See, also, post, § 626.

§ 614. Failure to submit to examination.

The penalty for disobedience of the wife to attend and be examined is visited upon the bankrupt by refusing him a discharge.—In re Van Tuyl, Case No. 16,881.

Where an order for the examination of the bankrupt's wife is served upon him, but not upon the wife, and she fails to attend, in order to obtain his discharge he must prove to the satisfaction of the court that he was unable to procure her attendance.—In re Van Tuyl, Case No. 16,879.

The fact that an answer would reveal the private business of the witness unnecessarily, and prejudice him in another suit pending, is not sufficient reason for his refusing to testify before the register to the actual consideration paid for his claim.—In re Trask, Case No. 14,141.

A departure of the bankrupt from the district before submitting to examination under an order will prevent a discharge until rectified by submission to examination.—In re Kingsley, Case No. 7,820.

§ 615. Acts done in composition proceedings.

No act done in composition proceedings, though of the description of the offense mentioned in Rev. St. § 5110, cl. 8, can be set up as a ground for preventing the bankrupt's discharge.—In re Morris, Case No. 9,824.

(H) OPERATION AND EFFECT OF DISCHARGE.

§ 616. In general.

The involuntary proceedings, under Act 1841, are not ex parte, and a decree and certificate of discharge, under Act 1841, are conclusive, unless fraud in obtaining them is averred.—Lathrop v. Stuart, Case No. 8,113.

Proceedings which affect only the assets in bankruptcy are of the nature of proceedings in rem, and bind all the world; otherwise where they affect property not embraced in the assets. —In re Judkins, Case No. 7,560.

§ 617. On pending contract.

Counsel employed by the bankrupt, prior to the proceeding, to carry on a suit at their own expense for a contingent fee of one-half their recovery, are entitled to such one-half, though they recover after the bankrupt's discharge.—Maybin v. Raymond, Case No. 9,338.

§ 618. As to third persons.

The liability of a person chargeable with the bankrupt for a debt as partner, joint contractor, indorser, surety, or otherwise, is not affected by any steps taken by the creditor in the bankruptcy proceedings.—In re Levy, Case No. 8,297.

§ 619. On rights in equity.

A plea of discharge in bankruptcy is not sustainable against a claim in equity to rescind a contract of sale on the ground of fraud.—Smith v. Babcock, Case No. 13,009.

§ 620. Jurisdiction over bankrupt.

The summary jurisdiction of the bankruptcy court over the person of the bankrupt ceases on the granting of the discharge.—In re Dole, Case No. 3,964.

§ 621. After-discovered assets.

A discharge does not bar the assignee's right to recover property afterwards discovered.—Maybin v. Raymond, Case No. 9,338.

§ 622. Liens on bankrupt's property.

A discharge obtained before judgment rendered in a suit in which property was attached before the bankruptcy proceedings were instituted may be pleaded as a bar to such suit.—Ex parte Foster, Case No. 4,960.

The lien upon a debtor's property and rights of action, created by an execution returned unsatisfied, and the commencement of a suit by judgment creditors' bill, is not devested by a subsequent discharge in bankruptcy.—McLean v. Lafayette Bank, Case No. 8,888.

Liens of creditors cannot be enforced in a court of bankruptcy after the bankrupt has obtained his discharge (Act 1867).—In re Dean, Case No. 3,701.

The lien of a debt is not released by the discharge, and it may be enforced by a state court when the property does not form part of the assets in bankruptcy, and where such property does not form a part of the assets the bankruptcy court may enforce the lien when the property subsequently comes into possession of the bankrupt.—Dixon v. Barnum, Case No. 3,928.

§ 623. New promise.

A discharge under the terms of a composition agreement is a discharge by operation of law, and an indebtedness thus discharged is a sufficient consideration to support a new promise to pay.—In re Merriman, Case No. 9,479.

§ 624. Extraterritorial effect.

A debt contracted in one country cannot be discharged by the bankrupt laws of another country.—Green v. Sarmiento, Case No. 5,760.

The discharge will bar actions brought against the bankrupt by foreign creditors, though it might not be recognized as a bar against foreign creditors in courts of their own country.—Zarega's Case, Case No. 18,204.

§ 625. Debts discharged — Time when contracted.

A discharge granted on consent in writing by the majority in number and value of creditors whose debts were contracted after January 1, 1869, operates as to debts contracted both before and after that date.—In re Hershman, Case No. 6,430.

§ 626. —— Debts created in fiduciary character.

Under Act 1841, a fiduciary creditor is not affected by the discharge, whatever may be its terms, where he did not elect to come in and prove his debt.—In re Brown, Case No. 1,979: In re Tebbetts, Id. 13,817.

The debt of an auctioneer *held* to be one of a fiduciary character. (Act 1841).—In re Lord, Case No. 8,501.

Fiduciary debts are provable equally with other debts, and, if the creditor elect to prove such debts, they will be barred by a discharge. (Act 1841).—In re Tebbetts, Case No. 13,817.

Money collected by an agent under an agreement to account and pay over the proceeds monthly to his principal is not a debt created in a "fiduciary character."—Grover & Baker Sewing-Mach. Co. v. Clinton, Case No 5,845.

The default of a factor in not making payment to his principal is not a fraud, nor is the debt one created "while acting in any fiduciary character," within the meaning of Act 1867, § 33, excepting such debts from the operation of the discharge.—Owsley v. Cobin, Case No. 10,636; Keime v. Graff, Id. 7,650. CONTRA, see In re Seymour, Case No. 12,684.

Only technical or special trusts, as contradistinguished from those which the law implies from the contract, are within the meaning of Act 1867, § 33.—Keime v. Graff, Case No. 7,650.

The liability of a guardian to his ward is not affected by his discharge.—In re Maybin, Case No. 9,337.

A discharge under Act 1841 will release the bankrupt's liability as surety on a postmaster's bond, though the postmaster was a defaulter.—United States v. Davis, Case No. 14,929.

The obligation of a surety upon a guardian's bond is not a fiduciary obligation, within Rev. St. § 5117, and is released by the discharge of the surety in bankruptcy.—Ex parte Taylor, Case No. 13,773.

A discharge will release the liability of the bankrupt as surety on the bond of a deceased collector of internal revenue. (Act 1867, § 34.) —United States v. Throckmorton, Case No. 16,516.

See, also, ante, § 613.

§ 627. —— Debts created by fraud.

Where a person purchases goods with an intent not to pay for them either in whole or in part, he "creates a debt by fraud," within Act 1867, providing that as to debts so created a bankrupt shall not be entitled to a discharge.—In re Alsberg, Case No. 261.

Where the United States has seized and filed a libel against a steamboat and cargo, as liable to forfeiture for violation of the rules of war, and the claimant gives bond for the property and makes an unsuccessful defense against the libel, but sets up his discharge in bankruptcy as a defense to a judgment against him on such bond, the debt evidenced by the bond is not created by fraud, within the meaning of Act 1867, § 33, even though the claimant used the evidence of false witnesses and swore falsely himself in making the defense to the libel.—United States v. The Rob Roy, Case No. 16,179.

See, also, ante, § 612.

§ 628. —— Debts not proved.

A discharge under the act of 1841 frees the bankrupt from all debts provable under the act, whether actually proved or not.—Case of Johnson, Case No. 7,365a.

The debt of a creditor is barred by a discharge, under Act 1867, although his name was

not placed on the schedule, it appearing that there was no fraud in the omission, and he received no notice of the proceeding in bankruptcy or of the petition for a discharge.—Lamb v. Brown, Case No. 8,011.

§ 629. —— Unliquidated demands.

The discharge of the defendant is not a bar to an action for injury to goods shipped, caused by his negligence, where the damages are not liquidated.—Dusar v. Murgatroyd, Case No. 4,199.

§ 630. —— Alimony.

A discharge in bankruptcy does not release a husband from the obligation to pay installments of alimony accruing after the petition was filed.—In re Garrett, Case No. 5,252.

§ 631. —— Debts due to United States.

Debts due the United States are not barred by a certificate of discharge. (Act 1800.)—United States v. King, Case No. 15,536.

A discharge under the act of 1841 bars a debt due to the government on account of customs duties.—United States v. Zerega, Case No. 16,786.

A discharge under Act 1867 does not discharge debts due the United States.—United States v. The Rob Roy, Case No. 16,179.

§ 632. —— Judgments.

A judgment obtained in an action of tort is a debt dischargeable under Acts 1841 and 1867.—In re Book, Case No. 1,637; In re Wiggers, Id. 17,623.

A judgment obtained on breach of promise to marry is a provable debt, and is barred by discharge.—In re Sidle, Case No. 12,844.

The discharge will release a judgment under which the body of the debtor was taken in execution, and a bond for jail liberties given, before the bankruptcy proceedings were commenced.—Long v. Dickerson, Case No. 8,480.

A discharge entitles the bankrupt to release from imprisonment under a judgment in trespass for malicious imprisonment and whipping.—In re Simpson, Case No. 12,879.

Where the record shows that an original demand or cause of action sprang from fraud, the judgment does not merge the fraud, and is not released by a discharge.—In re Pettis, Case No. 11,046; Warner v. Cronkhite, Id. 17,180.

A stipulation between the parties after judgment, by which plaintiff waived his right to execution against the body of defendant, does not affect the question of discharge.—Warner v. Cronkhite, Case No. 17,180.

§ 633. —— In partnership cases.

The discharge of a member of a firm, upon his individual petition, and without any proceedings by or against the firm, does not discharge such member from the partnership debts.—In re Little, Case No. 8,390; In re Noonan, Id. 10,292; Hudgins v. Lane, Id. 6,827; In re Plumb, Id. 11,231. CONTRA, see Wilkins v. Davis, Case No. 17,664.

A discharge on proceedings in involuntary bankruptcy against one partner alone will relieve him from payment of a firm debt only if there was no copartnership property at the time it was granted.—In re Abbe, Case No. 4; Crompton v. Conkling, Id. 3,407.

A discharge granted to one member of a partnership, after he alone had been adjudged bankrupt, is not a bar to an action against him and his copartner by a partnership creditor, where the creditor shows affirmatively that, at the time of the filing of the petition, there were partnership assets and partnership debts.—Crompton v. Conkling, Case No. 3,408.

Where two of three brothers, who are partners in business, and reside in the Southern district of New York, are also partners in business in the Northern district, an assignee on petition filed against the three in the Southern district takes the interest of the partners in business in the Northern district, and a discharge in such proceeding operates as to the entire indebtedness of both firms and discharges the members.—In re Leland, Case No. 8,228.

§ 634. Necessity of pleading discharge.

A discharge in bankruptcy must be pleaded both at law and in equity. The court is not bound to notice the defense of bankruptcy on motion founded upon an affidavit.—Fellows v. Hall, Case No. 4,722.

A discharged bankrupt, who allows a bill in equity against him to proceed until an opinion is obtained on the merits, without setting up his discharge in defense, cannot avail himself of such discharge.—Doggett v. Emerson, Case No. 3,962.

A discharge must be pleaded and it cannot be set up after judgment as a reason why the judgment should not be enforced.—Goodrich v. Hunton, Case No. 5,544.

The bankruptcy court cannot relieve a debtor who, being sued in another court on a debt arising before the adjudication, fails to plead his discharge, and judgment goes against him.—In re Ferguson, Case No. 4,738.

§ 635. Pleading discharge.

Although an attachment of property under mesne process bona fide made before a petition filed in bankruptcy may be a lien or security upon the property, within Act 1841, c. 9, § 2, preserving such liens, it will not entitle the creditor to proceed to judgment in the suit, if the debtor has, pending the suit, lawfully and bona fide obtained his discharge in bankruptcy, and the certificate thereof is pleaded as a bar to further proceedings in the suit.—In re Bellows, Case No. 1,278.

A plea of bankruptcy which sets out the certificate and discharge as required by Act 1841, § 4, is good.—White v. How, Case No. 17,549.

Where an attachment of property under mesne process is bona fide made before a petition is filed in bankruptcy, and a discharge subsequently obtained is pleaded in bar to further proceedings in the suit, it is not necessary for the district court to order the attaching officer to deliver the property to the assignee until the final decision in such suit, and where an order is so made it will be modified on appeal.—In re Bellows, Case No. 1,278.

Where, during the pendency of a suit, one of the parties is released under the bankrupt law, and the decree of bankruptcy is pleaded in abatement, plaintiff may show the invalidity of such decree.—Fellows v. Hall, Case No. 4,723.

A replication to a plea of discharge in bankruptcy is defective where it does not state that the debt sued for had been placed on the schedule.—Hood v. Spencer, Case No. 6,665.

Where a party sets up his discharge in an action brought against him, a general plea of fraud by the plaintiff is not sufficient to admit evidence of the same, where it appears that the bankrupt had been engaged in an extensive commercial business. He has a right to notice of the specific acts charged.—Lathrop v. Stewart, Case No. 8,112.

A plea setting up a judgment of discharge by a bankruptcy court having plenary jurisdiction is sufficient without averring the proceedings prior to discharge.—Lathrop v. Stuart, Case No. 8,113.

(I) VACATING AND SETTING ASIDE DISCHARGE.

§ 636. Who may make application.

Where a creditor, who neglected to file objections in due time, subsequently discovered fraud,

he may require the bankrupt to take his discharge and then apply to annul it.—In re Fowler, Case No. 4,999.

The knowledge of fraud which will bar a right to annul the discharge must have been such as to have been available before the return day of the order to show cause why the discharge should not be granted.—In re Fowler, Case No. 4,999.

§ 637. Time.

The court has power to recall a final decree granting a discharge upon application at the term at which it was passed.—In re Dupee, Case No. 4,183.

A motion to vacate a discharge as inadvertently granted will be denied after the time has expired for a review by the circuit court, and the bankrupt has procured loans on the faith thereof.—In re Buchstein, Case No. 2,076.

A suit to set aside a discharge on the ground that it was fraudulently obtained must be brought within two years from the date of the discharge, and not two years from the discovery of the fraud. Act 1867, § 34; Rev. St. § 5120. —Pickett v. McGavick, Case No. 11,126; In re Brown, Id. 1,983.

§ 638. Grounds.

Where the clerk enters a decree in bankruptcy granting a final discharge, when the only decree authorized is the one declaring the objections by the creditors to be badly pleaded, such unauthorized decree should be set aside.—In re Amory and Leeds, Case No. 336a.

A final decree granting a discharge will be recalled upon application made during the term at which the decree was made, where it appears that the opposing counsel were prevented from attending the hearing by a sudden and overpowering accident, and it appears upon affidavit that the opposing creditors were prepared with evidence to substantiate the charges of fraud alleged by them.—In re Dupee, Case No. 4,183.

Any act which, if duly proved, would have prevented a discharge, will be ground for setting it aside, under Act 1867, § 34.—Ex parte Briggs, Case No. 1,868.

A discharge will be set aside, for concealment and false swearing, where deeds from the bankrupt to his wife, through a third person, made without consideration, were asserted to have been burned, and credit was procured on the faith of his ownership of the property, where such deeds were subsequently placed on record, and the property omitted from his schedules.—In re Rainsford, Case No. 11,537.

Discharge set aside within two years on petition of creditors alleging fraud in the bankrupt's omission of their names from his schedule, where they had no knowledge thereof until after the discharge was granted.—In re Herrick, Case No. 6,419.

§ 639. Hearing and determination.

A discharge will not be set aside for alleged fraudulent acts, where the only evidence offered is incompetent and inadmissible.—Marionneaux's Case, Case No. 9,088.

Upon a motion to set aside a discharge the bankrupt's wife cannot be required to testify as a witness against him.—Tenny v. Collins, Case No. 13,833.

Creditors moving to set aside a discharge cannot prove at the trial acts of the bankrupt not set forth in the specifications.—Tenny v. Collins, Case No. 13,833.

VI. COSTS AND FEES.

§ 640. Power to fix and award.

The power of the United States supreme court to fix officers' fees, etc., in cases of bankruptcy, is plenary, with the limitation that they shall not exceed the statutory rate for similar services in other proceedings. (Rev. St. §§ 4990, 5126, 5127.)—In re Johnston, Case No. 7,421.

The fee bill of 1853 does not interfere with the practice of courts of equity or bankruptcy to allow counsel fees as costs in certain cases.—Ex parte Jaffray, Case No. 7,170.

A claim by petitioning creditors in involuntary bankruptcy for counsel fees incurred by them in the proceedings before adjudication cannot be entertained by the register in the first instance, but must be presented to the court by petition. —In re Dibblee, Case No. 3,886.

A general order referring a case to the register is sufficient to authorize him to take testimony in respect to the compensation of the petitioning creditor.—In re Robinson, Case No. 11,940.

The register has no authority to allow extra compensation to the assignee, even after a vote by a creditors' meeting, but the assignee must apply to the court for an extra allowance previous to the final meeting.—In re Merchants' Ins. Co., Case No. 9,442.

The register and messenger cannot resort to the fee bill of 1853 for services rendered by them, respectively, which are not directly provided for by Act 1867 and general orders.—In re Alexander, Case No. 163.

§ 641. Persons entitled—Prevailing party in general.

Costs are not awarded prevailing party unless the objections were frivolous or vexatious, or, on the other hand, the bankrupt is shown to have the means of paying costs.—In re George, Case No. 5,326.

Where an assignee sells at public sale mortgaged property, and the mortgagee has actual notice of the sale, but by mistake fails to attend, and upon his offering a higher bid a resale is ordered upon the condition that he deposit an amount in court to abide by an order of the court as to the amount which he must pay to the assignee and purchaser, upon a resale such purchaser is entitled for service of counsel in opposing the resale, but the assignee is not so entitled, it appearing plainly that a resale was for the interest of the estate.—In re Collins, Case No. 3,005.

Costs may be awarded the prevailing party in a proceeding to annul a discharge, brought under Rev. St. § 5120.—In re Holgate, Case No. 6,601.

§ 642. —— Petitioning creditors.

A creditor who successfully prosecutes proceedings in involuntary bankruptcy may be allowed his costs and reasonable expenses, including reasonable counsel fees, out of the estate.—In re O'Hara, Case No. 10,465; In re Williams, Id. 17,704; In re King, Id. 7,780; In re Mitteldorfer, Id. 9,675; In re Jaffray, Id. 7,170; In re New York Mail S. S. Co., Id. 10,208; In re Mead, Id. 9,364.

But such creditor has no right to contribution from the other creditors, where the assets are insufficient to pay the costs and expenses in full.—In re O'Hara, Case No. 10,465.

Such creditor is not entitled to compensation for his personal services.—In re Mead, Case No. 9,364.

Such creditor is not entitled to a preference out of the fund for expenses in attending court. —In re King, Case No. 7,780.

Where the adjudication has been resisted, costs may be recovered by the petitioning creditor which are allowed to a party recovering in a suit in equity (Act Feb. 26, 1853), but a special allowance for counsel fees cannot be made. —In re Sheehan, Case No. 12,738.

The amount allowed to the petitioning creditor as counsel fee in procuring the adjudication will be limited to the amount paid for the services rendered by him in the proceedings for the common benefit of all the creditors.—In re Mead, Case No. 9,364.

An allowance of $1,000 to counsel for petitioning creditors, who have obtained the adjudication and performed other services incident to the bankruptcy proceedings, where the assets of the bankrupt amount to $15,000, and such counsel have not in any way recovered property fraudulently conveyed, is excessive.—In re Sanger, Case No. 12,318.

An allowance of $50 to petitioning creditor for counsel fees in an uncontested case *held* proper and reasonable.—In re Jones, Case No. 7,451.

Petitioning creditors are not allowed retainers paid their attorneys or for services rendered after the adjudication.—In re Comstock, Case No. 3,075.

A mortgage of $4,000, given on an advancement of $1,000, is prima facie evidence of fraud, and ground of proceeding in bankruptcy justifying an allowance of petitioner's costs and expenses.—In re Dumont, Case No. 4,127.

§ 643. —— Other creditors.

The expenses of creditors in attending the first meeting of creditors will not be allowed out of the estate.—In re Ward, Case No. 17,145.

Costs not allowed to a claimant where expense and delay in proof of claim was caused by his failure to make full disclosure of the transactions on which it was founded.—In re De Metz, Case No. 3,781.

The costs of a claimant upon a reference to have a claim declared and enforced are to be paid out of the balance remaining after payment of all the expenses of administration.—In re Hoagland, Case No. 6,545.

Where services of counsel are rendered for the benefit of a special fund of a class of creditors, and in opposition to the interests of the general creditors, a counsel fee will not be allowed out of the general fund in excess of the statutory allowance of $20.—In re Hope Min. Co., Case No. 6,682.

§ 644. —— Debtor.

Petitioners, for the benefit of Act 1841, are bound to discharge all expenses incident to the prosecution of their application. No petitioner is enabled by such act to conduct the proceedings forma pauperis.—In re Greaves, Case No. 5,744.

Where a voluntary petition is dismissed, the debtor is entitled to receive by law the attorney's fees on a hearing in equity,—$20. No fee can be taxed for petitioner's attorney.—Dundore v. Coates, Case No. 4,142.

Costs will not be allowed to the bankrupt where a discharge is granted after opposition, where it appears that there was good probable cause of objection.—In re Rowell, Case No. 12,095.

Where a creditor opposes a bankrupt's discharge, a case is created for trial in the court docket in which the creditor is plaintiff and the bankrupt is defendant, and the counsel fee of the bankrupt is a proper charge in taxing costs against the creditor.—In re Eidom, Case No. 4,315.

An involuntary bankrupt, equally with a voluntary bankrupt, is entitled to his disbursements in proceedings to obtain a discharge. (Act 1867, § 47.)—In re Dibblee, Case No. 3,887.

The bankruptcy court may allow a debtor the expenses including attorney's fees of his unsuccessful defense of the petition to be paid from the assets in the hands of the assignee.—In re Comstock, Case No. 3,074.

Claim of bankrupt for extraordinary services cannot be allowed by the court, but may be allowed by creditors.—In re Barnes, Case No. 1,013.

§ 645. —— Assignee.

The assignee will be allowed costs in a suit to set aside a conveyance as fraudulent, where the case was clear, and the creditor contested it to the end.—Warren v. Delaware, L. & W. Ry. Co., Case No. 17,194.

Where the assignee continues the defense of a suit, the estate is liable to expense thereof, if the creditors impliedly consented.—In re Babcock, Case No. 697.

§ 646. Persons, property, or funds liable —Claimants.

A claimant of a nonprovable debt will be required to pay the costs of proceedings to reject the same.—In re Paddock, Case No. 10,657.

Where a petition to establish a right to payment in full has assumed the form of a regular suit, costs and a docket fee will be taxed.—In re Bank of Madison, Case No. 890.

§ 647. —— Contesting creditors.

The creditor at whose instance the assignee contests the claim of another creditor is liable to the latter for costs, where the claim is allowed.—In re Troy Woolen Co., Case No. 14,203.

Costs of resisting opposition to a discharge will be decreed against the creditor where he filed 20 specifications, none of which were sustained.—In re Robinson, Case No. 11,943.

§ 648. —— Assignee.

The dismissal of a bill by the assignee to set aside preferences as fraudulent, where the construction of the statute was doubtful, should be without costs.—Collins v. Gray, Case No. 3,013.

The assignee is chargeable personally with costs where he petitions to have an attachment dissolved, which covers property already set apart by him as exempt, for he is not a proper party to the petition, as he has no interest in the property which he has set apart as exempt.—In re Preston, Case No. 11,394.

An assignee, who fails to apply to enjoin mortgage foreclosure proceedings to which he was made a party until time of sale, will be chargeable personally with costs on dismissal of his petition for leave to sell.—In re Brinkman, Case No. 1,883.

Where the question presented to the court is one on which it is proper to ask its opinion, and the assignee in filing his bill acts under the advice of counsel, upon the assignee's failure to sustain such bill no costs will be allowed to the defendant.—Goodrich v. Remington, Case No. 5,546.

§ 649. —— In partnership cases.

Costs will be apportioned between the separate and joint estates where both come to the assignee's hands on adjudication against a member of a firm.—In re Ingalls, Case No. 7,032.

Where there are both firm and individual assets, each estate must pay its proportion of the entire expenses of administering the whole.—In re Smith, Case No. 12,987.

§ 650. —— Secured creditors and incumbered property.

A mortgagee in possession is not chargeable with any part of the costs in bankruptcy, or with the expenses of the sale of any of the property other than that on which his mort-

gage was a valid lien.—In re Eldridge, Case No. 4,330.

Where the assignee declined the mortgagee's offer to take the property for the debt, and on a sale the mortgagee bought it in for less than the debt, the mortgagee must pay the costs and expenses of such sale.—In re Ellerhorst, Case No. 4,380.

Where a suit to set aside a fraudulent conveyance is for the benefit of the secured creditors mainly, they should defray the expenses thereof.—Freelander v. Holloman, Case No. 5,081.

Where the estate of a bankrupt which is all incumbered is sold at the suggestion of his general creditors, and produces only enough to satisfy the liens, the proceeds are not chargeable with any costs in the bankruptcy proceeding except the costs of sale.—In re Blue Ridge R. Co., Case No. 1,570.

§ 651. —— Estate of bankrupt.

The expenses of a reference to contest a claim of a creditor before the appointment of an assignee, where the bankrupt is unable to pay any part of them, may be paid out of the estate.—In re Richardson, Case No. 11,775.

The costs, upon the petition for a discharge of involuntary bankrupts, the hearing, publication of notice, etc., must be paid out of the funds in the assignee's hands.—In re Olds, Case No. 10,484.

A fee for a letter or power of attorney by a creditor is not a charge on the fund.—In re Houghton, Case No. 6,729.

Where the fund is not more than sufficient for the privileged creditors, the assignee cannot spend any money in litigation for the benefit of the general creditors.—In re Sawyer, Case No. 12,396.

The register's fee for taking and certifying a deposition in proof of debt is $1, and is a charge on the fund.—In re Houghton, Case No. 6,729.

The fees of the register incident to a second general meeting called by a trustee appointed under Act 1867, § 43, are not chargeable against the estate, as the trustee has no authority to call such meeting.—In re Hinsdale, Case No. 6,525.

The necessary expenses and disbursements of the United States marshal and assignee must be taxed by the register and paid out of the estate.—In re Carow, Case No. 2,426.

§ 652. —— Costs of examinations.

On examination before a register, each party must pay for the direct examination of his own witnesses, and for such cross-examination as he may make of the witnesses of the adverse party.—Scofield v. Moorhead, Case No. 12,510.

A creditor applying for an order for the examination of the bankrupt must pay the register's fees for taking the bankrupt's depositions both on direct and cross examination.—In re Macintire, Case No. 8,821; In re MackIntire, Id. 8,867.

An assignee who examines the bankrupt under section 26 (Act 1867) must pay the register's fee, whether he has assets of the bankrupt or not.—In re Hughes, Case No. 6,841.

The bankrupt is liable for the costs of the register on an examination by contesting creditors on his proposal of a composition.—In re Griffin, Case No. 5,812.

On examination of the bankrupt, at the instance of a creditor, the bankrupt must pay the expense of taking down statements made in his own behalf, after the examination for the creditor is finished.—In re Mealy, Case No. 9,378.

The creditor must pay for such services performed by the register at his request as are in addition to those that the register would have been compelled to perform in the regular course of his duties.—In re Jackson, Case No. 7,128.

Charges for recording minutes of testimony of an examination of a bankrupt before a register, prior to the creditor's filing specifications in opposition to the discharge, are not properly taxed against the creditor, who was unsuccessful in opposing the discharge. The cost of the examination must be paid by the party upon whose application it was made.—In re Eidom, Case No. 4,315.

§ 653. Security or advances for costs.

Where a petitioner in bankruptcy has made advances as security for fees to the register, clerk, and marshal, he is not entitled to reimbursement therefor by the assignee out of the estate.—Anonymous, Case No. 457.

The assignee may be required to furnish security for costs when he is prosecuting an expensive litigation, and is without funds belonging to the estate.—Forman v. Campbell, Case No. 4,939.

The register may require that his lawful fees for conducting an inquiry instituted by a creditor should be paid or secured before entering thereon.—In re Tifft, Case No. 14,030.

If the examination is for the benefit of the creditors, under section 28, the expenses must be advanced or secured by the creditors.—In re Hughes, Case No. 6,841.

If the examination is one of the steps preliminary to the bankrupt's discharge, he must advance or secure the expenses.—In re Hughes, Case No. 6,841.

A petitioning creditor, who has advanced clerk's and marshal's fees, cannot have an order on the assignee for repayment; but the court may direct the assignee to pay the register's and marshal's fees out of the estate.—In re Smith, Case No. 12,972.

Rule 30 in bankruptcy provides that, where the debtor "makes proof to the satisfaction of the court" that he is unable to pay the costs prescribed by the act and rules, the judge may, in his discretion, direct that the costs shall be limited to the amount required to be deposited, and such an order will not be made upon the mere affidavit of the debtor that he is unable to pay the costs, as that is merely a statement of opinion, which may not be justified by the facts.—In re Anderson, Case No. 352.

An order limiting the fees and costs to the amount of the bankrupt's deposit should only be made after a personal examination of the bankrupt.—In re Redfield, Case No. 11,628.

Such order will not be made where it appears that the bankrupt has been depending for his subsistence on borrowed moneys, the indebtedness for which is not set out in the petition.—In re Redfield, Case No. 11,629.

Where a bankrupt is relieved by order of the court from further payment of fees, the $50 deposit will be distributed pro rata to the register, clerk, and marshal.—Costs and Fees, Case No. 18,282.

The sum, or such portion of it as may be necessary, may be appropriated to the register in the first place.—Costs and Fees, Case No. 18,282.

The sum of $50, deposited with the clerk, is not a fund in court for general distribution among creditors, but is to be disbursed under the supervision of the court.—Costs and Fees, Case No. 18,282.

A balance of the deposit of $50 remaining in the hands of a register at the close of a case in bankruptcy is a part of the assets, and

should be paid to the assignee, and not to the bankrupt.—Anonymous, Case No. 457.

A balance of the bankrupt's deposits for fees paid over to the assignee after the bankrupt has obtained his discharge should be distributed among the creditors who have been returned by the bankrupt.—In re James, Case No. 7,175.

§ 654. Notaries' fees.

No fees are taxable as costs, and entitled to priority of payment, under section 28, Act 1867, to notaries for taking proofs of debt.—In re Nebe, Case No. 10,073.

§ 655. Clerks' fees.

For all necessary services performed by the clerk in bankruptcy proceedings, the fees which are not provided for by Act 1867 or general orders, but which are embraced in the fee bill of 1853, fees may be taxed under the latter.—In re Alexander, Case No. 163.

For searching for petitions in bankruptcy the clerk was allowed 15 cents for each name searched against, the compensation not being provided for in Rev. St. § 828.—In re Vermeule, Case No. 16,916.

The clerk is entitled to separate fees for a certificate of discharge and seal and the order of discharge.—In re Dean, Case No. 3,699.

The clerk is entitled to 15 cents per folio for entering the certificate of the day and hour of filing on all papers filed in the proceeding.—In re Dean, Case No. 3,699.

Warrant "form 45" is a process within general order No. 2 and the fee bill of 1853, and the clerk may charge accordingly for issuing the same.—In re Dean, Case No. 3,699.

The clerk is entitled to 15 cents per folio for drawing the assignment, and 10 cents per folio for copying the same.—In re Dean, Case No. 3,699.

A charge by a clerk of one dollar for "issuing order form 4" is not a proper charge, as such order is not a process, and only an order.—In re Dean, Case No. 3,699.

A charge by a clerk for entering petition, schedules, and oaths as separate papers is proper, as for this purpose they are not regarded as one paper.—In re Dean, Case No. 3,699.

The clerk of the bankruptcy court has no authority to make out or charge for a certified copy of the deed of assignment, unless such copy is demanded by the assignee.—In re Alexander, Case No. 163.

A charge "for clerk's certificate and seal to judge's signature to certificate or discharge" is proper, and should be paid by the bankrupt himself, and not out of the estate nor out of the amount deposited, under Act 1867, § 47.—In re Dean, Case No. 3,699.

§ 656. Register's fees—In general.

A register, under general order No. 30 of the supreme court, is entitled to no fees except such as are provided by such order.—In re Carstens, Case No. 2,469.

A register is not bound to countersign a check unless the fee is first tendered to him.—In re Breck, Case No. 1,823.

§ 657. —— Per diem compensation.

A register is entitled, under general order No. 30, to charge five dollars a day, in all ordinary cases, for each day's service while actually employed under a special order of the court; but the court has power to fix the compensation at a smaller rate, if the circumstances of a particular case warrant it.—In re Hamberger, Case No. 5,971.

Where, under an order of the court, services are performed by the register not specially required by Act 1867 and general orders, and for which no compensation is provided, he will be allowed compensation therefor, under section 47 of said act, allowing him not exceeding five dollars for each day's service under special order of the court. But such order will not justify an increase of the fee for services at a creditors' meeting, fixed by section 47 of such act.—In re Alexander, Case No. 163.

Where an examination of a bankrupt is adjourned at the instance of the creditors, the register is not entitled to his per diem for that day.—In re Clarke, Case No. 2,842.

The register may, besides the charges for attendance, etc., specified in Act 1867, § 47, and in general order No. 30, make reasonable charges for his services in the business of the private sittings preceding the warrant, the business of the first public meeting of creditors, or its adjourned sittings, and the business of another public meeting after the application for a discharge.—In re Sherwood, Case No. 12,774.

A charge of five dollars by a register for "one day's services, under special order, form 4, examining papers," is improper, and will not be allowed.—In re Dean, Case No. 3,699.

Where the register grants an order out of the ordinary course of proceedings, where he is required to render services not specifically enjoined on him by Act 1867 or the general orders, he is entitled, under section 47 of such act, to a fee of five dollars per diem.—In re Dean, Case No. 3,699.

Where bankrupts surrender their property to a register, and thereafter, by order of the bankruptcy court, custodians are appointed, and are directed to sell certain goods at retail, paying over the proceeds to the register daily, which is done during 25 days, during which time $15,000 is received by the register, the latter is entitled to be paid five dollars per day, under Act 1867, § 47, and the percentage on the $15,000 allowed to assignees by section 28 of such act.—In re Loder, Case No. 8,455.

The register is entitled to five dollars per day for services under an order to show cause why the bankrupt should not be discharged, and for sitting in chambers on the return day of the order, and for certifying to the court whether the bankrupt has in all things conformed to his duty, under Act 1867, and has conformed to all the requirements of such act.—In re Bellamy, Case No. 1,267; In re Robinson, Id. 11,937.

A charge for an order to show cause in addition to such charge of five dollars per day will not be allowed.—In re Robinson, Case No. 11,937.

§ 658. —— Meetings of creditors.

Under Act 1867, § 47, a charge by the register for the application for the first meeting of creditors will not be allowed.—In re Robinson, Case No. 11,937.

Where it appears that there was but one application for both the second and third meeting of creditors, a charge for only one application will be allowed to the register. Act 1867, § 47.—In re Dean, Case No. 3,699; In re Robinson, Id. 11,937.

A charge of three dollars per day allowed the register under Act 1867, § 47, is not an allowance for each meeting, but for each day in which any meeting is held, and where two meetings are held on the same day he is entitled to a charge of three dollars only.—In re Robinson, Case No. 11,937.

The register is entitled to three dollars per day for attending second, third, and final meetings, under order 51.—In re Dean, Case No. 3,699.

When it appears from the bankrupt's schedules that there is a certain amount of assets, sufficient to justify a creditors' meeting, and the application for such meeting is made more than a month before the assignee's report, a

fee of three dollars should be allowed to the register for the meeting. Act 1867.—In re Alexander, Case No. 163.

§ 659. —— Certificates.

The register is entitled to 10 cents per folio for copying, and 15 cents for each certificate of one folio, for certified copies of schedules furnished the assignee.—In re Robinson, Case No. 11,937.

The register is not entitled to a charge for examining the schedules and certifying that they are correct, as form No. 4 is not a special order, within the meaning of Act 1867, § 47. —In re Robinson, Case No. 11,937.

Under general order No. 30, a charge by the register for the certified copy of the adjudication, furnished to the bankrupt, will not be allowed; but, where the certificate consists of one folio or less, the proper charge is 15 cents, and not 25 cents, which was inadvertently stated as the amount to be allowed in such general order.—In re Robinson, Case No. 11,937.

A separate charge for a certified list of creditors "for warrant" will not be allowed the register, as such charge is covered by the fee allowed for issuing the warrant.—In re Robinson, Case No. 11,937.

A printed paper is to be taxed for as if it were written.—In re Robinson, Case No. 11,937.

Notwithstanding the provision for the fee of the register in general order 30, he will be allowed only 15 cents per folio for the certificate to the order of adjudication furnished to the bankrupt, and for a certificate to a copy of memorandum forwarded to the clerk, according to the fee bill of 1853.—In re Dean, Case No. 3,699.

Where no dividend has been ordered, the register is not entitled to a fee for furnishing a certified list of creditors, who have proved their debts, to the assignee, but a charge for furnishing such list to the clerk is proper, for without it the clerk cannot give notice to the proper creditors.—In re Dean, Case No. 3,699.

A charge by a register for a copy of the schedules for the assignee will be allowed, as such schedules are papers within general order No. 30, and such copy is required to be furnished to the assignee under Act 1867, § 4.—In re Dean, Case No. 3,699.

A register in bankruptcy is entitled to fees for certifying the date of the receipt of papers which come to his office.—In re Alexander, Case No. 163.

A certificate of the correctness of a petition and schedules in bankruptcy may be regarded as a question certified to the court under Act 1867, § 4, and, as such, the register has a right to charge a fee therefor as provided for by rule 30. Such rule, however, allows but one fee for both issuing an order of adjudication and certifying the same.—In re Alexander, Case No. 163.

Although rule 14 of the rules of bankruptcy requires the register to keep a docket of his proceedings in each case, yet there is no authority for his charging anything therefor, but he is entitled to fees for certifying copies of such proceedings to the clerk.—In re Alexander, Case No. 163.

§ 660. —— Affidavits and depositions.

The register is entitled to a fee for taking the marshal's affidavit on returning the warrant in bankruptcy, as for a deposition; and so as to an affidavit to an order calling a meeting of creditors and an affidavit to the assignee's report.—In re Alexander, Case No. 163.

The register is entitled to a charge for taking the deposition of the assignee upon his return, and it makes no difference that the register inserted the printed matter in a printed form. Act 1867, § 47.—In re Robinson, Case No. 11,937.

The fee of the register for taking an ordinary proof of debt is $1.87½.—Fees for Registering, Case No. 18,295.

For examining and filing a proof of debt taken before any other officer, 50 cents will be allowed.—Fees for Registering, Case No. 18,295.

The register is entitled, under Act 1867, § 47, to 25 cents a folio for depositions taken upon the final examination of the bankrupt.—In re Dean, Case No. 3,699.

§ 661. —— In composition cases.

In composition cases the register is entitled to five dollars for incidental expenses.—In re Spillman, Case No. 13,242.

For the meeting in such cases he is entitled to $3.—In re Spillman, Case No. 13,242.

In such proceedings he is entitled to five dollars per day when acting under a special order. —In re Spillman, Case No. 13,242.

He is entitled to 10 cents a folio for filing each paper in the composition proceedings, and 20 cents for each folio of the examination.—In re Spillman, Case No. 13,242.

For each affidavit in the proceedings he is entitled to 25 cents.—In re Spillman, Case No. 13,242.

For ordering an adjournment of a meeting in such proceeding he is entitled to one dollar.—In re Spillman, Case No. 13,242.

He is entitled to 10 cents for each folio of the report in such proceeding.—In re Spillman, Case No. 13,242.

The compensation of the register who has received a surrender of the bankrupt's property, and subsequently returned it on a composition by the bankrupt, is to be fixed by the court.—In re Portington, Case No. 11,294.

§ 662. —— Miscellaneous cases.

The register is entitled to a charge for taking a bond on the assignee with surety.—In re Dean, Case No. 3,699.

When there is no opposition to a discharge, the register is entitled to a fee of two dollars for granting the same.—In re Dean, Case No. 3,699; In re Robinson, Id. 11,937.

The register is not entitled to the fee of one dollar or to any fee for making an order for the examination of the petitioner in bankruptcy on application of a creditor.—In re MacIntire, Case No. 8,821; In re MackIntire, Id. 8,867.

A fee for making a transfer of the bankrupt's estate by the register to the assignee will not be allowed, as neither Act 1867 nor the general orders provide any compensation for such service.—In re Dean, Case No. 3,699.

A charge by a register "for stationery, postage, and incidental expenses, rent, and clerk hire" will not be allowed, as there is no warrant for these charges, either under Act 1867 or the general orders.—In re Dean, Case No. 3,699.

The traveling expenses of a nonresident register, when apportioned among the several cases before him, will be allowed, and he may in addition charge for the time consumed in making the journey.—In re Sherwood, Case No. 12,774.

§ 663. Fees of marshal.

The bankruptcy court has no power to make discretionary allowances to the marshal beyond the specific fees prescribed by Rev. St. §§ 829, 5126, and general order No. 30.—In re Johnston, Case No. 7,421.

The fees to be allowed to a marshal as messenger are those specifically enumerated by Act

1867, and such other fees as he shows himself to have earned, the items of which are determinable by analogy to the fees allowed the marshal for similar services.—Anonymous, Case No. 437.

Where a marshal sends a process by mail to his deputy in a distant county, he is entitled to be paid mileage on such process; but, where he sends a deputy from the court house to a distant county for service, he is entitled to the reasonable expenses of the deputy, but not to mileage.—Anonymous, Case No. 437.

A messenger cannot charge commission on his own cost bill.—Anonymous, Case No. 437.

Additional allowances should not be made to the marshal, under § 47, Act 1867, unless it appear that he performed something beyond his ordinary duties.—In re Hare, Case No. 6,063.

A charge by the messenger of a certain sum per folio for preparing notices to creditors is improper, as such charge is not designated in the act as a fee to which he is entitled. Act 1867, § 47.—In re Dean, Case No. 3,699; In re Talbot, Id. 13,727.

A charge by a messenger "for attendance" is unauthorized, and will not be allowed under Act 1867, § 47.—In re Talbot, Case No. 13,727.

The marshal, as messenger, when he collects moneys of a bankrupt's estate, under a warrant, is entitled to charge a commission on the amount collected.—In re Pfaff, Case No. 11,060.

Marshals are not entitled to per diem service for holding, constructively, possession of bankrupt property.—In re Pace, Case No. 10,640.

No allowance will be made for the custody of property by way of commissions on its value.—In re Burnell, Case No. 2,171.

In absence of other proof, a charge of one dollar per hour for personal attention to the bankrupt's property by the messenger must be supported by his own oath, showing the fact of such attention and the necessity thereof.—In re Hellmar, Case No. 6,342.

A marshal is entitled to commissions of 2 per cent. on disbursements. Rev. St. § 829.—In re Johnston, Case No. 7,421.

Two per cent. commissions for disbursing moneys (Rev. St. § 829) are not limited to expenses of court.—In re Burnell, Case No. 2,171.

The marshal is entitled to 10 cents a folio for the inventory furnished the assignee.—In re Johnston, Case No. 7,421.

No allowance to the marshal will be made for time spent in verifying the inventory with the assignee.—In re Johnston, Case No. 7,421.

A marshal is entitled, under general order No. 30, to one dollar an hour for the time occupied in making an inventory, and the time spent in such work by one who was at that time acting as the marshal's assistant as keeper of the property may be charged.—In re Johnston, Case No. 7,421.

For collecting money on drafts and checks, the marshal will be allowed the same fees as on an attachment in rem in admiralty.—In re Johnston, Case No. 7,421.

The marshal is not entitled to charge for constructive mileage in serving a warrant in bankruptcy. Actual personal service, under order of court, is necessary.—In re Alexander, Case No. 163.

The United States marshal, as messenger, is entitled to five cents per mile for the necessary travel for the purpose of making a return on the warrant.—In re Talbot, Case No. 13,727.

The marshal is entitled to separate fees for service of copies of petition and order to show cause, though made at same time.—In re Burnell, Case No. 2,171. CONTRA, see In re Hellmar, Case No. 6,342.

§ 664. Disbursements of marshal.

The marshal will be allowed for the custody of property only actual disbursements and for his personal attention.—In re Johnston, Case No. 7,421.

For the custody of the property the marshal is entitled to the amount necessarily and actually paid to a keeper, not exceeding $2.50 per day, and no charge by the marshal for custody fees by way of commissions on the value of the property will be allowed.—In re Johnston, Case No. 7,421.

A marshal can only be allowed a charge for a storekeeper, not to exceed $2.50 per day, on showing the necessity for his employment, the reasonableness of the price paid, and the actual payment to the storekeeper.—In re Lowenstein, Case No. 8,572; In re Comstock, Id. 3,075; In re Pace, Id. 10,640.

Bookkeeper of bankrupt not entitled to compensation for making schedules while in employ of marshal, and in receipt of his usual salary.—In re Barnes, Case No. 1,013.

The oath of the marshal is not conclusive as to the necessity of expenses charged in his account.—In re Pace, Case No. 10,640.

Marshals must present vouchers for items charged in their accounts, or produce satisfactory reason for their absence.—In re Comstock, Case No. 3,075.

Register's decision disallowing a charge for a watchman, on the ground that no watchman was necessary, reversed.—In re Hare, Case No. 6,063.

§ 665. Fees of counsel for bankrupt.

Services rendered by attorneys in opposing involuntary petitions are not allowable as services to the assignee. Such services are rendered to the bankrupt and are provable against his estate.—In re New York Mail S. S. Co., Case No. 10,211.

An estate is not liable for counsel fees in opposing involuntary bankruptcy, and for drawing inventories, order of adjudication, etc.—In re Bigelow, Case No. 1,397.

On approval of the assignee, the counsel of a bankrupt may be paid from the estate for services in resisting the petition and settling conflicting claims.—In re Clark, Case No. 2,803.

Counsel for the debtor will not be allowed a fee for contesting the adjudication, where there was no question as to the insolvency of the debtor at the time.—In re Portsmouth Sav. Fund Soc., Case No. 11,298.

There is no authority under Act 1867 to allow a counsel fee to the bankrupt's attorney out of the assets.—In re New Lamp Chimney Co., Case No. 10,168.

Reasonable compensation to the solicitor of a voluntary bankrupt in preparing the petition and schedules will be allowed out of the assets in the hands of the assignee.—In re Kennedy, Case No. 7,700.

An application for such allowance will not be entertained after the filing of the assignee's account and an order for a meeting of creditors for final dividend.—In re Kennedy, Case No. 7,700.

The fee to be allowed counsel for the preparation of a schedule of a bankrupt is not to be determined by the amount of mere clerical labor performed,—the systematizing, arrangement, and condensation of the matter should be considered; and a fee of $100 for preparing a schedule numbering 40 pages of bankruptcy blanks was properly allowed.—In re Andrews, Case No. 370.

Compensation will be allowed attorneys employed by the bankrupts who procured the discharge of a warrant of arrest against one of the bankrupts and prepared the schedule and inventory required by Act 1867, § 41.—In re Mansfield, Case No. 9,048.

Attorneys for the bankrupt will not be allowed compensation for services rendered between the time of adjudication and the choice of an assignee, unless it appeared that they benefited the estate or were necessary to preserve it in the interest of the general creditors. —In re Jaycox, Case No. 7,239.

In an involuntary proceeding an attorney for the bankrupt will be allowed for his services on approval of his bill by the assignee, and certificate of the register that he has saved the estate considerable expense.—In re Montgomery, Case No. 9,726.

Where a petition in voluntary bankruptcy is filed against a firm, and an injunction issued preventing them from parting with their property, and a warrant of arrest is issued against one of them, under Act 1867, and the bankrupts employ attorneys who procure the discharge of such warrant, and upon adjudication being had they prepare the schedules and inventory required under such act, upon petition of such attorneys to the bankruptcy court to be paid for their services, they are entitled to compensation. The injunction having deprived the bankrupts of the means to employ counsel, such services are considered a part of the bankruptcy proceedings.—In re Mansfield, Case No. 9,048.

The bankrupt's attorney is entitled to an allowance for services in securing exemptions which were rejected by the assignee.—In re Comstock, Case No. 3,074.

The proper way to bring before the court the question of the compensation of and disbursements by the attorneys of the bankrupt is by petition, on which a reference will be ordered.—In re Rosenberg, Case No. 12,056.

§ 666. Docket fees.

The docket fee of $20 is taxable in cases of involuntary bankruptcy, where there is a "trial" by jury, and in those voluntary cases where, under Act 1867, § 31, the court is authorized to direct a trial upon specifications of objections to the bankrupt's discharge.—Gordon v. Scott, Case No. 5,620.

The docket fee of $20 is taxable in favor of the attorney for the successful party only in involuntary cases, and where there has been a trial by jury.—In re Mead, Case No. 9,364.

§ 667. Witness fees.

A bankrupt summoned by a creditor to appear as a witness is not entitled to witness fees.—In re McNair, Case No. 8,907.

A creditor who has proved his claim and appears for examination under order of the bankruptcy court is not entitled to witness fees.—In re Kyler, Case No. 7,956; In re Paddock, Id. 10,658.

The fees of a witness must be paid or tendered at the time of the service of the summons or subpœna. General Order No. 29.—In re Griffen, Case No. 5,810.

Witnesses are entitled to attendance fees for adjourned days, or to travel fees for going to and from home during adjournments.—In re Griffen, Case No. 5,810.

If the fees are not paid and the witness attends, the fees are to be collected as in ordinary actions, and according to the practice of courts therein.—In re Griffen, Case No. 5,810.

The wife of a bankrupt, attending under an order, and being examined as a witness, is entitled to witness and travel fees, calculated according to Act Feb. 26, 1853, § 3.—In re Griffen, Case No. 5,810.

A witness is entitled to fees only for the days of actual attendance, and not for the days on which he was ready to attend.—In re Crane, Case No. 3,352.

The party who serves the subpœna is entitled to recover for service and mileage.—Gordon v. Scott, Case No. 5,620.

§ 668. Taxation.

A regular taxation by the clerk should be made of all the fees and disbursements in each bankrupt case.—Costs and Fees, Case No. 18,282.

The standing auditor of the court has no power to tax a marshal's bill of costs.—In re Rein, Case No. 11,677.

The consent of the assignee *held* a sufficient ground for the taxation of the marshal's bill of fees and expenses, and the register must countersign a check drawn by the assignee for the amount.—In re Rein, Case No. 11,678.

If any question arises in respect to the register's fees, they must be taxed by the clerk, pursuant to general order No. 30, before they can be allowed, and an order therefor should be made on application of the bankrupts.—In re August, Case No. 645.

Where the bankrupt fails to raise the question at the proper time as to whether a supplemental warrant is necessary, the court will not determine the question upon the taxation of the fees of the register.—In re Robinson, Case No. 11,937.

As to the charges of the register, and how questions in regard thereto are to be raised.—In re Sherwood, Case No. 12,774.

Counsel for assignee allowed $350 for services.—In re Warshing, Case No. 17,209.

The clerk's certificate is only prima facie evidence of attendance of witnesses before the register. The register's memoranda of entries may be used to prove the proceedings.—In re Crane, Case No. 3,352.

§ 669. On appeal.

Costs are not allowed to either party where, on new evidence, on appeal to the circuit court on a trial of objections to a discharge, the verdict is changed in favor of the bankrupt.—In re Guild, Case No. 5,860.

§ 670. Payment and remedies for collection.

The register has authority to make an order directing the assignee to pay fees to court officers.—In re Lane, Case No. 8,042.

Registers may take cognizance of uncontested petitions filed by attorneys against the assignee to compel the payment of their fees and disbursements.—In re Stafford, Case No. 13,274.

The court may, under Act 1867, § 47, and general order 29, direct the assignee to pay the register's and marshal's fees out of the estate, but not before they are properly taxed. —In re Smith, Case No. 12,972.

A register has a lien for his fees on the fund in court which has been awarded to a party.—In re Breck, Case No. 1,823.

The costs and expenses of the bankruptcy, proceedings are entitled to priority of payment out of the funds in court derived from the sale of the property.—In re Whitehead, Case No. 17,562.

§ 671. Set-off.

A petitioner in involuntary bankruptcy, whose petition is dismissed with costs, cannot set off his debt against the costs.—In re Lowenstein, Case No. 8,572.

VII. OFFENSES AGAINST BANKRUPT LAWS.

§ 672. Perjury.

The bankrupt's intentional omission to state a part of his property in his sworn schedule is perjury under the act of 1825.—United States v. Nihols, Case No. 15,880.

Under Act March 3, 1825, an intentional omission, by one applying for the benefit of the bankrupt law (Act 1841) to place any portion of his property upon a schedule, sworn to by him as containing a true account of all his effects, is perjury.—United States v. Nihols, Case No. 15,880.

Under an order of the district court, authorizing petitioners in bankruptcy to verify their petitions before the clerk of the county in which they reside, and appointing such county clerk commissioner to administer oaths to such petitioners, the clerk of one county has no power to administer such oath to a resident of another county.—United States v. Deming, Case No. 14,945.

A deputy clerk, being authorized to act the same as the principal, has the right to administer oaths in bankruptcy; and such oaths are presumed to be administered in the presence of the court, and by virtue of its authority.—United States v. Nihols, Case No. 15,880.

The bankrupt is not guilty of perjury in withholding certain items from his schedule under the advice of counsel to whom he had fairly submitted the facts in regard to his property.—United States v. Conner, Case No. 14,847.

Perjury committed in bankruptcy proceedings cannot be prosecuted under the general criminal law (§ 18) nor will an indictment lie at common law.—Anonymous, Case No. 475.

§ 673. Fraudulent conveyances.

An intent to defraud only the original seller of goods is not within Act 1867, § 44, punishing bankrupts who, within three months before their petition is filed, dispose of goods otherwise than in due course of trade, with an intent to defraud.—United States v. Clark, Case No. 14,806.

To sustain a conviction for a fraudulent disposal of goods, it is not necessary that such goods shall have been obtained within three months prior to the commencement of the proceedings in bankruptcy.—United States v. Smith, Case No. 16,339.

A chattel mortgage is a disposition of property out of the usual course of business, and, where executed with an intent to defraud creditors, will subject the bankrupt to indictment, under Rev. St. § 5132.—United States v. Bayer, Case No. 14,548.

§ 674. Concealment of property or omission to schedule.

To sustain a conviction for concealing assets from the assignee, it is not necessary to prove a demand by the assignee.—United States v. Smith, Case No. 16,339.

The crime of fraudulently omitting property or effects from a bankrupt's schedule is complete when the false schedule is filed.—United States v. Clark, Case No. 14,806.

§ 675. Fictitious losses.

An indictment charging a conspiracy to have a bankrupt account for his property by falsely pretending that he had given a valid mortgage thereon to secure a consideration a part of which he should falsely pretend to have been stolen, sets out an offense under Rev. St. § 5440, as a conspiracy to attempt to account for property by fictitious losses.—United States v. Swett, Case No. 16,427.

§ 676. Obtaining goods with intent to defraud.

Under Rev. St. § 5132, cl. 9, making it a misdemeanor for a bankrupt to obtain goods on credit with intent to defraud, etc., it must be shown that the intent to defraud existed in the mind of the bankrupt against his creditors generally, and not against the particular creditor from whom the goods were obtained.—United States v. Penn, Case No. 16,025.

Under an indictment based upon Rev. St. § 5132, cl. 9, it must be shown that defendant falsely represented that he was carrying on business in the ordinary course of trade, and that such representations induced the seller to part with his goods.—United States v. Penn, Case No. 16,025.

A retailer who buys large quantities of goods under the pretense of needing them in his regular business, but ships them off and sells them at wholesale at a sacrifice, is guilty of a misdemeanor. Act 1867, § 44.—United States v. Frank, Case No. 15,159.

Where it appears from a hearing before a United States commissioner that an insolvent, within three months of his bankruptcy, obtained goods on credit from various parties, with intent to defraud, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, he will be held to bail. Act 1867, § 44.—United States v. Geary, Case No. 15,195a.

§ 677. Accessories.

Under Rev. St. § 5440, a person who conspires with the bankrupt to commit the acts made criminal by § 5132, subds. 7, 10, may be indicted.—United States v. Bayer, Case No. 14,547.

§ 678. Indictment and information.

On a charge of perjury by a petitioner in bankruptcy, the indictment need not set out particularly or substantially the petition.—United States v. Deming, Case No. 14,945.

An indictment for perjury in a proceeding in bankruptcy is sufficient, in alleging the petition as made "to a judge sitting as a bankrupt court."—United States v. Deming, Case No. 14,945.

In an indictment for perjury, in not giving a true and full account of the property of the petitioner, the items on the schedule need not be stated in the indictment.—United States v. Chapman, Case No. 14,784.

The allegation in such indictment that the property was omitted to defraud a certain creditor named and others is sufficient, as all the creditors need not be named in the indictment.—United States v. Chapman, Case No. 14,784.

An indictment under Rev. St. § 5132, will lie before an order of adjudication in bankruptcy.—United States v. Myers, Case No. 15,848.

In an indictment under such act all matters necessary to constitute the offense as defined therein must be pleaded.—United States v. Prescott, Case No. 16,084.

The description of the goods should be as definite as in a declaration in trover.—United States v. Prescott, Case No. 16,084.

The word "feloniously" should be omitted, the offenses being indictable as misdemeanors.—United States v. Prescott, Case No. 16,084.

An averment that defendant was lawfully adjudged a bankrupt, is sufficient to admit the record in the bankruptcy proceedings, of which the examination of the bankrupt is a part.—United States v. Crane, Case No. 14,887.

An indictment which merely avers the commencement of proceedings in bankruptcy pursuant to the act, without in any way describing the proceeding, except by the names of the

creditors "pursuant to the act," and which does not state the name of the court, or the time or place where the proceedings were instituted, is insufficient.—United States v. Latorre, Case No. 15,567.

An indictment for omitting property and effects from the schedule need not allege that the bankrupt took the oath of allegiance prescribed by Act 1867, § 11.—United States v. Clark, Case No. 14,806.

The crime defined in Rev. St. § 5132, subd. 6, is not an infamous one, within the meaning of that term at common law and as used in the fifth amendment to the United States constitution, and the party committing it may be prosecuted by information.—United States v. Block, Case No. 14,609.

An indictment, under Act 1867, § 44, cl. 7, is sufficient where it alleges that defendant was lawfully adjudged a bankrupt; that after commencement of proceedings in bankruptcy he was required by the district court to submit to examination on oath as to the disposal and condition of his property; that the examination was held; that the bankrupt was sworn to make true his answers: and that he attempted to account for a certain item of property, with intent to defraud his creditors, by a fictitious loss.—United States v. Crane, Case No. 14,887.

An indictment for obtaining goods under false pretenses (Rev. St. § 5132, cl. 9) need not charge an intent to defraud creditors generally.—United States v. Myers, Case No. 15,848.

The negative averment that the accused was in fact not carrying on business and dealing in the regular course of trade when he obtained credit for goods on false pretenses is not necessary.—United States v. Myers, Case No. 15,848.

§ 679. Evidence.

The compulsory examination of a bankrupt under oath under § 26 (act 1867) cannot be given in evidence against him on a criminal proceeding under § 44.—United States v. Prescott, Case No. 16,085.

Where the question in issue is whether the defendant absconded, his declarations made while on his way from his place of residence, as to his intentions of returning, are competent evidence in his favor.—United States v. Penn, Case No. 16,025.

§ 680. Trial—Witnesses.

Defendants are not competent witnesses in their own behalf on their trial on indictment for violating § 44 of the bankrupt act of 1867.—United States v. Black, Case No. 14,602.

VIII. REVIEW.

§ 681. Appellate and revisory jurisdiction.

The circuit court has jurisdiction to revise, correct, and reverse rulings of the district court in bankruptcy (Act 1867).—Langley v. Perry, Case No. 8,067.

The circuit court has complete and unlimited control over proceedings in bankruptcy to review the whole case, or any particular question arising in it. (Act 1867, § 2.)—Ruddick v. Billings, Case No. 12,110.

Act 1867, as to revisory jurisdiction, excludes from the category of general superintendence and jurisdiction of the circuit court the appellate jurisdiction defined by section 8 of said act, and brings within that category all decisions of district court or the district judge at chambers, which cannot be reviewed upon appeal or writ of error, under the provision of such section.—In re Alexander, Case No. 160.

Act 1867, which gives the circuit court appellate jurisdiction in certain cases, and, among others, of appeals in equity cases decided in the district court under the jurisdiction created by the act, and of writs of error in cases at law decided in the exercise of such jurisdiction, comprises those suits of which concurrent jurisdiction is given to the circuit and district courts by such act.—In re Alexander, Case No. 160.

Under Act 1867, the appellate jurisdiction which is conferred upon the federal circuit courts is limited to controversies between assignees and the claimants of adverse interest, and to controversies between assignees and creditors touching the allowance of claims.—In re Alexander, Case No. 160.

The jurisdiction of superintendence conferred upon the federal circuit courts by Act 1867, § 2, is to be exercised over proceedings in bankruptcy already pending in the federal district court.—In re Alexander, Case No. 160.

The circuit court has no supervisory jurisdiction in the case of a suit brought by the assignee or a creditor pending the bankruptcy proceedings, or on the rejection or allowance of a claim, but has such jurisdiction in all other classes of cases.—York's Case, Case No. 18,139.

The jurisdiction conferred upon the circuit court by Act 1867, § 2, is revisory, and confers no power to execute the decrees of the district court or to assume primary exercise of jurisdiction conferred on the district court by section 1.—In re Bininger, Case No. 1,418.

Act Feb. 6, 1839 (5 Stat. 315) § 8, which vests the federal district court for the middle district of Alabama with the jurisdiction of the federal circuit court, except in cases of appeal and writs of error, does not deprive such circuit court in that district of jurisdiction to review an adjudication in bankruptcy by the district court, under Act 1867, § 2, giving the circuit court, within and for the district in which the proceeding is pending, a general superintendence and jurisdiction of bankruptcy proceedings.—Alabama & C. R. Co. v. Jones, Case No. 126.

§ 682. Nature and form of remedy.

The distinction between the methods of review in actions in law and suits in equity—one being by writ of error, and the other by appeal—is preserved by section 8 of the act of 1867.—Ruddick v. Billings, Case No. 12,110.

A summary proceeding by order to show cause, asking the assignee to be directed to pay a mortgage debt out of the estate, is not a suit, within Act 1867, § 8, relating to appeals.—In re Casey, Case No. 2,495.

An order made by the district court in the exercise of its summary jurisdiction may be reviewed in the circuit court by petition or on bill filed in a plenary suit in the circuit court, but it cannot be reviewed by appeal under section 8.—In re Casey, Case No. 2,495; Hurst v. Teft, Id. 6,939.

An appeal to the circuit court will not lie by the petitioning creditors from an order of the district court vacating, at the instance of another creditor, an order made at a previous term adjudicating the debtor a bankrupt. The remedy of the petitioning creditors in such case is under Act 1867, § 2, and not an appeal under section 8.—In re Hall, Case No. 5,920.

Where the issue of bankruptcy is tried by a jury, errors of the court in the progress of the trial can be reviewed only by writ of error, and cannot be reviewed by petition, under Act 1867, § 2.—Lehman v. Strassberger, Case No. 8,216; In re Oregon Bulletin Printing & Publishing Co., Id. 10,560.

A petition filed by the bankrupt after discharge, praying that certain money recovered for his estate since the discharge might be applied to his debts and the costs of the proceedings, and the balance paid to him, is not a bill in equity, but a petition, and a decree

thereunder is reviewable by petition.—Maybin v. Raymond, Case No. 9,338.

The decision of the district court respecting a claim of a creditor can only be reviewed by an appeal taken as prescribed by Act 1867, §§ 8, 24, and rule 26.—In re Place, Case No. 11,200.

Questions arising in the progress of a case can be reviewed by the circuit court only by petition and not by appeal.—In re Reed, Case No. 11,638.

The proper process by which to remove to the circuit court an order granting or refusing a discharge is by petition under section 2, Act 1867.—Ruddick v. Billings, Case No. 12,110.

The review of an interlocutory decree of the district court in a suit to set aside an illegal preference can only be had by appeal under Act 1867, § 8, and cannot be had by petition for review under § 2 of such act.—Warren v. Tenth Nat. Bank, Case No. 17,201.

§ 683. Decisions reviewable.

The removal of the assignee by the district court for a "cause which in its judgment renders such removal necessary or expedient" is not such a case or question as can be reviewed by the circuit court.—In re Adler, Case No. 82.

A resolution of composition is subject to review under the revisory power of the circuit court.—In re South Boston Iron Co., Case No. 13,183.

Under Act 1867, § 8, the appeal provided for can be taken only from a final order.—In re Casey, Case No. 2,495.

The power of the circuit court to review proceedings in bankruptcy is not limited by the amount involved.—In re Clark, Case No. 2,802.

The decision of the register, on submission of a claim to him by stipulation, is not final, but is subject to review of the court.—In re Ford, Case No. 4,932.

An appeal will lie to the supreme court from a decision of the circuit court in the exercise of its supervisory jurisdiction under the bankrupt law.—In re Fox, Case No. 5,007.

On the overruling of the opposition and allowance of a claim, the opposing creditor may take the question to the circuit court for review, by bill, petition, or other proper process. Rev. St. § 4986.—In re Joseph, Case No. 7,532.

An order for the sale of lands of the bankrupt free of incumbrances may be reviewed in the circuit court under section 2, Act 1867.—Markson v. Heaney, Case No. 9,098.

A proceeding in the district court to have proof of debt rejected, under Rev. St. § 5081, held appealable to the circuit court under section 4980.—Morris v. Brush, Case No. 9,828.

An appeal will not lie to the circuit court from an adjudication of bankruptcy.—In re O'Brien, Case No. 10,397.

A proceeding to have a debtor adjudged a bankrupt cannot be reviewed until after final judgment.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,560.

The circuit court has jurisdiction to review an order of the district court upon a trial before it without a jury, adjudicating the petitioner a bankrupt. (Act 1867, § 2.)—In re Picton, Case No. 11,136.

An appeal may be taken to the circuit court from a decree of the district court in a suit to recover alleged property of the bankrupt, where the amount in dispute exceeds $500.—Scammon v. Cole, Case No. 12,432.

In bankruptcy cases an appeal to the circuit court will be allowed upon final decrees of the district court in a suit in equity by or against an assignee, only where the sum in controversy exceeds $500.—In re Zug, Case No. 18,222.

The decision of the district court upon an application to confirm a sale of a bankrupt's estate is not within the general supervisory jurisdiction of the circuit courts. (Act 1867, § 2.)—York's Case, Case No. 18,139.

§ 684. Right of review.

A person not a party to the proceeding below cannot file petition for review.—Alabama & C. R. Co. v. Jones, Case No. 127.

Any lien creditor may appeal from a decree affecting his rights to the supervisory jurisdiction of the circuit court.—In re Taliafero, Case No. 13,736.

An objecting creditor cannot further contest the claim of another after a decision on its validity by the district court. Proceedings to review such decision must be taken by the assignee by appeal under § 8 (Act 1867).—In re Troy Woolen Co., Case No. 14,202.

A bankrupt seeking a review, and at the same time prosecuting suits in a state court to restrain proceedings in the district court, will not be required to elect.—In re Bininger, Case No. 1,419.

§ 685. Presentation and reservation in lower court of grounds of review.

Proceedings not passed upon in the district court cannot be availed of as error on review.—Alabama & C. R. Co. v. Jones, Case No. 127.

Where an assignee proceeded by petition to recover certain property as assets of the bankrupt, and the respondent answered without objection, the circuit court, on review, will not consider whether a more formal suit would have been proper.—In re Clark, Case No. 2,802.

The circuit court has no authority to entertain questions adjourned from the district court unless they are distinctly raised.—In re Grant, Case No. 5,690.

The objection that there was no direction from the bankrupt court to bring the suit cannot be first raised in the appellate court.—Hallack v. Tritch, Case No. 5,956.

On a review in bankruptcy, the circuit court cannot consider objections to a proceeding in composition that were not taken in the district court.—In re Wilson, Case No. 17,781.

§ 686. Time of taking proceedings.

The provision of Act June 1, 1872, § 2, limiting the time to appeal from the district court to one year, does not apply to appeals under Act 1867.—Sedgwick v. Fridenberg, Case No. 12,611.

In a suit by an assignee in bankruptcy against a person claiming adverse interest no appeal lies before final decree from the interlocutory decree of the district court.—Clark v. Iselin, Case No. 2,824.

A petition for a revision by the circuit court of a final decree of the district court refusing a discharge may be entertained, although no proceedings were actually pending in the district court when the petition for revision was made (Act 1867, § 2).—Littlefield v. Delaware & H. Canal Co., Case No. 8,400.

In computing the time within which an appeal in bankruptcy must be taken, Sunday is to be counted, except when the last day would fall on Sunday.—York's Case, Case No. 18,139.

The federal circuit court has no jurisdiction on an appeal in any case under Act 1867, from the district court, unless it is claimed, and the bond is filed at the time it is claimed, and notice is given, as required by section 8 of said act, within 10 days after the entry of the decree or decision appealed from, or unless it is entered at the term of the circuit court first held, within the proper district, after the expiration of the 10 days from the time it was claimed.—In re Alexander, Case No. 160.

Where the appeal provided for in Act 1867, § 8, is not taken within 10 days after the decree is entered, the court acquires no jurisdiction.—Sedgwick v. Fridenberg, Case No. 12,611.

An appeal from the rejection of a claim will be dismissed for failure to file the statement and enter the appeal within the 10 days as required by Act 1867, §§ 8, 24, and rule 26.—In re Kyler, Case No. 7,957; In re Place, Id. 11,200, 11,201.

General order No. 26, in relation to the time of filing an appeal from the district court in the circuit court, is a rule of practice in the latter court, and, if disregarded, the appellee has prima facie ground on which to move to dismiss the appeal.—Morris v. Brush, Case No. 9,828.

A compliance with general order in bankruptcy No. 26, in relation to the filing of an appeal in the circuit court, is not necessary to give jurisdiction, but the court will hear such appeal where a satisfactory excuse is offered for the delay in filing.—Morris v. Brush, Case No. 9,828.

§ 687. Petition for review.

Statement of counsel that they are authorized by a corporation to file petition for review of proceedings is conclusive as to authority.—Alabama & C. R. Co. v. Jones, Case No. 126.

A petition for the review of law and fact must state specifically the errors complained of in the ruling or order of the district court.—In re South Boston Iron Co., Case No. 13,183.

The petition for revision under Act 1867, § 2, must distinctly state in what the error consists, whether it be of law or fact. An allegation that petitioner has conformed to the provisions of the act, and is aggrieved because the prayer of his petition for discharge was refused, is not sufficient.—Littlefield v. Delaware & H. Canal Co., Case No. 8,400.

Asking a review and reversal or modification of an order of the bankruptcy court in exercise of its summary jurisdiction and a mere notice of appeal is not "proper process" for invoking a review.—In re Casey, Case No. 2,495.

Service of petition for review on attorney for creditor filing petition below is sufficient.—Alabama & C. R. Co. v. Jones, Case No. 126.

§ 688. Bond.

An appeal cannot be allowed where a bond is not given within 10 days after the decree has been entered, as required by Act 1867, § 8.—In re Alexander, Case No. 160; Benjamin v. Hart, Id. 1,302.

A bond given on appeal under Act 1867, § 8, which has no statement of the court which rendered the decree, except by a reference to the title of the cause, and the cause being entitled in the circuit court, is not sufficient, and will not be approved.—Benjamin v. Hart, Case No. 1,302.

§ 689. Powers and proceedings in lower court on transfer of cause.

The district court may open the decree, and grant a rehearing, in case of newly-discovered evidence; and, pending application therefor, the circuit court will suspend action on the petition for review.—In re Great Western Tel. Co., Case No. 5,739.

§ 690. Stay of proceedings.

A stay of proceedings in the district court is in the discretion of the circuit court, and will not be granted where the debtor will not be seriously prejudiced by their continuation.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,560.

§ 691. Record.

The record on appeal from the disallowance of a claim in bankruptcy must show that appellant, within the time specified by the rules of court, made a statement in writing of his claim, and filed the same with the clerk.—In re Coleman, Case No. 2,979.

Appeals in equity cases, under Act 1867, from the district to the circuit court, are regulated by section 8 and general order No. 26, framed by the supreme court; and where, in an equity case, the record does not show that an appeal was claimed or notice given, and contains no bond, it will be dismissed by the circuit court.—Hawkins v. Hastings Nat. Bank, Case No. 6,245.

A transcript of the proceedings in the district court is not required to be filed within the 10 days allowed for filing an appeal in a circuit court, but it is sufficient if a statement of the appellant's claim, a brief account of what has been done in the district court, and the grounds of appeal, are filed. Rev. St. § 4984.—Morris v. Brush, Case No. 9,828.

The statements in a petition for review, like those in any other pleading, must be taken as true on demurrer, and, if sufficient, the decree below reversed. Case No. 9,923 reversed.—Curran v. Munger, Case No. 3,487.

§ 692. Dismissal.

A petition for review by the circuit court, under Act 1867, § 2, filed 50 days after the making of a final decree by the district court refusing the discharge, in the absence of a rule limiting the time, will not be dismissed on the ground of delay.—Littlefield v. Delaware & H. Canal Co., Case No. 8,400.

Proceedings for review instituted by a creditor whose interest was $6,000 out of $300,000 nearly five months after the discharge was granted is unreasonably delayed, where the bankrupt, on the faith of the discharge, aided by friends, had resumed his former business.—In re Murray, Case No. 9,953.

An appeal under Act March 2, 1867, § 8, will be dismissed for failure to comply with the provisions in regard to entering the appeal, or the provisions of general order No. 26 in regard to filing the appeal, and setting forth a statement in writing of the claim.—In re Coleman, Case No. 2,979.

§ 693. Hearing.

A bill or petition under Act 1867, § 2, for a review of an adjudication of bankruptcy may be heard by the circuit judge, in chambers at any place within the circuit, whether within or without the district where the bankruptcy proceedings are pending.—Markson v. Heaney, Case No. 9,098; Thornhill v. Bank of Louisiana, Case No. 13,992.

§ 694. Review.

The circuit court has power to review the findings, where the evidence is before it upon which the bankrupt was adjudged guilty of contempt in failing to disclose his property.—In re Salkey, Case No. 12,254.

In such case the circuit court may direct the district court to allow the bankrupt to be reexamined before the register, and, on the return of an attachment, the court will examine the bankrupt.—In re Salkey, Case No. 12,254.

When questions of policy and expediency have been fairly before the creditors, and disposed of by them, and their action has been approved by the register and the district court, such action will not be interfered with by the circuit court, on review.—In re Wilson, Case No. 17,781.

In a composition case the circuit court, in the exercise of its supervisory jurisdiction, will not interfere, except in a very clear case, where the district court has affirmed the action of majority creditors.—In re Wronkow, Case No. 18,105.

Where a composition has been approved by the creditors, the register, and the district

court, the circuit court will not interfere, unless specific errors in the action of the creditors or the court below can be pointed out, which, if sustained, would change the judgment.—In re Wronkow, Case No. 18,105.

On petition for review of the finding of the district court on a matter of fact, the burden is on the petitioner to show that the evidence cannot support the finding. Case No. 11,322 affirmed.—Coggeshall v. Potter, Case No. 2,955.

The circuit court will not review an incidental question of practice in the district court.—In re Robinson, Case No. 11,939.

On review the decision of the district court on a question of fact will not be reversed unless it clearly appears that the court was in error. —In re Mooney, Case No. 9,748.

Where all the evidence in the district court on a trial without a jury is preserved by bill of exceptions and certified to the circuit court, the correctness of the order of the district court adjudicating the petitioner a bankrupt can be reviewed.—In re Picton, Case No. 11,136.

The circuit court will not set aside the appointment of an assignee by the district judge where the only error claimed is in holding that no election had been made by the creditors, there being no allegation against the fitness of the person appointed.—Woods v. Buckewell, Case No. 17,991.

On an appeal by a creditor from the decision of the district court rejecting his claim, where a declaration and plea are filed, the creditor has a right to a jury trial (Rev. St. §§ 4980, 4984). —Thistle v. Hamilton, Case No. 13,884.

Such right will not be held to have been waived where the appeal is inadvertently submitted, and decided as if the cause had been brought up by writ of error.—Thistle v. Hamilton, Case No. 13,884.

The circuit court will not, on petition for review, hear additional testimony. Its power is simply revisory.—In re Great Western Tel. Co., Case No. 5,739.

On a revisory petition to the circuit court the case will not be taken up de novo, but the error complained of must be particularly set forth.— In re Sutherland, Case No. 13,636.

The cause of action on appeal to the circuit court under Act 1867, § 24, from a rejection of proof of debt must be the same as that presented to the district court.—In re Jaycox, Case No. 7,237.

On an appeal by a creditor from a decision of the district court rejecting his claim the case is reconstructed in the circuit court, and the issues are made up and tried in the same way as if the case were originally commenced in such court. —Stillwell v. Walker, Case No. 13,451.

§ 695. Determination and disposition of cause.

In the case of an appeal, under Act 1867, § 8, from an order of the district court requiring the surrender of property belonging to the bankrupt, the order will be affirmed on the merits, where it clearly appears that the proceedings in granting such order were authorized, although there is a motion to dismiss the appeal as unauthorized by said section 8.—Samson v. Blake, Case No. 12,284.

The power to review conferred on a circuit court of the United States by Act 1867 (14 Stat. 518) is given to it as a court of equity; and it is not bound to reverse on strictly legal grounds, if satisfied that the facts are correctly found, and that no injustice has been done.—In re Clark, Case No. 2,802.

BANKS AND BANKING.

I. CONTROL AND REGULATION IN GENERAL.

§ 1, What are banks. § 2, Safety fund.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

§ 3, Incorporation, organization, and incidents of existence. § 4, Capital stock and dividends. § 5, Stockholders. § 6, Officers and agents. § 7, Insolvency and dissolution.

III. FUNCTIONS AND DEALINGS.

§ 8, Banking franchises and powers, and their exercise in general. § 9, Deposits. § 10, Collections. § 11, Loans and discounts. § 12, Exchange. § 13, Circulating notes. § 14, Actions.

IV. NATIONAL BANKS.

§ 15, Transfer of stock. § 16, Liability of stockholders for debts of the bank. § 17, Officers. § 18, Contracts and dealings in general. § 19, Loans and collateral security. § 20, Interest and usury. § 21, Actions. § 22, Receivers. § 23, Dissolution.

Liens on bank stock in bankruptcy, see "Bankruptcy," § 257.
Taxation of banks and bankers, see "Internal Revenue," § 29.

I. CONTROL AND REGULATION IN GENERAL.

§ 1. What are banks.

A corporation engaged in loaning its own money upon note and mortgage is not a banking corporation.—Oregon & W. Trust Inv. Co. v. Rathburn, Case No. 10,555.

§ 2. Safety funds.

The safety-fund law of Michigan, which prohibited all banks subsequently established from issuing notes except they are payable on demand, and without interest, applies to a bank charter granted on the same day.—Weed v. Snow, Case No. 17,347.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

§ 3. Incorporation, organization, and incidents of existence.

The expiration of the charter of a bank indebted to the United States will prevent a remedy over against the debtors of the bank where there was no previous assignment.—United States v. Alexander, Case No. 14,428.

Debts due the late Bank of the United States were not extinguished by the expiration of its charter; and a note given after such expiration to one of its agents, in his own name, in renewal of a note previously due, is valid.—Smith v. Frye, Case No. 13,049.

Section 14 of the charter of the Bank of Columbia was repealed by Act March 2, 1821, § 8, except as to debts contracted before the repeal. —Smith v. Bank of Columbia, Case No. 13,011.

Notes given after the repeal, and discounted by the bank to pay debts previously due, are not within the exception.—Smith v. Bank of Columbia, Case No. 13,011.

A new bank, incorporated with the same name as an old bank, whose charter is about to expire, and with nearly the same stockholders, is not responsible for notes of the old bank. —Bellows v. Hallowell & Augusta Bank, Case No. 1,279.

The corporate name of the bank incorporated by Act March 3, 1817, § 23, is "The Central

Bank of Georgetown and Washington," and not "The President and Directors of" said bank. —Central Bank v. Tayloe, Case No. 2,548.

§ 4. Capital stock and dividends.

A purchaser of bank stock becomes its legal owner on its full sale to him, without waiting the formal transfer on the books of the bank.—Hubbard v. Bank of United States, Case No. 6,815.

The court will compel a bank to permit a transfer of shares of its stock to be made upon the proper books to the rightful owner, regardless of the by-laws on that subject.—Hubbard v. Bank of United States, Case No. 6,815.

Where shares are transferable only at the bank, the bank is not liable to a purchaser who never applied for a transfer, where it permits their attachment as the property of the person in whose name they stand on the bank books.—Williams v. Mechanics' Bank of New Haven, Case No. 17,727.

A certificate reciting the ownership of bank shares "which are transferable at the bank in person or by attorney" means transferable only at the bank under cognizance of its officers.—Williams v. Mechanics' Bank of New Haven, Case No. 17,727.

The Bank of Potomac has a lien upon its stock in the hands of a stockholder whose notes are lying over, unpaid.—Burford v. Crandell, Case No. 2,150.

The private banking institution known by the name of the Union Bank of Alexandria had not, before it obtained its charter, any specific lien on the stock of its stockholders.—Neale v. Janney, Case No. 10,069.

Priority of claim of United States against dividends of deceased stockholder of Bank of Washington, as against debts due the bank.—Brent v. Bank of Washington, Case No. 1,834.

Where the charter of a bank gives it a general lien upon the shares of its stockholders for debts due the bank, the bank has such general lien on shares pledged with other securities to secure the payment of a particular note.—In re Peebles, Case No. 10,902.

The Bank of Washington may prevent a transfer of stock on its books until a debt of the holder to the bank is paid.—Pierson v. Bank of Washington, Case No. 11,155.

See, also, post, § 15.

§ 5. Stockholders.

Stockholders *held* liable, as principals, to redeem dishonored bank bills, under the charter provision that their persons and property shall be at all times bound for such redemption.—Hatch v. Burroughs, Case No. 6,203.

The fact that the holders of unpaid stock may have severally redeemed their share of the bills of the bank does not release them from liability for the amount due on their stock subscriptions. —Marsh v. Burroughs, Case No. 9,112.

Obligations contracted by a banking association organized under an unconstitutional law are not enforceable against the directors and stockholders, the transactions being illegal and the parties particeps criminis.—Nessmith v. Shelden, Case No. 10,125.

Construction of Acts Ind. May 28, 1852, and March, 1855, in relation to the liability of stockholders of banks.—Toucey v. Bowen, Case No. 14,107.

A declaration at law by a single bank creditor to enforce the charter liability of one stockholder, who owns nearly all the stock, for twice the amount of his shares, is not demurrable where it does not appear that there are any other creditors.—Marsh v. Charleston, Case No. 9,113.

Individual members of banking associations, who employed a laborer, *held* liable to a suit at law by him, irrespective of articles of association.—Davis v. Beverly, Case No. 3,627.

A state statute of limitations (New Hampshire), in effect a transcript of the English statute, does not apply to an action of debt against a stockholder to recover on a dishonored bank note.—Bullard v. Bell, Case No. 2,121.

See, also, post, § 16.

§ 6. Officers and agents.

A stockholder who has pledged his stock to the bank as collateral security for the payment of his notes not yet due may vote at the election of directors.—Scholfield v. Union Bank, Case No. 12,475.

Qualifications of directors of Mechanics' Bank of Alexandria, D. C.—Gray v. Mechanics' Bank of Alexandria, Case No. 5,723.

The directors are liable for all excess of debts above three times the amount of capital stock paid, and also for all deficits occasioned by the insolvency of the bank.—White v. How, Case No. 17,548.

Where the plaintiff seeks to make the directors liable for excess of loans, etc., the declaration must aver the amount of such excess.—White v. How, Case No. 17,548.

If a director protested against certain loans at the time they were made, he is not liable, as director, in his individual capacity for such loans.—White v. How, Case No. 17,548.

Under Act Mich. March 15, 1837, the directors are liable in their individual capacities in the first instance if the debts of the institution exceed three times the amount of stock paid.—White v. How, Case No. 17,548.

The proceeding by the bank commissioners under the statute is no bar to an action against the directors to make them personally liable.—White v. How, Case No. 17,549.

A plea to an action against the directors which avers the notes on which the action was brought were fraudulently put into circulation is no answer to the declaration.—White v. How, Case No. 17,549.

A bank president borrowed money for his personal use, on the security of shares of stock fraudulently issued to him. The money went into the assets of the bank. *Held*, that it was liable therefor.—Manhattan Life Ins. Co. v. Farmers' & Citizens' Nat. Bank, Case No. 9,024.

Bona fide indorsees before maturity of paper discounted by a cashier are not affected by the fact that it was unauthorized by the discounting committee of the bank, if the paper passed through the bank in the usual course of business. —Blair v. First Nat. Bank, Case No. 1,485.

A cashier without special authority cannot bind his bank by an official indorsement of his individual note, and the onus is on the payee to show the cashier's authority.—West St. Louis Sav. Bank v. Shawnee County Bank, Case No. 17,462.

A cashier has authority by custom to assign or accept bills of exchange for the bank.—Lafayette Bank v. Bank of Illinois, Case No. 7,987.

A cashier of a bank has prima facie authority to indorse, on behalf of the bank, the negotiable securities held by it. If there be any restriction of his authority, it must be proved by the bank. —Wild v. Bank of Passamaquoddy, Case No. 17,646.

It is within the authority of a cashier to sign a blank transfer on a certificate of stock held as collateral, and deliver the certificate to the pledgor, on payment of the loan.—Matthews v. Massachusetts Nat. Bank, Case No. 9,286.

The cashier of a bank, as such, has no authority to settle an account by taking private notes and drafts, and giving a receipt in full.—Sandy River Bank v. Merchants' & Mechanics' Bank, Case No. 12,309.

The burden of showing authority to make such settlement is upon the party who alleges it.—Sandy River Bank v. Merchants' & Mechanics' Bank, Case No. 12,309.

The teller is not liable for losses during his absence.—Bank of the United States v. Johnson, Case No. 919.

An unauthorized discounting, by the president of a bank, of a note payable to the cashier, *held* to have been ratified by the bank in drawing for the proceeds, through its cashier, and in approving, by its cashier and vice president, a statement of the account sent to them by the discounting bank.—Kennedy v. First Nat. Bank, Case No. 7,701a.

The bond of a teller of a branch Bank of the United States is not void because executed 14 days after he has entered upon his duties.—Bank of the United States v. Brent, Case No. 910.

The sureties on the bond of a cashier of a bank are liable for his acts pending the communication and carrying into effect of a resolution of suspension.—Bank of the United States v. Magill, Case No. 929.

Acceptance of an official bond of a bank officer can only be proven by the bank's record of the proceedings.—Bank of the United States v. Dandridge, Case No. 914.

See, also, post, § 17.

§ 7. Insolvency and dissolution.

On the failure of a bank to pay specie, it may be forced into liquidation.—Bank of Circleville v. Iglehart, Case No. 860.

The holders of notes for small amounts, payable to bearer, illegally issued by a firm of bankers, *held* entitled to preference on their insolvency.—Tucker v. Fowler, Case No. 14,219.

On the winding up of a bank, *held*, that stockholders who had paid their subscriptions in full were entitled to a return of the excess over what was paid by others, before ratable distribution, notwithstanding that dividends had been paid in proportion to the amounts paid in.—Krebs v. Carlisle Bank, Case No. 7,932.

The capital stock of a bank is a trust fund for the payment of the bank notes; and where any portion of it, before the expiration of the bank charter, is divided among its stockholders without providing funds which ultimately are sufficient to pay the outstanding bank notes, the fund may be followed into the hands of the stockholders.—Wood v. Dummer, Case No. 17,944.

A bill in equity for such purpose might be maintained by some of the holders of the bank notes against some of the stockholders, the impossibility of bringing all before the court being sufficient to dispense with the ordinary rule of making all parties in interest parties.—Wood v. Dummer, Case No. 17,944.

In such case the decree against the stockholders before the court should be only for their contributory share of the debt, in the proportion which the stock held by them bore to the whole capital stock.—Wood v. Dummer, Case No. 17,944.

See, also, post, § 23.

III. FUNCTIONS AND DEALINGS.

See, also, post, §§ 18–21.

§ 8. Banking franchises and powers, and their exercise in general.

Construction of Act Mich. March 15, 1837, to organize and regulate banking associations.—Falconer v. Campbell, Case No. 4,620.

Construction of special charters of certain Ohio banks.—McLean v. Lafayette Bank, Case No. 8,888.

Power to receive special deposits is not conferred by a charter "to carry on the business of receiving money on deposit, and to allow interest thereon, giving to the person depositing credit therefor."—First Nat. Bank v. Citizens' Bank of Topeka, Case No. 4,802.

§ 9. Deposits.

While a state bank, under Act Aug. 6, 1846, cannot become a depositary of public money, it may lawfully contract with the secretary of the treasury to transmit a draft, or to draw on a fund at the place of payment and pay over the amount.—United States v. City Bank, Case No. 14,796.

A bank can justify its payment on the individual check of a member of a firm, of funds deposited in the name of the firm, only by showing that the money thus drawn was applied to the use of the firm.—Coote v. Bank of the United States, Cases Nos. 3,203, 3,204.

No title passes to savings bank on deposit of check representing moneys belonging to a third person where it has notice of his claim.—Beecher v. Gillespie, Case No. 1,224.

A bank holding an indorsed note may offset it against the maker's general deposit account.—Blair v. Allen, Case No. 1,483.

A banker has a lien for all securities of the debtor in his hands for the general balance of his account, where not inconsistent with the actual or presumed intention of the parties.—Kelly v. Phelan, Case No. 7,673.

A bank issuing a certificate of deposit to a person who cannot write his name is entitled to rely upon the identification of the payee by another bank, through whom it is collected on presentation by a person who stole it.—State Nat. Bank v. Freedmen's Savings & Trust Co., Case No. 13,324.

A bank which received a special deposit of a box for safe-keeping, though responsible therefor if it is delivered to a wrong person, or is lost or mislaid by the carelessness of an officer or employé thereof, in the course of business, is not responsible, proper care having been observed in the selection of officers and employés, if it is lost through any act of theirs not within the scope of their employment.—White v. Commonwealth Nat. Bank, Case No. 17,544.

A bank which receives from a customer a box for safe-keeping, without any special compensation therefor, is liable for gross negligence only.—White v. Commonwealth Nat. Bank, Case No. 17,544.

A bank which received a special deposit of a box for safe-keeping has the burden of showing that the loss thereof is not due to its fault.—White v. Commonwealth Nat. Bank, Case No. 17,544.

One depositing in a bank without notice of its by-law that special deposits for safe-keeping shall be at the risk of the depositor is not bound thereby.—White v. Commonwealth Nat. Bank, Case No. 17,544.

A note was deposited with a bank with the understanding that, in certain contingencies, it was to be handed back to the maker, otherwise to be delivered to the payee. *Held* a special deposit, and that the transaction was ultra vires.—First Nat. Bank v. Citizens' Bank of Topeka, Case No. 4,802.

§ 10. Collections.

The relation between a bank and its customer is not of a fiduciary character.—In re Bank of Madison, Case No. 890.

The relation of a branch of the Bank of the United States to another branch or to the parent

bank which has forwarded paper for collection is simply that of principal and agent.—Bank of the United States v. Goddard, Case No. 917.

Where a bill of exchange is indorsed and delivered to a bank, to be transmitted to another bank for collection, the latter becomes the agent of the payee, and is answerable to him alone for breach of its duty.—Farmers' Bank of Virginia v. Owen, Case No. 4,662.

Bank to whom draft was sent "for collection and credit" *held* to be agent of sender until collection of certified check given by payee in payment; and money received thereon after its suspension is held in trust for the sender.—German-American Bank v. Third Nat. Bank, Case No. 5,359.

An undertaking by a bank to "collect" is not merely an undertaking to select a suitable agent, and transmit the paper to him, but to answer for any default of such agent.—Kent v. Dawson Bank, Case No. 7,714.

The relation of the bank and a customer as respects a specific sum of money, remitted by the bank at the request of the customer to another bank to pay a debt, is that of principal and agent, and not that of debtor and creditor. —St. Louis v. Johnson, Case No. 12,235.

A bank, acting as collecting agent of another bank, is liable for a loss caused by its failure to use reasonable diligence and care.—First Nat. Bank of Trinidad v. First Nat. Bank of Denver, Case No. 4,810.

A note deposited for collection and credited to depositor, is property of bank; and, on its bankruptcy, proceeds go to general creditors.—In re Bank of Madison, Case No. 890.

A bank acting as a collecting agent, in the absence of special authority or usage, has no right to receive in payment anything but money. Payment by check is not complete until the money is received thereon.—Levi v. National Bank of Missouri, Case No. 8,289.

A bank holding a check for collection, which accepts the certification of the bank upon which it is drawn, in lieu of payment, is liable to the owner for the amount thereof, with interest from the date of certification, though the drawee bank was without funds of the drawer.—Essex County Nat. Bank v. Bank of Montreal, Case No. 4,532.

A bank which, in the absence of instructions, surrenders to consignees bills of lading attached to drafts, on the mere acceptance of the drafts, is liable for a resulting loss.—Merchants' Nat. Bank v. National Bank of Commerce, Case No. 9,446.

A bank receiving a draft from another bank for collection *held* liable for the amount thereof, where it transmitted the same directly to the drawee, its correspondent, and made no inquiry in regard thereto for one month, the drawee having failed in the meantime, and the draft having miscarried.—First Nat. Bank v. First Nat. Bank, Case No. 4,810.

A bank receiving a sight draft from another bank, with directions to return without protest if not accepted, *held* liable to the former bank where there was delay which it did not explain, during which the former bank paid the amount to the drawer on the faith of a letter from the drawee, stating that he had paid the draft.—Merchants' & Manufacturers' Bank v. Stafford Nat. Bank, Case No. 9,438.

Where a draft is drawn on time, and is sent, together with the bill of lading for goods shipped to the drawee, to a bank at his place for collection, the bank is not liable for delivering the bills of lading to the drawee on the acceptance of the draft.—Woolen v. New York & E. Bank, Case No. 18,026.

A bank acting as a collecting agent for plaintiff received a check in payment, procured its certification, and suspended the same day, having previously credited plaintiff with the amount. *Held*, that plaintiff was entitled to the proceeds of the check.—Levi v. National Bank of Missouri, Case No. 8,289.

When banks receiving paper from other banks for collection are entitled, as against the real owners, to hold the same to secure a general balance due from the transmitting bank.—New England Bank v. Bank of the Metropolis, Case No. 10,152.

A bank undertaking to collect a draft for another bank is liable for the proceeds, although the agent selected by it to make the collection failed while the proceeds were in his hands.—Kent v. Dawson Bank, Case No. 7,714.

A bank receiving a note for collection is not liable in damages for failing to demand payment on Saturday where the last day of grace falls on Sunday, where its known and established method of business in such case was not to demand payment until Monday.—Patriotic Bank of Washington v. Farmers' Bank of Alexandria, Case No. 10,811.

Customs bonds left with a bank for collection, and paid with the proceeds of notes made by the principal, and bearing forged indorsements, will be *held* discharged, and the bank cannot enforce the priority of payment of the United States out of the assets of the principal.—United States v. Rousmaniere's Adm'rs, Case No. 16,200.

Where a bank received a draft from a bank in another state, credited the same to it, entered it for collection, and so advised the latter, *held*, that the contract to collect was governed by the law of the state of the collecting bank.—Kent v. Dawson Bank, Case No. 7,714.

The implied contract between the owner of a note and the bank with whom it is deposited for collection does not follow the note into the hands of a second bank, and the owner has no remedy against it.—Hyde v. First Nat. Bank, Case No. 6,970.

§ 11. Loans and discounts.

A charter authorizing a bank to discount notes, etc., on banking principles, does not make void a contract or note reserving more than 6 per cent. interest.—McLean v. Lafayette Bank, Case No. 8,888.

Where a bank accepts stock and notes which it was given as collateral security for a loan, it may sell the stock after the notes become due.—Canfield v. State Nat. Bank, Case No. 2,382.

The assignee, as collateral security for a note for money borrowed, of stock of the United States, has an equitable interest therein, enforceable as against the United States claiming as a creditor, though the same has not been transferred on the books as required by Act 1790, c. 61.—United States v. Cutts, Case No. 14,912.

Banks holding collateral security for the payment of loans must take the same care that good business men or persons or corporations of their class ordinarily take of such bonds.—Fleming v. Northampton Nat. Bank, Case No. 4,862a.

A bank with which stock is pledged by an executor is entitled to sell the same, in case of default, if it had no notice, actual or constructive, of a violation of trust, although the pledge was in fact for the executor's individual benefit. —Lowry v. Commercial & Farmers' Bank, Case No. 8,581.

A bank holding bonds as collateral security *held* not liable for a loss by robbers after the watchman had left, as was usual, at four o'clock in the morning.—Fleming v. Northampton Nat. Bank, Case No. 4,862a.

The Bank of Alexandria may, upon discounting notes, deduct the whole interest to become due.—Bank of Alexandria v. Mandeville, Case No. 850.

The burden is on the bank to show the assent of the partnership to charge up to its account the individual note of one of the partners.—Coote v. Bank of the United States, Case No. 3,204.

§ 12. Exchange.

A bank located in Columbus, Ohio, having power by its charter to deal in bills of exchange generally could deal in exchange through an agent in another city.—City Bank of Columbus v. Beach, Case No. 2,736.

A letter of credit *held* to be used within the terms of the agreement giving right to commissions, though bill issued thereunder was never presented.—Baring v. Lyman, Case No. 983.

§ 13. Circulating notes.

Notes issued in violation of the safety-fund law of Michigan are void.—Weed v. Snow, Case No. 17,347.

One bank demanding payment of the bank bills of another is not bound to receive its own bills in payment, but may demand specie.—Suffolk Bank v. Lincoln Bank, Case No. 13,590.

The holder of bank bills is entitled to be paid in specie, by weight, the amount of such bills, upon a demand within the usual banking hours of the bank.—Suffolk Bank v. Lincoln Bank, Case No. 13,590.

The bank is bound to keep its money counted or weighed, or to employ servants sufficient to count or weigh it, so as to pay all demands made within the usual banking hours.—Suffolk Bank v. Lincoln Bank, Case No. 13,590.

A bank is answerable for the acts of its agent; and it is immaterial how notes get into circulation, if they come into the hands of the holder bona fide.—White v. How, Case No. 17,549.

The Bank of the United States is bound to pay the full amount of a note which has been cut in two, and each part mailed separately to it, though but one part is received.—Martin v. Bank of the United States, Case No. 9,156.

A bill drawn by a bank in express violation of its charter cannot be set up by it in payment.—Davis v. Bank of River Raisin, Case No. 3,626.

Notes of a state bank or state banking association used for circulation, and paid out by it, whether previously issued or not, are liable to the tax of 10 per cent. (Rev. St. § 3412).—Deposit Sav. Ass'n v. Marks, Case No. 3,812; Same v. Mayer, Id. 3,813.

The tax upon the average amount of circulation "issued" (Rev. St. § 3408) applies both to the making of notes and the putting of them in circulation.—Deposit Sav. Ass'n v. Mayer, Case No. 3,813.

Persons taking notes of a bank are chargeable with notice of the powers of the bank, as granted in its charter.—Root v. Wallace, Case No. 12,039.

§ 14. Actions.

Congress has power to authorize the Bank of the United States to sue in the federal courts.—Bank of the United States v. Roberts, Case No. 934.

The act incorporating the Bank of the United States confers the right to sue in the circuit courts, irrespective of the question of citizenship.—Bank of United States v. Northumberland Bank, Case No. 931. CONTRA, see Bank of United States v. Deveaux, Case No. 916.

The issuing of an execution by the Bank of Columbia is the commencement of the action in regard to the statute of limitations.—Bank of Columbia v. Moore, Case No. 875.

Where a contract is made by a branch bank within the state of the plaintiff bank, the exception in favor of one "beyond the seas or out of the country" is not applicable.—Bank of United States v. McKenzie, Case No. 927.

The court will permit defendant upon return of execution to plead the statute of limitations.—Bank of Columbia v. Cook, Case No. 864: Same v. Sweeny, Id. 881.

Where a bank, having a large amount in bills of another bank, by agreement with it placed the same in the hands of a third party as collateral, and the other bank drew drafts on New York, also advancing additional collateral to pay possible expenses of protest, *held*, in an action on the drafts, that the agreement was not pleadable in bar, the drafts having been taken as payment.—Stickney v. Bank of Illinois, Case No. 13,440.

Payment of check is prima facie evidence of funds in an action for an overdraft.—Bank of Alexandria v. McCrea, Case No. 849; Bank of United States v. Washington, Id. 940; Same v. Wilson, Id. 943.

Bank of Alexandria may have its causes tried at the first term to which the writ was returnable.—Bank of Alexandria v. Henderson, Case No. 848; Same v. Young, Id. 857.

An order for an execution by the president of the Bank of Columbia is not a judgment.—Bank of Columbia v. Baker, Case No. 862.

Affidavit of president of Bank of Columbia on an order for an execution—Form and contents.—Bank of Columbia v. Cook, Case No. 864.

Execution issued on order of the president of the Bank of Columbia—Form and contents.—Bank of Columbia v. Bunnel, Case No. 863.

Form of execution issued by president of Bank of Columbia under Act Md. 1793, c. 30, § 14.—O'Kely v. Boyd, Case No. 10,476.

The suit is discontinued by failure to prosecute the execution.—Bank of Columbia v. Baker, Case No. 862.

Where the Bank of the United States recovers less than $500 in a suit in the circuit court, it cannot recover costs, and may be adjudged to pay all costs.—Bank of United States v. Roberts, Case No. 934.

No action can be maintained on notes of an association issued in violation of law, and the issuance and circulation of which is made subject to a penalty by statute.—Milne v. Huber, Case No. 9,617.

IV. NATIONAL BANKS.

Embezzlement by officer or agent, see "Embezzlement," § 1.
Judicial notice, see "Evidence," § 8.
Misapplication of funds, see "Indictment and Information," § 1.
Taxation, see "Taxation," §§ 5, 9, 14.

§ 15. Transfer of stock.

As between the seller and purchaser of national bank shares, the sale is complete when the certificate is delivered duly assigned, with power of transfer on the books of the bank, and payment received therefor.—Johnson v. Laflin, Case No. 7,393.

The directors of a national bank have no power to refuse to register a bona fide transfer of stock without some valid and sufficient reason therefor.—Johnson v. Laflin, Case No. 7,393.

The directors of a national bank have authority under the statute (Act June 3, 1864, § 8) to forbid any stockholder indebted to the bank, whether as principal or surety, to transfer his stock without the consent of a majority of the directors.—Knight v. Old Nat. Bank, Case No. 7,885.

A shareholder in a national bank, who sold his shares through a broker to the president of the bank, executing blank transfers, without knowledge of the real purchaser or the insolvency of the bank, and received in payment the broker's check on the bank, which was paid out of the bank's funds, *held* not liable for the amount to the receiver of the bank.—Johnson v. Laflin, Case No. 7,393.

A by-law of a national bank, declaring that no transfer of the stock by a shareholder indebted to the bank should be made without consent of the directors, is invalid, under Act June 3, 1864, § 35; and the bank has no lien on such stock as against a bona fide transferee.—Evansville Nat. Bank v. Metropolitan Nat. Bank, Case No. 4,573. CONTRA, see In re Dunkerson, Case No. 4,156.

A national bank held bound, under the local law, to recognize a transfer of its stock by a foreign executor duly appointed in another state, when not in conflict with its by-laws or articles of association.—Hobbs v. Western Nat. Bank, Case No. 6,551a.

§ 16. Liability of stockholders for debts of the bank.

One holding shares in a national bank as trustee is personally liable for debts of the bank, unless his trusteeship appears on the bank's books.—Davis v. First Baptist Society, Case No. 3,633.

One to whom shares of national bank stock are transferred as collateral security, but under a transfer made absolute in due form on its books, is liable to its creditors as a stockholder.—Bowden v. Farmers' & Merchants' Bank, Case No. 1,714; Moore v. Jones, Id. 9,769.

A religious society purchasing national bank shares with a bequest of money is an ordinary stockholder, liable to assessment for debts.—Davis v. First Baptist Society, Case No. 3,633.

An insurance company, though forbidden by its charter from investing in national bank stock, after holding the stock and receiving dividends thereon, is estopped from setting up the unlawful acquisition to escape liability for an assessment on the subsequent insolvency of the bank, where the latter did not know in what manner the stock was acquired.—Strong v. O'Neill, Case No. 13,543a.

A letter from the comptroller of the currency is not sufficient evidence to establish the liability of a stockholder of a national bank to contribute the entire amount of his stock to meet its liabilities.—Bowden v. Morris, Case No. 1,715.

Individual liability for the debts of a national bank cannot be escaped by a transfer of stock to a person pecuniarily irresponsible, by a purchaser who remains the actual owner.—Davis v. Stevens, Case No. 3,653; Man v. Cheeseman, Id. 9,002a.

A transfer of national bank shares, with intent to relieve the transferror from liability to creditors, is void as against the creditors.—Bowden v. Santos, Case No. 1,716.

The estate of a stockholder of a national bank, who died prior to its insolvency, but whose stock had not been transferred at the date of the comptroller's order making an assessment, is liable therefor. Rev. St. § 5152, does not affect such liability.—Davis v. Weed, Case No. 3,658.

Liability of stockholders of national bank is several, and a suit at law is the proper remedy to enforce a specific assessment ordered by the comptroller.—Bailey v. Sawyer, Case No. 744.

The right of the receiver of a national bank to recover an assessment laid on the stockholders for the purpose of paying debts grows out of Rev. St. § 5234, and the state statute is inapplicable as a rule of decision.—Stanton v. Wilkeson, Case No. 13,299.

Such action is properly brought by the receiver in his own name.—Stanton v. Wilkeson, Case No. 13,299.

The receiver may in such case proceed against the separate stockholders to recover the amount due from each.—Stanton v. Wilkeson, Case No. 13,299.

Stockholders of an insolvent national bank are bound by the action of the comptroller in making an assessment against them, and have no right to examine the accounts of the receiver as to the assets or debts of the bank.—Man v. Cheeseman, Case No. 9,002a.

It is no defense to a suit by the receiver of a national bank against a stockholder to recover the amount of an assessment made by the comptroller of the currency that the assessment was not needed by the receiver.—Strong v. Southworth, Case No. 13,545.

§ 17. Officers.

The officers of a national bank may borrow money of the bank the same as other persons.—Blair v. First Nat. Bank, Case No. 1,485.

General authority from the directors to draw bills and sign notes is sufficient if the bills and notes relate to the business of the bank, but not if they relate to the private business of the officer.—United States v. Johnson, Case No. 15,483.

The cashier of a national bank in Boston *held* to have no authority to certify checks, either by usage or otherwise.—Merchants' Nat. Bank v. State Nat. Bank, Case No. 9,449.

The making of false entries by a clerk in a national bank by direction of the president constitutes the latter a principal in the offense of making false entries.—In re Van Campen, Case No. 16,835.

§ 18. Contracts and dealings in general.

A national bank cannot repudiate an unauthorized contract, and at the same time retain the benefit thereof.—Casey v. La Societe De Credit Mobilier, Case No. 2,496.

An agreement by a national bank to pledge a portion of its assets to secure loan made to it by a firm is not affected by the fact that the president of the bank was a member of the firm.—Casey v. La Societe De Credit Mobilier, Case No. 2,496.

A national bank being without authority to purchase or hold its own shares, cannot, by a purchase and transfer, vest title in another.—Meyers v. Valley Nat. Bank, Case No. 9,519; Man v. Cheeseman, Id. 9,002a.

A national bank has no authority to lend its credit on personal security.—Johnston v. Charlottesville Nat. Bank, Case No. 7,425.

A national bank has authority, under Rev. St. § 5136, to take and hold interest coupons not under seal, attached to railway aid bonds under seal, where each coupon contains an express promise to pay to bearer, and is signed by the proper officer.—First Nat. Bank v. Bennington, Case No. 4,807.

§ 19. Loans and collateral security.

A loan by a national bank in excess of the restriction (Act June 3, 1864, § 29) is not void; but making such a loan subjects the bank and its officers to the forfeitures and penalties prescribed in section 53.—Stewart v. National Union Bank, Case No. 13,435; Shoemaker v. National Mechanics' Bank, Id. 12,801.

One national bank, which loans money to another, knowing that the latter intends to loan the same to its directors, may recover the same from the borrowing bank, if it had no knowledge of any fraudulent intent in making the loans to the directors, even though the di-

rectors failed to repay the same.—National Bank of Commerce v. National Bank of Missouri, Case No. 18,310.

A national bank has power to lend money upon the note or other personal obligation of the borrower, secured by a pledge of stock of a corporation as collateral security.—Shoemaker v. National Mechanics' Bank, Case No. 12,801.

A national bank may lend money in good faith, without any fraudulent intent, to its directors as well as to others, provided the amount so loaned does not exceed the limitation of one-tenth of the capital stock actually paid in.—National Bank of Commerce v. National Bank of Missouri, Case No. 18,310.

A national bank may borrow money for the purpose of lending the same again to others with a view to making a profit.—National Bank of Commerce v. National Bank of Missouri, Case No. 18,310.

A national bank may take from a customer, as collateral security, the note and mortgage of a third person, and may foreclose the same if the borrower becomes insolvent, and the personal security fails.—Merchants' Nat. Bank v. Mears, Case No. 9,450.

A national bank may take a pledge of chattels as security for money lent.—Pittsburgh Locomotive & Car Works v. State Nat. Bank, Case No. 11,198.

A national bank has no power to guaranty the obligation of a person on the deposit of collateral security.—Seligman v. Charlottesville Nat. Bank, Case No. 12,642.

A national bank cannot take a mortgage upon real estate as security for a debt concurrently created or for future advances (Act June 3, 1864).—Kansas Val. Nat. Bank v. Rowell, Case No. 7,611.

National banks may hold real-estate security acquired by subrogation from a holder of a negotiable note.—Mathews v. Abbott, Case No. 9,275.

§ 20. Interest and usury.

The penalty prescribed by Act June 3, 1864, § 30, for the taking of usury on loans and discounts by national banks, is the only penalty enforceable.—National Exch. Bank v. Moore, Case No. 10,041.

Where usurious interest has been actually paid, double the amount thereof may be recovered from a national bank under Rev. St. § 5198.—Markson v. First Nat. Bank, Case No. 9,097; Crocker v. Same, Id. 3,397.

The action against a national bank to recover a penalty for usury in the case of successive renewal notes *held* to accrue at the time the interest taken was applied to the principal, or when judgment is entered therefor.—Duncan v. First Nat. Bank, Case No. 4,135.

The assignee in bankruptcy of a person who has paid to a national bank a greater amount of interest than that allowed by law is his "legal representative," within Rev. St. § 5198, allowing a recovery of twice the sum paid, and may sue to recover the same.—Crocker v. First Nat. Bank, Case No. 3,397; Markson v. Same, Id. 9,097; Wright v. Same, Id. 18,078. CONTRA, see Barnett v. Muncie Nat. Bank, Case No. 1,026; Barnits v. First Nat. Bank, Id. 1,034.

The indorser of a bill of exchange is not such "legal representative."—Barnett v. Muncie Nat. Bank, Case No. 1,026.

Although, under the New York law, a corporation cannot interpose the defense of usury, a national bank which makes a loan to a corporation at a greater rate than 7 per cent. per annum forfeits the interest under Act June 3, 1864, § 30.—Ex parte Wild, Case No. 17,645.

Assumpsit by the holder of a claim against a national bank, which had been declared in default, to recover interest during the period of administration, will not lie against the receiver or against the comptroller of the currency, but will lie against the bank.—Chemical Nat. Bank v. Bailey, Case No. 2,635.

A national bank is entitled to the same privileges in regard to charging interest as is extended to state banks of issue in the state in which it is located.—First Nat. Bank v. Duncan, Case No. 4,804; Same v. Tinstman, Id. 4,805. CONTRA, see Duncan v. First Nat. Bank, Case No. 4,135.

Interest is recoverable on the balance due a depositor in a national bank which has been declared in default by the comptroller of the currency, though he made no formal demand of payment.—Chemical Nat. Bank v. Bailey, Case No. 2,635.

Where a sufficient fund has been realized from the assets of a national bank, which has been declared in default, to pay all claims against it, and leave a surplus, interest on the claims will be allowed during the period of administration, before appropriating the surplus to the stockholders.—Chemical Nat. Bank v. Bailey, Case No. 2,635.

Where a renewal note at legal interest is given for a note discounted by a national bank at a usurious rate, the bank is entitled to recover the amount of the renewal note with interest, less the amount of usury reserved on the original discount credited as of that date.—National Bank of Madison v. Davis, Case No. 10,038.

Usury paid more than two years before the commencement of the suit cannot be recovered nor credited upon the principal of the note.—National Bank of Madison v. Davis, Case No. 10,038.

§ 21. Actions.

An action cannot be maintained against a national bank for conversion of shares of its own capital stock.—Meyers v. Valley Nat. Bank, Case No. 9,519.

Suits may be maintained by as well as against national banks in the federal courts of the district of their location (Act June 2, 1864, § 57).—Union Nat. Bank v. Chicago, Case No. 14,374.

A national bank incorporated under Act June 3, 1867, can be sued only in the courts designated in section 57.—Cadle v. Tracy, Case No. 2,279.

A national bank cannot be sued outside the district in which it is located. Service on the cashier when found within another district does not give jurisdiction.—Main v. Second Nat. Bank, Case No. 8,976.

The circuit courts do not have exclusive jurisdiction of actions against national banks under Rev. St. § 5198.—New Orleans Nat. Banking Ass'n v. Adams, Case No. 10,184.

The jurisdiction of the federal circuit court on a creditors' bill against a national bank, for discovery and other relief upon allegations of fraud by the officers, is not superseded by the appointment of a receiver by the comptroller.—McElhenny v. First Nat. Bank, Case No. 8,779.

In such case, the costs of a master appointed to investigate the affairs of the bank will be ordered to be paid by the receiver.—McElhenny v. First Nat. Bank, Case No. 8,779.

The circuit court has jurisdiction of a bill filed by a stockholder of a national bank to enjoin its officers from an illegal application of funds to his prejudice.—Shoemaker v. National Mechanics' Bank, Case No. 12,801.

A state court has no jurisdiction of an action against a national bank located in another state. Act June 3, 1867, § 57.—Cadle v. Tracy, Case No. 2,279.

Jurisdiction of actions by or against national banks, see, also, "Courts," § 36.

§ 22. Receivers.

Where the officers of a national bank have been making preferential payments, a court of equity, on the application of a depositor, will appoint a receiver.—Irons v. Manufacturers' Nat. Bank, Case No. 7,068.

An attachment of funds of a national bank on deposit in another bank, after one of its circulating notes has been duly protested for nonpayment, will not create a lien, as against a receiver subsequently appointed.—Harvey v. Allen, Case No. 6,177.

The assignee of bonds deposited with the treasurer of the United States as security for the redemption of national bank notes cannot question the validity of the appointment of a receiver for the bank in respect to other property than the bonds.—Van Antwerp v. Hulburd, Case No. 16,827.

The receiver of an insolvent national bank has no greater right to enforce collection of assets than the bank itself would have had.—Casey v. La Societe De Credit Mobilier, Case No. 2,496.

A receiver of a national bank is an officer of the United States.—Stanton v. Wilkeson, Case No. 13,299; Platt v. Beach, Id. 11,215.

The federal district court has jurisdiction of a common-law action brought by a receiver to collect a claim due the estate.—Platt v. Beach, Case No. 11,215.

A receiver of a national bank *held* not estopped from questioning jurisdiction by being substituted as defendant in place of the bank in a suit in a state court of another state.—Cadle v. Tracy, Case No. 2,279.

The district court is "a court of record of competent jurisdiction," within Rev. St. § 5234, permitting a receiver of a national bank to compromise doubtful claims on the order of such a court.—In re Platt, Case No. 11,211.

An order for the composition of a claim, when the claim is not a "bad or doubtful debt," is invalid, and a composition made under such an order is ineffectual.—Price v. Yates, Case No. 11,418.

The United States, as a creditor, has a prior lien over other creditors in the distribution of the assets of an insolvent national bank in charge of a receiver.—United States v. Cook County Nat. Bank, Case No. 14,853.

§ 23. Dissolution.

Comptroller of currency, in winding up insolvent national bank, has authority to finally determine when a deficiency of assets exists.—Bailey v. Sawyer, Case No. 744.

The provisions of the general banking law for winding up national banks under the direction of the comptroller of the currency are not exclusive of the remedy by creditors' suit, and the appointment of a receiver.—Wright v. Merchants' Nat. Bank, Case No. 18,084.

BAR.

Of action by former adjudication, see "Judgment," §§ 46–48, 65, 66.
Of dower, see "Dower," § 3.

BARRATRY.

See "Attorney and Client," § 7.

BASTARDS.

§ 1, Presumption of legitimacy. § 2, Proceedings under bastardy laws.

Right to inherit, see "Descent and Distribution," § 2.

§ 1. Presumption of legitimacy.

The marriage of the mother of a bastard, and the acknowledgment by the husband of the child, are prima facie evidence that he was the father.—United States v. Skam, Case No. 16,308.

The presumption of legitimacy in case of a child born in lawful wedlock is repelled by evidence which places the nonaccess of the husband beyond all reasonable doubt. It is not necessary to prove that nonaccess was impossible.—Stegall v. Stegall, Case No. 13,351.

Sufficiency of evidence to repel the presumption of legitimacy where the woman was pregnant when she was married.—Stegall v. Stegall, Case No. 13,351.

§ 2. Proceedings under bastardy laws.

A justice of the peace has no authority to take a recognizance (Act Va. Dec. 26, 1792, § 23) except upon application by an overseer of the poor.—United States v. Hancock, Case No. 15,295; Same v. Clements, Id. 14,816.

In cases of bastardy the circuit court of the District of Columbia has no jurisdiction, except upon complaint of the county overseers of the poor.—United States v. Dick, Case No. 14,957.

The circuit court of the District of Columbia has jurisdiction to require the father of a bastard to give security for its support.—Ross v. Kingston, Case No. 12,076.

The general report of the neighborhood is admissible on the question of legitimacy of a child born in lawful wedlock.—Stegall v. Stegall, Case No. 13,351.

The declarations of a father as to the maternity of his child are competent evidence.—United States v. Sanders, Case No. 16,220.

The unsworn declarations of the mother and putative father are inadmissible to prove illegitimacy in the case of a child born in lawful wedlock.—Stegall v. Stegall, Case No. 13,351.

Evidence of the likeness of the child to the supposed father is not admissible.—United States v. Collins, Case No. 14,835.

The confession of defendant having been given in evidence, he was not permitted to give evidence of his declarations at the same time that others also had had connection with the mother.—United States v. Collins, Case No. 14,835.

The order for paying £30 a year can only be made by a justice of the peace, under Act Md. 1796, c. 34.—United States v. Collins, Case No. 14,835.

The only judgment which can be given under the statute is that defendant give security to indemnify the county from any charge for the maintenance of the child.—United States v. Collins, Case No. 14,835.

BATTERY.

See "Assault and Battery."

BAWDY HOUSE.

See "Disorderly House."

BENEFICIAL ASSOCIATIONS.

See "Associations"; "Building and Loan Associations."
Mutual benefit insurance associations, see "Insurance," §§ 196–199.

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," §§ 20–26.

BETTING.

See "Gaming."

BIAS.

Of juror, see "Jury," §§ 15–21.
Of witness, see "Witnesses," §§ 28–50.

BIGAMY.

§ 1, Evidence. § 2, Punishment.

Venue, see "Criminal Law," § 16.

§ 1. **Evidence.**
The bond given by defendant to obtain a marriage license is not admissible as evidence for the prosecution.—United States v. Lambert, Case No. 15,554.

That the person who performed the marriage ceremony was a clergyman with authority to celebrate such rites, according to the Virginia laws, may be proved by parol, and the record of the testimonial required by statute need not be produced.—United States v. Lambert, Case No. 15,554.

§ 2. **Punishment.**
On a conviction of bigamy, the court may dispense with burning in the hand.—United States v. Jennegen, Case No. 15,474.

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF EXCHANGE.

See "Bills and Notes."
As payment, see "Payment," §§ 5, 6.

BILL OF LADING.

See "Carriers," §§ 2–5; "Shipping," §§ 136–141, 175–178.

BILL OF PARTICULARS.

See "Pleading," §§ 63, 64.

BILL OF REVIEW.

See "Equity," §§ 127–135.

BILL OF SALE.

See "Sales," §§ 20, 21.
In trust, see "Chattel Mortgages," § 1.
Of vessel, see "Shipping," § 31.

BILLS AND NOTES.

I. REQUISITES AND VALIDITY.

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II. CONSTRUCTION AND OPERATION.

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(D) Bona Fide Purchasers.

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V. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

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VII. ACTIONS.

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Alteration, see "Alteration of Instruments."
As payment, see "Payment," §§ 5, 6.
Bills of lading, see "Carriers," §§ 2–5; "Shipping," §§ 136–141, 175–178.
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By trustee, see "Trusts," § 22.
Competency of parties as witnesses, see "Witnesses," § 41.
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Proof of in bankruptcy, see "Bankruptcy," §§ 371, 372.
Subrogation, see "Subrogation," §§ 4, 6.

I. REQUISITES AND VALIDITY.

§ 1. Bills of exchange.

A warrant issued by the controller of a city, whose payment is restricted to a particular fund is not regarded as bill of exchange.—Bayerque v. San Francisco, Case No. 1,137.

It is not necessary that the various parties to a negotiable instrument should be different persons in order to render it a bill of exchange.—Wildes v. Savage, Case No. 17,653.

A bill of exchange drawn in one state on a person in another is a foreign bill, and the protest of such a bill is good evidence.—Lonsdale v. Brown, Cases Nos. 8,493, 8,494.

The following instrument: "St. Louis, May 10, 1861. At sight pay to the order of S., P. & Co., $4,000, value received, and charge the same to the account of L., P. & Co. To the Marine Bank of Chicago, Ill.."—is a bill of exchange, and not a check.—Olshausen v Lewis, Case No. 10,507.

§ 2. Checks.

The characteristics which distinguish checks from bills of exchange are that checks are always drawn on a bank; that they are payable immediately on presentment, and without days of grace; and that they are not presentable for acceptance, but only for payment.—In re Brown, Case No. 1,985.

The fact that checks are payable at a certain day, and not on demand, will not make them bills of exchange.—In re Brown, Case No. 1,985.

§ 3. Promissory notes.

A cashier's certificate of deposit for a sum named, payable at a certain time, to the order of the depositary, is a promissory note.—Austen v. Miller, Case No. 661.

The fact that a note is made payable in exchange with rate not specified does not prevent its being a promissory note. The rate is subject to proof.—Bradley v. Lill, Case No. 1,783.

A promise to pay a specified sum, with current exchange on New York and expenses of collection in case of suit, is not a promissory note.—Lane v. Gobbold, Case No. 8,051.

§ 4. Execution and delivery.

The addition of "and Company," to the signature of a note after the maker had taken in a partner, made with the consent of all parties, will make the note binding against the firm.—Crum v. Abbott, Case No. 3,454.

A promissory note delivered in escrow *held* valid in the hands of the payee, although agreement not complied with.—Boone v. Queen, Case No. 1,643.

§ 5. Acceptance—Promise to accept.

A promise to accept a nonexisting bill of exchange will amount to an acceptance of a bill subsequently drawn in favor of a person who took the same upon the faith of such promise.—Russell v. Wiggin, Case No. 12,165.

Persons who advance money on bills of exchange on the faith of a letter of credit of a third person, promising to accept the same when drawn, may maintain an action on such promise.—Russell v. Wiggin, Case No. 12,165.

A promise to accept a bill when drawn, shown to a third person, who, upon the faith thereof, takes the bill, when drawn for a valuable consideration, is in law an acceptance.—Payson v. Coolidge, Case No. 10,860; Wildes v. Savage, Id. 17,653.

It is not material that the bill is taken for a pre-existing debt.—Payson v. Coolidge, Case No. 10,860.

But the bill must be one payable after date, and not after sight.—Wildes v. Savage, Case No. 17,653.

An authority to draw bills of exchange, specifying amounts and times, with an assurance of payment, is an acceptance to one who takes the bills on the credit thereof.—Bayard v. Lathy, Case No. 1,131.

A letter written within a reasonable time after date of a bill of exchange, describing it, and promising to accept it, is a virtual acceptance.—Cassel v. Dows, Case No. 2,502; Bayard v. Lathy, Id. 1,131.

Where a letter has no reference to particular bills to be drawn, but is a general authority to draw at any time and to any amount against property to be shipped, the writer cannot be held as acceptor of a bill drawn under it, but the letter may be considered as a promise to accept, and the person who takes a bill on the credit of such promise may maintain an action on such promise.—Cassel v. Dows, Case No. 2,502.

An agreement to accept bills renders it unnecessary that the drawee shall have funds in his hands belonging to the drawer.—De Tastett v. Crousillat, Case No. 3,828.

A statement of sales by a consignee with authority to draw for the amount *held* an acceptance of a bill subsequently drawn by the agent of the owner, whose authority was not revoked by the bankruptcy in the meantime of the principal abroad without notice.—Ogden v. Gillingham, Case No. 10,456.

§ 6. —— Mode and sufficiency.

A bill of exchange may be accepted by the drawer's writing the word "excepted" upon it.—Miller v. Butler, Case No. 9,565.

An order written by the agent of the drawee, on the back of a bill, to another person, to pay it, *held* evidence of the drawee's acceptance of the original bill.—Harper v. West, Case No. 6,093.

§ 7. —— Conditional or qualified.

To charge the acceptor under a conditional acceptance, the holder must show performance of the condition.—Read v. Wilkinson, Case No. 11,611.

§ 8. —— For honor or supra protest.

An acceptance for the honor of the payee, after protest, is not binding.—Freeman v. Perot, Case No. 5,087.

§ 9. Consideration — Necessity and sufficiency.

A promissory note given in consideration of Confederate notes is void.—Bailey v. Milner, Case No. 740.

A mere moral consideration is not sufficient to support a promise to pay.—In re Cornwall, Case No. 3,251.

A gift, though expressed in a note, is not a sufficient consideration to support a promise to pay.—In re Cornwall, Case No. 3,251.

A promissory note of an emancipated slave given to the master in consideration of the emancipation is valid.—Smith v. Parker, Case No. 13,087.

An assignment of a sheriff's certificate of sale of real property is a sufficient consideration for a promissory note.—Packwood v. Clark, Case No. 10,656.

A bond to convey land is a good consideration for a promissory note, although the obligor has not the legal title when the note becomes due.—Lane v. Dyer, Case No. 8,050.

A promissory note given by the heir in renewal of a note made by his ancestor, which was barred by limitation at the death of the ancestor, is void for want of consideration.—Didlake v. Robb, Case No. 3,899.

§ 10. —— Failure of.

A partial failure of consideration is no defense to an action by the payee against the maker of a promissory note.—Varnum v. Mauro, Case No. 16,889.

§ 11. Validity—Duress.

A note given under the threat of interference to defeat a proposed compromise is void in the hands of the payee.—Bullene v. Blain, Case No. 2,124.

§ 12. —— Illegality.

Any instrument issued in violation of an act prohibiting a bank from issuing any bill or note not payable on demand, and without interest, under a penalty, is void.—Hayden v. Davis, Case No. 6,259.

An acceptance of such a draft, or an agreement to indemnify the person who signed it, is void.—Hayden v. Davis, Case No. 6,259.

A note given for slaves taken to Texas in 1835 in violation of the laws of Mexico is invalid.—Toby v. Randon, Case No. 14,071.

It is a good defense to a note given in 1864, for the hire of slaves, that, as part of the consideration, the hirer was to keep them out of reach of the Federal army.—Martin v. Bartow Iron Works, Case No. 9,157.

A note given for the assignment of the time of an apprentice, being for an illegal consideration, is void.—Walker v. Johnson, Case No. 17,073.

A note given for the loan of Confederate money is illegal, without consideration, and void, and will not support a note or duebill given in renewal thereof.—Scudder v. Thomas, Case No. 12,567.

"Confederate Treasury Notes" are illegal because issued by organization of subjects in rebellion.—Bailey v. Milner, Case No. 740.

Where property sold during the Civil War was to be paid for in Confederate notes, the seller cannot sue thereon, nor on a note given to secure the payment, though it did not specify the currency.—Nordlinger v. Vaiden, Case No. 10,296.

Notes issued by the city of Richmond in 1861 and 1862 *held* to have been intended to give aid and support to the Rebellion, and incapable of being validated.—Evans v. Richmond, Case No. 4,570.

A note given upon a wager as to the result of the local vote for presidential electors, though between parties not qualified to vote, is void.—Denney v. Elkins, Case No. 3,790.

§ 13. —— Ratification.

A suit for money obtained on a fraudulent note is not an affirmance of the contract.—Gibson v. Stevens, Case No. 5,401.

II. CONSTRUCTION AND OPERATION.

§ 14. What law governs.

The statutes of a state enter into and become part of a note made in that state.—Gregg v. Weston, Case No. 5,800.

Where bills are accepted, payable in London, on a promise to provide funds to meet them, the contract is governed by the law of England.—Bainbridge v. Wilcocks, Case No. 755.

A bill drawn and indorsed in one state, but payable in another, is governed by the law of the former as to the liability of the indorser, but by the law of the latter as to the amount of interest.—Bank of Illinois v. Brady, Case No. 888.

A letter of credit given in Massachusetts by an agent there of a foreign banking house *held* governed by the laws of Massachusetts, and not by those of the domicile of the bankers.—Russell v. Wiggin, Case No. 12,165.

Notes drawn, dated, signed, and indorsed at Philadelphia, where drawers and indorser resided, delivered and discounted in New York, are governed by the laws of New York.—In re Conrad, Case No. 3,126.

A note made by an agent in Boston of a citizen and resident of California to a citizen and resident of Massachusetts, payable in Boston, is a Massachusetts contract.—Byington v. Lemmons, Case No. 2,264a.

A promissory note made in Oregon and payable in Scotland is to be considered as if made in Scotland, and a mortgage upon real estate in Oregon to secure its payment is to be tested by the laws of Oregon.—Oregon & W. Trust Inv. Co. v. Rathburn, Case No. 10,554.

A discount of notes in Rhode Island, procured there by an indorser, where the money is there paid, *held* a Rhode Island transaction, though the note was made in New York, where the maker resided, and where it was dated and made payable.—Providence County Sav. Bank v. Frost, Cases Nos. 11,453, 11,454.

A note "negotiable in the Bank of Alexandria," D. C., *held* governed by the laws in force in Alexandria.—Gilman v. King, Case No. 5,444.

The place where notes were negotiated, and not that where they were signed and indorsed, *held* to be the place of the contract.—Orr v. Lacy, Case No. 10,589.

See, also, post, §§ 36, 45, 61.
Effect of state laws and decisions in federal courts, see "Courts," § 80.

§ 15. Parties.

In the absence of a special agreement, the liability of acceptor and indorser of a bill of exchange attaches in the order in which their names appear on the bill.—Robinson v. Kilbreth, Case No. 11,957.

Where a bill is drawn with directions to charge to another, and it is accepted generally, the drawer is not ordinarily liable to the drawee.—Bell v. Davidson, Case No. 1,248.

An agent is not personally liable upon a promissory note made by him to one who took it with knowledge that it was given by him as agent of a corporation.—Bradley v. McKee, Case No. 1,784.

A note payable to A., B., C., or D. is payable to the promisees individually, and not to the

three first jointly, or the fourth.—Samuels v. Evans, Case No. 12,289.

A note given to A., B., C., or D. is a promise to pay in the alternative, and either of the promisees may sue in his own name.—Spaulding v. Evans, Case No. 13,216.

§ 16. Interest and exchange.

Exchange is to be settled at the rate prevailing at the time of the verdict.—Cropper v. Nelson, Case No. 3,417.

The rate of interest and damages which the drawee of a bill is to pay ex mora is governed by the law of the place where the bill is drawn. —Ex parte Heidelback, Case No. 6,322.

Interest customary at Canton may be allowed upon a note executed there.—Cowqua v. Lauderbrun, Case No. 3,299.

Where a note is given in Indiana payable in New York, with interest and the rate of exchange, the rate of exchange will be the time the note becomes due.—Price v. Teal, Case No. 11,417.

§ 17. Accommodation paper.

Notes given by factors by way of advances on goods consigned, where not in excess of the value of the goods cannot be *held* to be accommodation paper.—In re Many, Case No. 9,054.

A person who gives a letter of credit on himself, as an accommodation, becomes a surety or guarantor only for the payment of drafts drawn on him to the extent of the credit given, and in strict compliance with its terms.—Lienow v. Pitcairn, Case No. 8,341.

An accommodation acceptor of a bill of exchange is a surety as to the drawer, but a principal as to the holder, although he knew the facts.—In re Babcock, Case No. 696.

§ 18. Attorney's fees.

The stipulation in a note for the payment of a reasonable attorney's fee on collection by action is valid, and binding on all indorsers.—Bank of British North America v. Ellis, Case No. 859.

See, also, post, § 26.

§ 19. Place of payment.

Where the maker signs a note by mistake above the printed line, stating where it is payable, the latter is nevertheless a part of the note.—Turnbull v. Thomas, Case No. 14,243.

§ 20. Time of payment.

A note payable when a certain third party should settle her accounts with the maker *held* payable after the lapse of one year, that being a reasonable time for the maker to coerce such settlement.—Scull v. Roane, Case No. 12,570c.

An acceptance takes effect from the day that it is actually made, and does not relate back to the day of presentation.—Mitchell v. DeGrand, Case No. 9,661.

A note and trust deed given to secure the same will be construed together, and the note may be declared due under a clause in the deed providing that the debt secured shall become wholly due on default in payment of interest. —Gregory v. Marks, Case No. 5,802.

§ 21. Days of grace.

On a bill payable a certain number of days after sight, the day of acceptance is excluded, and three days of grace added.—Mitchell v. DeGrand, Case No. 9,661.

The custom of merchants as to days of grace does not apply as between maker and payee.— McLain v. Rutherford, Case No. 8,868a.

A check is not entitled to days of grace, though payable at a certain day, and not on demand.—In re Brown, Case No. 1,985.

Days of grace are not allowed on promissory notes.—Cook v. Gray, Case No. 3,156a.

§ 22. Assignment of fund drawn on.

A check in the hands of the payee, before presentation, acceptance, or payment, is not an assignment of any part of the fund in the hands of the drawee.—Strain v. Gourdin, Case No. 13,521.

An order drawn on a general or particular fund does not amount to an assignment of that part, or give a lien, as against the drawee, unless there has been an express or implied acceptance by him.—McLoon v. Linquist, Case No. 8,899.

A draft upon a bank in which the drawer has a fund on deposit, before it is presented to or accepted by the drawee, or charged by it against the drawer, does not operate as an assignment of the fund; and the payee is not entitled to the fund, as against a subsequent assignee for creditors, who first notifies the bank of his title.—Rosenthal v. Mastin Bank, Case No. 12,063.

The right to the funds of the drawer in the hands of the drawee is vested in the indorsee of the bill, though the same is not accepted, and such funds are not subject to attachment after suit commenced against the drawee by the indorsee in the name of the payee.—Corser v. Craig, Case No. 3,255.

The presentation to the drawee of a negotiable draft drawn against a general balance in his hands, less than its amount, without an acceptance by him, does not operate as an assignment of the fund, or create any lien in favor of the holder.—Randolph v. Canby, Case No. 11,559.

§ 23. Collateral agreements.

A note absolute on its face may be made payable on conditions by a separate agreement as between the original parties, and an assignee with notice is affected with existing equities.— Thomas v. Page, Case No. 13,906.

III. NEGOTIABILITY AND TRANSFER.

§ 24. Statutory provisions.

A note not made payable at a bank is not a "promissory note negotiable by the law merchant," where, under the state law, the maker is entitled to assert, against any indorsee, any equity available against the payee.—Gregg v. Weston, Case No. 5,800.

§ 25. Certainty as to amount or parties.

A note which, in addition to interest, provides for the payment of taxes whose amount is uncertain, is not negotiable.—Howell v. Todd, Case No. 6,783.

A note containing a provision for the payment of all taxes and charges that might be levied upon it, or the mortgage securing its payment, is not negotiable.—Farquhar v. Fidelity Insurance, Trust & Safe Deposit Co., Case No. 4,676.

A United States "seven-thirty" note, payable to the order of ——, and not having the name of any person filled in the blank space, is negotiable by delivery.—United States v. Vermilye, Case No. 16,618.

No indorsements on the note, while such blank is left unfilled, will restrict its negotiability.—United States v. Vermilye, Case No. 16,618.

Such a note is not money, and a person who purchases it after its maturity, and after the time for its conversion into bonds has passed, takes nothing but the actual right and title of his vendor.—United States v. Vermilye, Case No. 16,618.

§ 26. Attorney's fees.

A stipulation to pay attorney's fees if a suit be instituted on the note does not affect its

negotiability.—Howenstein v. Barnes, Case No. 6,786.

See, also, ante, § 18.

§ 27. Mode and form of payment.

To be negotiable, a note must be for the payment of money, in a sum certain, subject to no conditions. A note payable in "New York funds, or their equivalent," is not negotiable.—Hasbrook v. Palmer, Case No. 6,188.

A note for a certain sum payable in "current bank notes" is not negotiable.—Fry v. Rousseau, Case No. 5,141.

A note which, during four of the five years it has to run, may, at the maker's option, be paid in buggies at wholesale prices, is not negotiable.—Howell v. Todd, Case No. 6,783.

§ 28. Transfer by indorsement.

An indorsement by one who draws a foreign bill in his own favor, "Pay the amount to order for my use," prevents its negotiability, and no damages can be recovered for its nonacceptance.—Brown v. Jackson, Case No. 2,015.

The indorsement of a note placed in the hands of a third person for the benefit of a creditor of the indorser *held* to take effect from the date of the indorsement, and not from the date of its delivery to the creditor.—Fossitt v. Bell, Case No. 4,958.

§ 29. Transfer without indorsement.

A duebill payable to order or bearer is assignable, and may be assigned by an agent.—Griffin v. Nokes, Case No. 5,817a.

Delivery, without indorsement, of a note payable to a payee named, or bearer, is not sufficient to authorize the assignee to sue in his own name.—Bradley v. Trammel, Case No. 1,788a. CONTRA, see Bradford v. Jenks, Case No. 1,769.

A deed conveying a number of negotiable instruments of various kinds will not be considered as a negotiation of the paper on mercantile principles.—Hopkirk v. Page, Case No. 6,697.

IV. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(A) INDORSEMENT BEFORE DELIVERY TO OR TRANSFER BY PAYEE.

§ 30. Liability as joint maker.

A receipt, not negotiable, and intended as a memorandum of indebtedness by the maker thereof to the holder, does not come within the rule of law in Massachusetts that one who indorses a note, not being a holder of it, is an original promisor.—In re Wrentham Mfg. Co., Case No. 18,063; Ex parte Southwick, Id.

§ 31. Liability as indorser.

A stranger who writes his name in blank on the back of a promissory note is presumed, as to subsequent holders, to be an indorser, and is entitled to all the rights of one.—McComber v. Clarke, Case No. 8,711.

An action will lie by the holder against an indorser of a promissory note, where the indorsement was made upon a blank paper and subsequently filled up by the maker as intended by the indorser.—Patton v. Violett, Case No. 10,839.

A note may be good against an indorser, though it is void as against the maker.—Codwise v. Gleason, Case No. 2,939.

The surrender of notes by the payees to a subsequent indorser *held* a sufficient consideration to support his promise to pay the same.—Pinnes v. Ely, Case No. 11,169.

If a person who is not a party to a promissory note indorses his name upon it in blank, with intent to give it credit, the plaintiff may write over it an engagement to pay it in case of the insolvency of the maker.—Offutt v. Hall, Case No. 10,449.

§ 32. Liability as surety.

An accommodation maker is entitled to the rights of a surety as against a holder with knowledge of his true relation, and is discharged by a valid extension of time to the one who is, in fact, the principal debtor.—In re Goodwin, Case No. 5,549.

§ 33. Accommodation indorsement.

The presentation by the maker of a note for discount is notice to the bank that the indorsement thereon is an accommodation indorsement.—Lemoine v. Bank of North America, Case No. 8,240.

Where such indorsement is by a firm, the bank must ascertain whether it was duly authorized.—Lemoine v. Bank of North America, Case No. 8,240.

An indorser on a note made and indorsed for the accommodation of a third person is not a cosurety with the maker, unless so specially agreed.—Law v. Stewart, Case No. 8,130.

An accommodation indorsement on a note does not make it commercial paper as to the accommodation indorser.—Innes v. Carpenter, Case No. 7,049.

An accommodation indorser of a bill of exchange, who pays the same after protest, has a right of action against the acceptor.—Robinson v. Kilbreth, Case No. 11,957.

An accommodation indorser can show a want of consideration only as against the accommodated party.—Bank of British North America, v. Ellis, Case No. 859.

One indorsing a note, after previous indorsement by two others for accommodation of the maker, may recover from either of them the whole amount paid by him to take up the note.—Mason v. Mason, Cases Nos. 9,245, 9,246.

An indorsement of a note to give it credit is a sufficient consideration to support the action against the indorser.—Vowell v. Lyles, Case No. 17,021.

§ 34. Contribution.

The indorsers of accommodation paper are considered as joint sureties, and liable to contribution.—McDonald v. Magruder, Case No. 8,761.

On a several indorsement for the accommodation of the maker of a note, one indorser, who is obliged to take up the note, may recover his proportion from the other.—Magruder v. McDonald, Case No. 8,965.

A covenant not to sue one maker of a promissory note is no release of the others.—Ferson v. Sanger, Case No. 4,752.

(B) INDORSEMENT FOR TRANSFER.

§ 35. Nature and grounds of liability.

The indorsement of a negotiable note, as well as the note itself, purports a consideration.—McClintick v. Johnston, Case No. 8,700.

Indorser *held* liable on partnership note given by one partner after dissolution in renewal of note made before dissolution.—Greatrake v. Brown, Case No. 5,743.

An indorser is in any event liable to his indorsee only for the amount actually paid by the indorsee, with lawful interest thereon, and not for the face value of the note.—In re Many, Case No. 9,054.

§ 36. What law governs.

The indorsement of a note is a new, distinct contract, which is governed by the law of the place where it is made, without regard to the

law of the place where the note was made.—Mott v. Wright, Case No. 9,883; Pomery v. Slacum, Id. 11,262.

The indorsement of a negotiable note in different states by different indorsers will be governed by the local law where each indorsement was made.—Dundas v. Bowler, Case No. 4,141.

The indorsement is considered to have been made in the state in which the instrument is delivered to the indorsee, though it was written in another state.—Mott v. Wright, Case No. 9,883.

The indorser of a bill of exchange is liable for damages according to the law of the place where the indorsement is made.—Lenox v. Wilson, Case No. 8,247.

The law of Indiana which requires a suit against the maker, before recourse can be had against the indorser, does not govern an action in such state against the assignor of a negotiable note made and assigned in Ohio, and payable there, the assignment being a new contract.—Burrows v. Hannegan, Case No. 2,206.

See, also, ante, § 14; post, §§ 45, 61.

§ 36a. Parties to indorsement.

A note payable to M., cashier, is a note payable to the bank, and the bank is liable on an indorsement and discounting by him.—Blair v. First Nat. Bank, Case No. 1,485.

An indorsement of a note by the president and cashier transfers the note to the indorsee of a corporation to which it is payable.—Chillicothe Branch of State Bank v. Fox, Case No. 2,683.

§ 37. Indorsement in blank.

A blank indorsement does not discharge subsequent indorsers as such.—Bank of British North America v. Ellis, Case No. 859.

The blank indorsement of a bill of exchange passes all the interest therein to every indorsee in succession, discharged from any obligation which might subsist between the original parties, but which does not appear upon the face of the instrument itself.—Wilkinson v. Nicklin, Case No. 17,673.

§ 38. Special indorsement.

A special indorsement does not restrict the rights of the indorsee as against prior indorsers or the drawer.—Brown v. Jackson, Case No. 2,016.

§ 39. Restrictive indorsements.

A parol agreement, made at the time a note is indorsed, cannot affect the indorser's rights under the law merchant.—Bank of Alexandria v. Deneale, Case No. 846.

§ 40. Implied warranties.

The transferror of a note impliedly warrants its genuineness.—Semmes v. Wilson, Case No. 12,658.

It cannot be inferred that a transferee took the risk of the note's being a forgery because it was passed to him long after dishonor, at a heavy discount.—Semmes v. Wilson, Case No. 12,658.

§ 41. Liability of successive indorsers.

Where a note, after indorsements to others, is indorsed to the first indorser, who reindorses it, the intermediate indorsers are not liable thereon.—Howe Mach. Co. v. Hadden, Case No. 6,785.

All indorsers or assignors of any instrument in writing, assignable by law for the payment of money (in Arkansas), become equally liable with the maker, obligor, or payee, on receiving due notice of the nonpayment or protest of such instrument.—Campbell v. Jordan, Case No. 2,362.

In the case of a raised check, passing through several banks before it was finally paid by the drawee, the loss must fall upon the one who first gave it credit by indorsement.—First Nat. Bank v. Third Nat. Bank, Case No. 4,801.

§ 42. Discharge of indorser—By extending time of payment.

An agreement between the holder and drawer, which suspends the right of the holder to enforce payment, will discharge the indorser, for it suspends his rights.—Bank of the United States v. Hatch, Case No. 918; Cooper v. Gibbs, Id. 3,194.

A contract to give time to the maker does not discharge the indorser unless it is valid and enforceable.—Ex parte Balch, Case No. 789.

The indorser is discharged where the indorsee gives time to the maker, either to pay the note or the mortgage securing it.—Morgan v. Tipton, Case No. 9,809.

The indorser of a promissory note is discharged by the holder giving the maker time to pay by installments.—Cope v. Huntt, Case No. 3,206.

If new notes or securities are taken by the holder of a note, and time given without consent of the indorser upon the old note, he is discharged.—White v. Burns, Case No. 17,539; Bank of United States v. Lee, Id. 921.

The first indorser is discharged where, after dishonor, an extension of credit is given without his consent, by an arrangement made between the maker, the holder, and subsequent indorsers.—Seventh Ward Bank v. Hanrick, Case No. 12,678.

An indorser on the notes of a bankrupt is not discharged by an extension of time given to the bankrupt by the holder.—Tiernan v. Woodruff, Case No. 14,028.

Giving time to the maker of a promissory note, after judgment against both maker and indorser, does not discharge the indorser.—King v. Thompson, Case No. 7,807.

Giving time by indorsee to maker in consideration of part payment, after obtaining judgment and issuing execution against him, discharges the indorser.—Low v. Underhill, Case No. 8,561.

The indulgence which will release an indorser of negotiable paper must not only be given upon a good consideration, but must be for some limited and definite time within which the creditor's right of action is suspended.—Varnum v. Bellamy, Case No. 16,886.

The payment of a part of the debt and accepting claims to be applied when collected in further payment, under a verbal agreement not to sue, constitute no legal consideration for a promise of forbearance.—Varnum v. Bellamy, Case No. 16,886.

After demand and notice, the holder may give time to the maker, or take time note of indorser, without releasing subsequent indorser.—Bank of United States v. Abbott, Case No. 906; Same v. MacDonald, Id. 925.

§ 43. —— In other ways.

A representation by the holder of a note to the indorser that it has been paid will not discharge the indorser if he has not been injured thereby.—Ex parte Balch, Case No. 789.

An attorney who receives a note for collection cannot, without special instructions, make a binding agreement to release the indorser from his liability.—Varnum v. Bellamy, Case No. 16,886.

The liability of an indorser, after waiver of demand and notice, is fixed, and is not discharged by the subsequent guaranty of pay-

ment by a third person.—Corbett v. Woodward, Case No. 3,223.

After demand and notice, a neglect to enforce security until it becomes inadequate by depreciation will not discharge the indorser.—Bank of Alexandria v. Wilson, Case No. 856.

The indorser is released where, without his consent, the holder assents to the discharge of the maker in bankruptcy.—In re McDonald, Case No. 8,753.

A release of a remote indorser by the holder of a note is a discharge of the subsequent indorsers.—Hawkins v. Thompson, Case No. 6,246.

The indorser is discharged where the holder, on request, does not sue the maker, who was at the time solvent. (Act Va. Dec. 23, 1794.)—Patton v. Violett, Case No. 10,839.

The holder of a note cannot be chargeable with gross negligence in failing to sue the maker, who resides in another state.—Davie v. Hatcher, Case No. 3,610.

An intention of the parties, appearing from the circumstances, on releasing the maker, to preserve the liability of the indorser, will be given effect equal to an express declaration.—Eldrege v. Chacon, Case No. 4,329.

§ 44. Rights of indorsee against indorser.

In Indiana, on all other instruments save those given to banks, the maker must be prosecuted to insolvency, before the indorsee can have recourse to his indorser.—Morgan v. Tipton, Case No. 9,809; Mott v. Wright, Id. 9,883.

Under the provision of the Indiana statute giving the indorsee a right of action against the indorser, after having used due diligence to obtain the money, the indorsee of a note secured by a mortgage on lands in another state need not first exhaust such security.—Swiggett v. Seymour, Case No. 13,701.

The holder of a promissory note has no equity against a remote indorser unless he has used due diligence to recover from the parties liable to him at law.—Dean v. Marsteller, Case No. 3,710.

The rights of a holder of a protested bill as to one party cannot be affected by his failure to sue another party.—Brown v. Jackson, Case No. 2,016.

An action will not lie by an indorsee against a remote indorser upon a promissory note which is not mercantile negotiable paper.—Bradley v. Knox, Case No. 1,782.

A bona fide indorsee may recover against the indorser of a void note by showing the consideration paid therefor.—Root v. Wallace, Case No. 12,039.

A person to whom a forged note has been passed may recover on the original consideration, without showing that defendant had knowledge of the forgery.—Semmes v. Wilson, Case No. 12,658.

(C) ASSIGNMENT OR SALE.

§ 45. What law governs.

An assignment of a note is a new contract, and is governed by the law of the place where it is made.—Dundas v. Bowler, Case No. 4,141.

See, also, ante, §§ 14, 36; post, § 61.

§ 46. Parties.

An assignment of a promissory note by one of two payees when not in partnership transfers only one-half interest and will not enable the assignee to sue the maker.—Dwight v. Pease, Case No. 4,217.

§ 47. Rights of assignee.

If a draft, not negotiable, be accepted by the drawee, with an agreement to pay the amount to any person to whom it is assigned, the assignee, after notice, may maintain an action for money had and received to his use against the acceptor.—Weston v. Penniman, Case No. 17,455.

In Pennsylvania the assignee of a note not under seal, containing a warrant to confess judgment, may sue in his own name.—Mitchell v. Walker, Case No. 9,670.

No particular form of assignment is necessary. It is sufficient that the intent to assign appear.—Mitchell v. Walker, Case No. 9,670.

One who receives from the drawer a nonnegotiable bill in payment of a debt may recover against all persons responsible on it, though it is not accepted.—Brown v. Jackson, Case No. 2,015.

An assignment of a note in one state to an unauthorized banking association thereof gives the assignee no right to sue in the state where the note is payable.—McClintick v. Cummins, Case No. 8,699.

After a note is taken up by the indorser its negotiability ceases, and his assignee cannot sue in his own name.—Swann v. Scholfield, Case No. 13,676.

The assignee of a note, taking it from the payee after dishonor, cannot enforce it against the maker, who has been released by the payee.—Gelston v. Adams, Case No. 5,302.

§ 48. Equities and defenses against assignee.

A note assigned after its maturity leaves all equities open between the original parties.—Gwathney v. McLane, Case No. 5,882.

The maker may set up the same defense against a note in the hands of an assignee that he might make if it were held by the payee.—Bradley v. Trammel, Case No. 1,788a.

Notes assigned as collateral security for an antecedent debt, to one who had notice of the consideration, are subject in his hands to the defenses available against the payee.—Smith v. Babcock, Case No. 13,009.

A plea that the defendant paid the note to the assignor before he had notice of the assignment cannot be sustained against the assignee.—Patterson v. Atherton, Case No. 10,822.

It is no defense to a suit against the maker of a note, by one to whom it was assigned after it was dishonored, that it was given to pay for land which had not been conveyed, where defendant has not demanded a conveyance.—Holy v. Rhodes, Case No. 6,651.

§ 49. Recourse by assignee to assignor.

The assignment of a note by writing guaranteeing "the ultimate payment" does not change the liability from that of an ordinary assignor.—Dent v. Ashley, Case No. 3,809b.

A note in the hands of an assignee is prima facie evidence that the face thereof was paid by him for it, but the assignor can prove what actually was paid.—Martin v. Kercheval, Case No. 9,163.

The assignee of a note must use due diligence, by prosecuting the maker to insolvency, or show some sufficient excuse for the failure, before he can hold the assignor liable.—Lemmons v. Choteau, Case No. 8,239a.

That the maker is a transient and unsettled person, without averring insolvency, is not sufficient to excuse the holder from using due diligence.—Lemmons v. Choteau, Case No. 8,239a.

The assignee of a note must use due diligence to recover of the maker, who is not notoriously insolvent or removed from the state, before he

can resort to the assignor.—Dent v. Ashley, Case No. 3,809b.

(D) BONA FIDE PURCHASERS.

§ 50. Statutory provisions.

A collateral agreement between the parties to a negotiable note that it is to be paid only on certain conditions cannot be set up in defense to a suit by a bona fide transferee for value, though a state statute provides that the maker may set up any defense against the assignee which he could make against the payee.—Thomas v. Page, Case No. 13,907.

§ 51. Mode or form of transfer.

An unauthorized transfer, to a bona fide purchaser, of certificates of a public debt, indorsed in blank to facilitate partial payment and exchange for other certificates, vests an absolute title in the purchaser.—Combs v. Hodge, Case No. 3,048.

§ 52. Actual and constructive notice.

Where one of the firm accepts a bill of exchange for accommodation, without the knowledge of his partners, the drawer has a right to sell the same, and those taking it, though with knowledge, are bona fide holders.—City Bank of Columbus v. Beach, Case No. 2,737.

One who takes a check with knowledge that the person who transferred it had no right to do so cannot recover against the drawer.—Rounsavel v. Scholfield, Case No. 12,085.

A merchant purchasing a note at heavy discount, after learning of insolvency of payees, is not a bona fide holder as against previous lien of judgment creditor's bill.—Cummings v. Mead, Case No. 3,476.

An indorsement on a bill of exchange, "Credit my account," is restrictive in character, and prevents further negotiability of the bill.—Lee v. Chillicothe Branch Bank, Cases Nos. 8,186, 8,187.

Such indorsement is sufficient to apprise subsequent indorsees of want of authority to transfer to them.—Lee v. Chillicothe Branch Bank, Case No. 8,186.

An indorsee of a note given in payment for a horse, in the sale of which there was a fraudulent concealment of the animal's unsound condition, is not an innocent holder for value, where he owned an interest in the horse, and the seller was his agent.—Pease v. McClelland, Case No. 10,882.

A transferee of a draft, having knowledge that the acceptance was procured by fraud, cannot rely upon statements of the acceptor made to the one who negotiated it and repeated to him.—Platt v. Jerome, Case No. 11,217.

The rule of lis pendens does not apply to commercial paper.—In re Great Western Tel. Co., Case No. 5,740.

The pendency of the suit on negotiable paper is not constructive notice to purchasers thereof. —Preble v. Portage County, Case No. 11,380.

§ 53. Facts putting on inquiry.

A bona fide purchaser is not bound to inquire into the character of a note which on its face is valid.—Ex parte Estabrook, Case No. 4,534.

Circumstances that would put a prudent man on inquiry will not affect the title of the purchaser of a note before maturity, if he did not in fact know of any defect in the title.—Ex parte Estabrook, Case No. 4,534.

Where a promissory note is fair upon its face, an indorsee is not bound to inquire into the consideration or circumstances under which it was given.—In re Great Western Tel. Co., Case No. 5,740.

A bill drawn by a partner in two firms, in the name of one, upon the other, payable to himself for his individual debt, and accepted, is enforceable in the hands of an indorsee without notice.—Babcock v. Stone, Case No. 701.

§ 54. Consideration in general.

The holder of a note given for a fraudulent consideration will be held to strict proof that he paid value.—Prentice v. Zane, Case No. 11,383.

Payment need not be in cash to make one a bona fide purchaser of a promissory note.—In re Great Western Tel. Co., Case No. 5,740.

A creditor to whom a note is given with directions to collect it and to retain the surplus, where the debt is afterwards settled, is not a holder for value.—Cummings v. Mead, Case No. 3,476.

§ 55. Taking as collateral security.

A pledgee in good faith and for value before maturity is a bona fide holder for value.—Ex parte Kelty, Case No. 7,681.

One holding a promissory note as collateral security is not a purchaser for value.—Mack v. Baker, Case No. 8,834.

Notes of third parties to himself, passed by a borrower to a lender with his own note, are good in the lender's hands, though originally without consideration. The makers can protect themselves as sureties only by positive notice to the lender of the want of consideration and that the paper was to be used as a security only.—New York Life Ins. & Trust Co. v. Cowperthwaite, Case No. 10,207.

§ 56. Taking as security for antecedent debt.

The holder of a negotiable bill or note taken as security for a pre-existing debt is a holder for value, unaffected by equities subsisting between the original parties.—In re Huddell, Case No. 6,825; Fogg v. Stickney, Id. 4,898. CONTRA, see Prentice v. Zane, Case No. 11,383.

An indorsee in good faith of a note wrongfully diverted and transferred as collateral security for a precedent debt is not affected by equities existing between the original parties.—National Bank of Republic v. Brooklyn City & N. R. Co., Case No. 10,039.

§ 57. Taking in payment of existing debt.

A pre-existing debt is a sufficient consideration for the assignment of a note to close the equities between the original parties.—Riley v. Anderson, Case No. 11,835; Cummings v. Mead, Id. 3,476.

By the commercial law, a negotiable promissory note, received in payment of a pre-existing debt, bona fide, and without notice, is not subject to the equities between the original parties as an accommodation note, though the rule in New York be otherwise.—Crosby v. Lane, Case No. 3,423.

Where such note is accepted as payment on false and fraudulent representations of the assignor as to its making, and the responsibility of the parties, the original debt is not extinguished.—Crosby v. Lane, Case No. 3,423.

A creditor to whom an agent transfers notes of his principal, before maturity, in consideration of the canceling of a security held against the agent, *held* a bona fide purchaser for value where the principal was indebted for advances made.—Turnbull v. Thomas, Case No. 14,243.

A person to whom an accommodation indorser transfers the note in payment of a pre-existing debt due from the makers, though he has knowledge of the circumstances, may recover thereon against the indorser.—Varnum v. Bellamy, Case No. 16,886.

The payee of a draft accepted for the accommodation of the maker, who takes it in satisfaction of a debt due from the maker, or as securi-

ty, without notice of any fraud on the acceptor, is a bona fide holder for value, and stands in the same position as if the draft were drawn in favor of the acceptor, and indorsed by him to such holder.—Pugh v. Durfee, Case No. 11,460.

§ 58. Rights of bona fide purchasers.

The intended misapplication of the proceeds of a note drawn by a partner in the firm name, apparently in the course of the partnership business, will not affect the rights of a bona fide holder.—Bush v. Crawford, Case No. 2,224.

An innocent purchaser for value of a treasury note, on which the indorsee's name is forged, and the name of the indorser is erased, is entitled to receive the amount thereof from the treasury.—Jarvis v. Kendall, Case No. 7,227.

The assignee of one partner *held* to have a prima facie title to notes taken by the other partner for goods sold after the assignment, as against a purchaser with notice.—Fisher v. Lord, Case No. 4,821.

V. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

§ 59. Necessity in general.

An election by the holder to consider what passed on presentation of a bill as a nonacceptance is binding on him, as against other parties.—Mitchell v. De Grand, Case No. 9,661.

A demand of payment at the placed named is not necessary to charge the maker.—Beverley v. Beverley, Case No. 1,376; Brown v. Piatt, Id. 2,026; Bank of United States v. Bussard, Id. 911; Silver v. Henderson, Id. 12,854; Chillicothe Branch of State Bank v. Fox, Id. 2,683; Smith v. Johnson, Id. 13,067; Thompson v. Cook, Id. 13,952.

If defendant was ready to pay or did pay into the bank named as the place of payment the amount due, it is matter of defense.—Silver v. Henderson, Case No. 12,854.

Where a note may be discharged in property at a certain time, no demand is necessary.—Campbell v. Clark, Case No. 2,355a.

If an indorser is once fixed by due notice of the non-acceptance of a bill, no delay of the holder to return the bill and demand payment takes away his right of recovery, notwithstanding the drawer may, in the intermediate time, have failed.—Wild v. Bank of Passamaquoddy, Case No. 17,646.

One discounting a note for the joint benefit of the maker and indorsers, though in unequal amounts, need not make demand and give notice to recover against indorsers.—Bank of Washington v. Way, Case No. 957.

A payee of a promissory note indorsing it after dishonor is considered a drawer, and is not liable to the indorsee without demand and notice.—Cox v. Jones, Case No. 3,303.

The bank of Alexandria is bound to make demand and give notice to charge the indorser.—Bank of Alexandria v. Young, Case No. 858.

In Virginia the indorsee of a promissory note may recover at law against a remote indorser, without having given notice of nonpayment by the maker.—Dunlop v. Silver, Case No 4,169.

Notice to the indorser of nonpayment of a promissory note, not payable to order, is not necessary in Virginia.—Ish v. Mills, Case No. 7,104.

Notice of demand and nonpayment is necessary to charge the guarantor of a note or bill, whether his name be upon the paper or not; but in the latter case reasonable notice is sufficient.—Foote v. Brown, Case No. 4,909.

A foreign bill of exchange must be regularly protested, after a demand and refusal of payment.—Orr v. Lacy, Case No. 10,589.

Where a check is presented and not paid, notice of dishonor must be given the maker, in order to charge him.—Farwell v. Curtis, Case No. 4,690.

Notice to an indorser should be given, though he be beyond sea, if his residence is known, and reasonable diligence should be used to find his place of residence.—McMurtrie v. Jones, Case No. 8,905.

§ 60. Diligence required of holder.

The holder of a foreign bill, protested for nonacceptance, must give notice to the indorser as soon as possible, under all the circumstances, according to the usual course of communication.—Lindenberger v. Wilson, Case No. 8,361.

The holder of a bill of exchange, after demand and notice, is not bound to active diligence.—Barnes v. Ryder, Case No. 1,020.

Where the holder of a check accepts the check of the bank in payment, he must present and collect it the same day, or be chargeable with laches.—Farwell v. Curtis, Case No. 4,690.

The loss falls on the holder of a check where he fails to present the same within a reasonable time, and the bank fails.—Farwell v. Curtis, Case No. 4,690.

The holder of a check cannot extend the time for which the drawer would be liable.—Farwell v. Curtis, Case No. 4,690.

The holder of a check makes the drawee his agent where he sends it by mail to the drawee for collection and return, and must bear any loss arising after the time when the check could have been presented by express or other usual method.—Farwell v. Curtis, Case No. 4,690.

If the maker of a draft had a well-founded expectation that if presented within a reasonable time it would be honored, the holder must use due diligence in presenting it, and give him notice of its dishonor.—Olshausen v. Lewis, Case No. 10,507.

Where the holder retains a draft drawn on a bank for more than a month without presentation, and waits three weeks longer to protest it, he cannot recover of the drawer.—Olshausen v. Lewis, Case No. 10,507.

A drawee to whom a collecting agent mails a check for collection is a subagent, and the holder is chargeable with the subagent's negligence, either in presenting to himself or in giving notice of dishonor.—Simonds v. Black River Ins. Co., Case No. 12,874.

Delay in receiving a reply, due wholly to the postal service, does not charge a collecting agent with notice of the dishonor of a check which he has mailed to the drawee for collection.—Simonds v. Black River Ins. Co., Case No. 12,874.

A creditor holding a note whose proceeds are to be collected and applied to discharge the debt is bound to use due diligence to collect the note, and give notice of nonpayment.—Foote v. Brown, Case No. 4,909.

If the holder of a bill remitted as payment of a pre-existing debt does all in his power to notify the one remitting it of its dishonor, he is not liable.—Gallagher v. Roberts, Case No. 5,195.

§ 61. What law governs.

A note or foreign bill of exchange is a contract of the state in which it is made payable, and is governed by its laws as to demand and notice and protest. — Gaylord v. Johnson, Case No. 5,285; Golden v. Prince, Id. 5,509; Indseth v. Pierce, Id. 7,026; Neederer v. Barber, Id. 10,079.

See, also, ante, §§ 14, 36, 45.

§ 62. Presentment for acceptance.

A foreign bill of exchange must be presented for acceptance within a reasonable time, and what is a reasonable time depends upon the circumstances of each particular case.—Wallace v. Agry, Case No. 17,096.

A bill of exchange, payable at sight, must be presented within a reasonable time. In the case of a foreign bill, it need not be sent by the first vessel.—United States v. Barker, Case No. 14,519.

The drawer of a bill is liable only as indorser where it is remitted to, and received by, his creditor in payment of a debt, whether the drawer had funds in the hands of the drawee or not.—Denniston v. Imbrie, Case No. 3,802.

§ 63. Notice of nonacceptance.

Where a bill is presented and dishonored, though it was not necessary to present it, notice must be given without waiting the maturity of the bill.—United States v. Barker, Case No. 14,520.

Notice of protest of a bill of exchange must be given by the earliest practicable post after the bill is dishonored, where the parties do not live in the same town.—United States v. Barker, Case No. 14,520.

The burden is upon the party charged with the duty of giving notice of nonacceptance or dishonor of proving the manner in which it was given, and of any legal excuses for its delay.—United States v. Barker, Case No. 14,520.

Want of notice of nonacceptance is not excused by an understanding between plaintiff and defendant that the bill should not be sent on for acceptance.—Nicholson v. Patton, Case No. 10,250.

A protest for nonpayment will not supply the place of a protest for nonacceptance where the bill has been presented.—United States v. Barker, Case No. 14,519.

An unexplained delay of nine days in giving notice of nonacceptance of a foreign bill *held* fatal.—United States v. Barker, Case No. 14,519.

§ 64. Presentment for payment and demand—Who may make.

Demand and notice may be made by notary's clerk.—Bank of Alexandria v. Wilson, Case No. 856.

A justice of the peace in Mississippi is ex officio notary public for purpose of protest and notice.—Austen v. Miller, Case No. 661.

§ 65. —— Upon whom to be made.

Demand where maker of notes dies before maturity, see Bank of Washington v. Reynolds, Case No. 954.

In the case of a joint and several promissory note, a demand must be made upon both makers to charge the indorser, though one resides in another state.—Tayloe v. Davidson, Case No. 13,769.

Demand of payment on one of the firm *held* sufficient to charge the indorser of a firm note given after dissolution.—Greatrake v. Brown, Case No. 5,743.

An indorser who promised to pay in case of the insolvency of the maker is entitled to the usual demand and notice.—Offutt v. Hall, Case No. 10,449.

§ 66. —— Place.

Demand of payment of a note given by citizens of one state to citizens of another, in which it was dated, but not payable at any particular place, must be made at the usual place of business of the makers.—Burrows v. Hannegan, Case No. 2,205.

Demand at bank where payable, and which was holder, must be made, though maker had no funds to his credit.—Bank of United States v. Smith, Case No. 935.

A note made negotiable at a certain bank is not "payable" at that bank, and demand there is not necessary.—Beeding v. Thornton, Case No. 1,228.

Demand at government office, in which the maker was employed, in his absence, during his usual hours of business, where he lived out of town, *held* not sufficient.—Goldsborough v. Jones, Case No. 5,517.

A demand of the barkeeper of a tavern to which the livery stable was attached, in which the maker of a note occasionally left his horse while at a government office, in which he was employed, is not a sufficient demand.—Goldsborough v. Jones, Case No. 5,517.

§ 67. —— Time.

To hold the indorser of a note payable on demand, demand must be made within a reasonable time. An unexplained delay of seven months is unreasonable.—Martin v. Winslow, Case No. 9,172.

An indorser is not liable on a demand note where no demand is made within four years.—In re Crawford, Case No. 3,364.

A demand and notice more than five years after date on a demand note is not within a reasonable time.—In re Grant, Case No. 5,691.

The reasonable time within which a foreign bill of exchange, payable after sight, ought to be presented, must be determined with reference to the usage among merchants as to the delays in the negotiation and transmission of such bills.—Wallace v. Agry, Case No. 17,097.

A bill of exchange payable 60 days after sight, drawn in Havana upon London, need not be sent direct to London, and may be sent for sale to the United States.—Wallace v. Agry, Case No. 17,096.

Notes left for collection in the bank are due on the third day of grace, under the general commercial usage.—Hill v. Norvell, Case No. 6,497.

The day of the date is excluded, in computing the time when a note without grace is due.—Hill v. Norvell, Case No. 6,497.

The demand must be made on the last day of grace.—Auld v. Peyton, Case No. 654.

Demand (in District of Columbia) *held* not necessary until the day after the last day of grace.—Brent v. Coyle, Case No. 1,837.

The usage of the banks in the District of Columbia to make a demand on the fourth day of grace only applies to notes negotiated by the bank.—Hill v. Norvell, Case No. 6,497.

In the county of Washington, D. C., by usage, demand and notice, on the day after the last day of grace on a promissory note, will charge indorsers residing in the county, and having notice of the usage.—Smith v. Glover, Case No. 13,051.

Demand and notice on the day after the expiration of the days of grace is in time, in the District of Columbia.—Bank of Alexandria v. Wilson, Case No. 856.

A demand on the last day of grace, after banking hours, is not too soon.—Bank of Metropolis v. Walker, Case No. 903; Munroe v. Mandeville, Id. 9,929.

Where a note, drawn without grace, falls due on Sunday, demand and protest on Saturday will hold the indorsers.—Doremus v. Burton, Case No. 4,002; Mandeville v. Rumney, Id. 9,015.

If the last day of grace fall on Sunday, demand must be made on Saturday, but the notice may be given on Monday.—Irwin v. Brown, Case No. 7,080.

Demand of payment on the 5th of July of a note due on the 1st–4th of July is too late to charge the indorser, and the insolvency of the maker will not excuse the delay.—Neale v. Peyton, Case No. 10,071.

Demand on the day after the third day of grace is too late.—Beeding v. Pic, Case No. 1,227; Lindenberger v. Beale, Id. 8,359.

Upon a note due 23d and 26th July, demand and notice after the 28th are too late, but demand and notice on the 27th are not.—Lenox v. Wright, Case No. 8,249.

Demand by a notary public, the day after the last day of grace, upon the indorser at his house (where the note was payable), without inquiring for the maker, or whether he had funds there, *held* not sufficient to bind a second indorser.—Mechanics' Bank v. Lynn, Case No. 9,382.

§ 68. —— Mode and sufficiency.

An indorser is bound by the usage of the local banks as to demand, notice, and protest, known to him at the time of indorsing.—Bank of Columbia v. Lawrence, Case No. 872; Same v. McKenny, Id. 874.

But not otherwise except upon his agreement.—Bank of Alexandria v. Deneale, Case No. 846.

Where note is payable at a certain bank demand need not be personal.—Bank of Metropolis v. Brent, Case No. 900; Bank of United States v. O'Neale, Id. 932.

Inquiry made by the teller of the bookkeeper of a bank as to whether a deposit has been made to pay a note left for collection is a sufficient demand.—Browning v. Andrews, Case No. 2,040.

The demand is good though the teller acted as clerk of the protesting notary.—Browning v. Andrews, Case No. 2,040.

If the maker is not found at his office or his dwelling house on the last day of grace, so that payment of the note cannot be demanded, the note is dishonored.—Greatrake v. Brown, Case No. 5,743.

On a demand of the maker the note must be produced.—Peabody v. Denton, Case No. 10,867.

A protest of interest coupons is sufficient to charge the indorser of the notes from which they were cut, though the notary did not have the notes as well as the coupons to present for payment.—Codman v. Vermont & C. R. Co., Case No. 2,936.

§ 69. —— Excuses for failure to present.

Demand and notice excused where drawer has no funds and no reason to expect payment.—Allen v. King, Case No. 226.

The mere fact that the indorser of a note is a member of the firm by which it is made will not excuse a failure of demand and notice, although the firm were insolvent when the note was given, and the indorser knew that it was not paid.—In re Grant, Case No. 5,691.

A promissory note transferred by indorsement after maturity is payable on demand, and demand and notice are necessary to charge the indorser, though he knew the maker to be insolvent at the time of indorsing it.—Stewart v. French, Case No. 13,427.

Insolvency of the maker, in Virginia, dispenses with suit and demand and notice.—Offutt v. Hall, Cases Nos. 10,449, 10,450.

Where the maker dies before the note falls due, demand or notice to charge the indorser is not necessary where he administers upon the maker's estate.—Union Bank of Georgetown v. Magruder, Case No. 14,360.

§ 70. —— Effect of delay or failure.

The want of due presentation of a check and of notice of nonpayment exonerates the drawer in so far only as actual damages resulted.—In re Brown, Case No. 1,985.

Agent liable for failure to make demand and give notice.—Allen v. King, Case No. 226.

§ 71. Protest and certificate.

A protest cannot be made in the name of a notary by his clerk.—Sacrider v. Brown, Case No. 12,205.

One protest to a bill of exchange is sufficient.—Indseth v. Pierce, Case No. 7,026.

The fact that the notary's signature and part of a notice of protest are printed does not invalidate it.—Spalding v. Krutz, Case No. 13,201.

A notary should certify all the facts that occurred in relation to a protest of commercial paper.—Searight v. Calbraith, Case No. 12,585.

A protest which does not state that the notary informed the indorser of demand and refusal is insufficient.—Bank of Alexandria v. Wilson, Case No. 856.

A statement in the protest of a demand on a drawer, of nonpayment, and that notice was given to the indorser, is prima facie evidence of due notice.—Eldrege v. Chacon, Case No. 4,329.

The notary's certificate under seal is evidence of the facts therein recited.—Jones v. Heaton, Case No. 7,468; Indseth v. Pierce, Id. 7,026.

§ 72. Notice of nonpayment and protest —To whom to be given.

The indorser is, in all cases, entitled to due notice of the dishonor of a bill of exchange.—Ramdulollday v. Darieux, Case No. 11,543.

Where there are two joint indorsers notice must be given to both.—Gantt v. Jones, Case No. 5,213.

The holder of a check must give notice to the drawer of refusal of payment by the bank, and such notice must be averred in a declaration thereon.—Sherman v. Comstock, Case No. 12,764.

A notice left with a person authorized to receive notices is not good when given after the indorser's death.—Brent v. Bank of Washington, Case No. 1,834.

Where indorser dies intestate, notice left with his son at intestate's place of business, before appointment of administrator, *held* sufficient.—Bank of Columbia v. King, Case No. 871.

A bank which receives a note for collection from another bank, indorsed by the cashier thereof, need not give notice of nonpayment to any other party than such bank.—Codrington v. Adams, Case No. 2,937.

An agent to present a note for payment is not bound to give notice of dishonor to the indorser, but only to his principal, who in turn gives such notice.—Bank of United States v. Goddard, Case No. 917.

An accommodation indorser is not entitled to notice unless he has actually sustained damages by its want.—Bank of Columbia v. French, Case No. 867.

Notice of dishonor need not be given to parties who are not liable on account of the dishonor, and can look to no person on the bill for indemnification, or for payment of it.—Hutz v. Karthause, Case No. 6,963.

§ 73. —— Place.

A personal notice, to charge the indorser, may be served anywhere.—Hyslop v. Jones, Case No. 6,990.

Where the indorser lives in the city, the notice must be served on him personally, or at his place of business or residence.—Hyslop v. Jones, Case No. 6,990.

But if deposited in the post office, and in fact received by him in time, it is sufficient.—Hyslop v. Jones, Case No. 6,990.

A written notice of the dishonor of the note, left at the dwelling house of the indorser, is sufficient.—Greatrake v. Brown, Case No. 5,743.

Notice left in the indorser's separate room, in a business house where he is a clerk, is sufficient.—Bank of United States v. MacDonald, Case No. 925.

Notice left with a boarder at the same house with the indorser, with the request to hand it to him, is sufficient.—Bank of United States v. Hatch, Case No. 918.

A notice left at a boarding house where the indorser resided when it was drawn, but which he had left without the holder's knowledge, having embarked for Europe, is sufficient.—McMurtrie v. Jones, Case No. 8,905.

Where the notary does not find the indorser at home, and leaves a written notice with his family, it is sufficient.—Cana v. Friend, Case No. 2,375.

Notice left at shop of indorser's son, though connected with his dwelling house, *held* not sufficient.—Bank of United States v. Corcoran, Case No. 912.

Where the indorser has a known place of business within the city, notice must be given to him there, irrespective of his residence.—Spalding v. Krutz, Case No. 13,201.

§ 74. —— Time.

A demand of payment on the third day of grace, after bank hours, and notice to the indorser and protest on the same day, are not too soon, if the note is in bank for collection, and the maker has been notified thereof; such being the usage of the banks.—Munroe v. Mandeville, Case No. 9,929.

Where a demand is made on the last day of grace, notice to the indorser on the next day is in time.—Read v. Carbery, Case No. 11,604; Bank of Metropolis v. Walker, Id. 903.

Notice on the third day of grace, though after bank hours, is too soon.—Auld v. Mandeville, Case No. 653.

If a note fall due on Saturday, and payment be demanded of the maker on that day, notice to the indorser on Monday is not too late.—Crawford v. Milligan, Case No. 3,370; Seventh Ward Bank v. Hanrick, Id. 12,678.

If Sunday be the last day of grace, the demand, protest, and notice may be on Saturday, and suit may be instituted the same day, after banking hours.—Mandeville v. Rumney, Case No. 9,016.

But in such case the notice may be given on Monday, the demand having been made on Saturday.—McElroy v. English, Case No. 8,782.

Notices of dishonor sent through agents must be transmitted within the time allowed to the principal.—United States v. Barker, Case No. 14,519.

Where an agent, who received directions by mail on noon of Saturday to give notice of protest, did not give such notice until Monday, *held*, that the drawer was discharged.—United States v. Barker, Case No. 14,518.

Notice of demand and nonpayment need not be given during business hours.—Bonner v. New Orleans, Case No. 1,631.

§ 75. —— Mode and sufficiency.

A copy of the protest for nonacceptance need not accompany the notice of dishonor.—Wallace v. Agry, Case No. 17,096.

Notice is sufficient if it describe the note so that the indorsers must know it, and state that payment was demanded and protest made, and that the holders look to the indorsers for payment.—Cooper v. Gibbs, Case No. 3,194.

Due notice, as between any indorsers, is sufficient to charge such indorsers in favor of all subsequent indorsers.—Bank of United States v. Goddard, Case No. 917.

The receipt of notice cannot be inferred from an agreement by the indorser not to take advantage of the statute of limitations, and to authorize an attorney to docket a suit.—Bank of United States v. Corcoran, Case No. 912.

A verbal notice, on the day following the last day of grace, that payment had been demanded, and that the note would be protested if not paid, is not sufficient.—Bank of United States v. Barry, Case No. 907.

The delivery of a note to a deputy notary is not per se notice to the notary who was indorser thereon.—Bank of Columbia v. Mackall, Case No. 873.

A notice wrongly stating amount of note is ineffectual.—Bank of Alexandria v. Saunders, Case No. 852.

A mistake in the recital of the date of the note will not invalidate the notice.—Bank of United States v. Watterston, Case No. 941.

As to the sufficiency of a notice of dishonor of a bill held by the government, to the transaction of whose business unusual delays are incident.—United States v. Barker, Case No. 14,519.

Inserting the name "John" instead of "James" will invalidate the notice, unless the party have good reason to believe that "James" was intended.—Underwood v. Huddlestone, Case No. 14,340.

The usages of an office, as regards the service of a notice, cannot make that evidence which is in itself not so.—Whitehead v. Jones, Case No. 17,563.

Testimony of a notary that he made demand at the shop of an indorser, but did not remember whether he saw him, is not sufficient proof of notice.—Mechanics' Bank v. Taylor, Case No. 9,383.

§ 76. —— By mail.

The next mail after protest is sufficient.—Austen v. Miller, Case No. 661.

Notice of nonpayment, if by mail, must be given on the last day of grace, where the mail does not close until six hours after the close of the bank.—Bank of Alexandria v. Swann, Case No. 853.

Notice mailed after closing of mail on the day after the last day of grace is too late.—Bank of United States v. Swann, Case No. 937.

If demand is made on Saturday, and notice by mail would reach the indorser on the same evening, it is too late to mail the notice on the following Monday.—King v. Foyles, Case No. 7,792.

The notice is properly directed to the post office where the party is in the practice of receiving his mail, though it be not the nearest post office.—Sherman v. Clark, Case No. 12,763.

Where the indorser lives at the place where the note is payable, notice of protest received through the mail on the day of dishonor or the next is sufficient.—Spalding v. Krutz, Case No. 13,201.

Notice by mail is not sufficient as to an indorser residing in the country where he had a house in town usually resorted to by him for business.—Bank of Columbia v. Lawrence, Case No. 872.

Notice to an indorser by mail must be directed to the post office nearest his place of residence.—Fowler v. Warfield, Case No. 5,004.

A notice to an indorser, who is a member of congress, then in session, left in the post office of the senate or house of representatives, is not sufficient.—Hill v. Norvell, Case No. 6,497.

Where an indorser has a public office in town, which is kept open every day, a notice deposited in the mail is not sufficient, though he resides five miles out of town, and the post office is his nearest post office.—Vowell v. Patton, Case No. 17,022.

In case of a war between two countries, a notice of nonpayment, sent between the countries through the post, is not good.—United States v. Barker, Case No. 14,519.

A notice by mail of a protest of a foreign bill, deposited in a mail bag of a vessel belonging to a nation at the time at war with another, is insufficient, where not followed by a duplicate notice.—Philips v. Janney, Case No. 11,095.

§ 77. —— Excuses for failure to give notice.

Demand, and notice to the indorser, are not necessary, where the maker is insolvent.—Riddle v. Mott, Case No. 11,810.

Notice to the indorser is not necessary where he knew the maker to be insolvent at the time of the indorsement.—Morris v. Gardner, Case No. 9,830.

Notice of nonpayment is excused where the holder called at the indorser's place of business, in business hours, and found it closed.—Bowie v. Blacklock, Case No. 1,729.

Want of funds in the hands of the drawee of a bill of exchange renders notice to the drawer of nonacceptance or nonpayment unnecessary.—Read v. Wilkinson, Case No. 11,611; Baker v. Gallagher, Id. 768; Cox v. Simms, Id. 3,306.

A drawer of a check is only entitled to notice of nonpayment where he draws in the reasonable expectation of having funds to meet its payment.—In re Brown, Case No. 1,985; Valk v. Simmons, Id. 16,815.

The accommodation drawer of a check on a bank in which he had no funds is entitled to notice of nonpayment, where the holder took it with knowledge that the drawer had reasonable expectations that the drawee would furnish funds to meet it.—Mackall v. Goszler, Case No. 8,835.

Notice of nonpayment and protest is unnecessary where the drawee, having a trifling balance due to the drawer in his hands, gave notice that bills would not be honored.—Hopkirk v. Page, Case No. 6,697.

A state of war between the countries in which the drawer and drawee respectively reside will excuse notice of nonpayment and protest to the drawer until within a reasonable time after the impediment is removed.—Hopkirk v. Page, Case No. 6,697.

The transfer of property by the maker of a promissory note to the indorser for the express purpose of paying the debt will dispense with notice of nonpayment, if the amount of property thus assigned be sufficient to satisfy the liability; not otherwise, although all the property of the maker may have been thus assigned.—Woodbury v. Crum, Case No. 17,969.

If, however, the assignment to the indorser is in trust for general creditors, and sufficient only for the payment of a small portion of the debts of the maker, such transfer, although including all the debtor's property, is not sufficient to excuse the want of notice to the indorser.—Woodbury v. Crum, Case No. 17,969.

§ 78. —— Effect of delay or failure to give.

Where the parties live within two miles of each other, nine days' delay to give notice is fatal.—Morris v. Gardner, Case No. 9,830.

If one of the joint indorsers pay the note, he cannot recover a moiety from the other indorser, to whom notice of dishonor was not given.—Gantt v. Jones, Case No. 5,213.

§ 79. Waiver of presentment, demand, protest, and notice.

An indorser who, with knowledge that no notice of nonpayment was given him, promises to pay the note, waives such notice.—Perry v. Rhodes, Case No. 11,011.

Where the drawer of a bill, after it is drawn, gives the drawee notice not to pay it, presentation for acceptance and payment is waived.—Neederer v. Barber, Case No. 10,079.

The waiver of objection as to want of notice may be after, as well as before, the laches.—Bank of Columbia v. Mackall, Case No. 873.

An indorser, by taking partial indemnity, after the note becomes due, does not thereby waive legal notice.—Burrows v. Hannegan, Case No. 2,205.

A request by the indorser of a note to the holder to pursue the maker is not evidence of waiver of demand and notice, but the jury may infer therefrom due demand and notice.—Riggs v. St. Clair, Case No. 11,829.

§ 80. New promise after discharge.

A subsequent promise by an indorser to pay, made with full knowledge of his discharge, will bind him.—Morris v. Gardner, Case No. 9,830.

A promise by an indorser to pay, after being discharged by neglect of due notice, is not binding unless made with knowledge of all material facts.—Martin v. Winslow, Case No. 9,172.

A promise to pay does not bind an indorser who did not know at the time that he was discharged by the laches of the holder.—Good v. Sprigg, Case No. 5,532.

A promise to pay by the indorser is presumptive evidence of due notice of protest and nonpayment.—Sherman v. Clark, Case No. 12,763.

Admission to a stranger by an indorser that he is willing to pay the debt will not dispense with proof of demand and notice, etc.—Gassaway v. Jones, Case No. 5,263.

VI. PAYMENT.

§ 81. What constitutes in general.

A guarantor may take up the paper guaranteed, and transfer his claim as guarantor to the persons from whom he obtained the means with which to take up the paper.—Fourth Nat. Bank v. Walker, Case No. 4,992.

Purchase of notes by trustee for another *held* not to amount to a payment.—Ex parte Balch, Case No. 789.

A landlord who also holds a note of his tenant with a deed of trust of personalty as security must apply the proceeds of such property distrained for rent to the note, as against an indorser.—Bank of United States v. Smith, Case No. 936.

A promissory note given as collateral for a note borrowed is not discharged by the borrower's taking up the borrowed note with funds furnished by the lender.—Smith v. Johnson, Case No. 13,067.

If the holder receive an inland bill for the money due by the note, it is a discharge of the note, unless the parties otherwise agree.—Dunlop v. Silver, Case No. 4,169.

Bona fide payment by the maker to a fraudulent holder discharges the debt.—Alexander v. Horner, Case No. 169.

§ 82. Mode and sufficiency.

The taking of stock and cash in satisfaction of a debt on surrendering a note *held* to amount

to a payment of such note.—In re Ford, Case No. 4,932.

A draft drawn on a bank is payable in current coin and not in depreciated bank notes.—Olshausen v. Lewis, Case No. 10,507.

The holder of a check is not bound to receive part payment thereof, even though the bank be willing to pay in part.—In re Brown, Case No. 1,985.

The payee of a note for the payment of money by a certain day, which may be discharged in property, has no right to demand property, nor can the obligor discharge it in property after the day of payment has passed.—Campbell v. Clark, Case No. 2,355a.

A qualified acceptance of bill of exchange to the amount of proceeds of certain property against which it was drawn, and subsequent application of such proceeds, is a satisfaction only pro tanto.—Cassel v. Dows, Case No. 2,502.

§ 83. Evidence of payment.

The possession by the payee of a time draft, unaccepted and uncanceled, is not prima facie evidence that he has paid it.—Hankin v. Squires, Case No. 6,025.

The circumstance that a draft does not bear the customary "Paid" stamp of the bank, nor appear on its books to have been paid, may be considered by the jury in determining the question of payment.—Hankin v. Squires, Case No. 6,025.

The possession of a bill of exchange by the drawee is prima facie evidence that he has paid all those who could claim against him thereon, and the indorser is a competent witness in a suit by the payee against the drawer.—Lonsdale v. Brown, Case No. 8,492.

§ 84. Effect of payment.

The holder of a bill of exchange cannot recover from the maker damages for its nonpayment after receiving the principal and interest from the indorser.—Tombeckbee Bank of Mobile v. ——, Case No. 14,082.

The holder of a bill before protest is not affected by a settlement between the drawer and payee.—Cox v. Simms, Case No. 3,306.

The payment, by the maker, of a judgment in favor of the assignee of a note, obtained in a suit against him alone, will not protect him from liability to the payees, in a prior suit by them to set aside the transfer, and recover the note, where he failed to give them notice of the second suit.—Pratt v. Burr, Case No. 11,373.

VII. ACTIONS.

Form of action, see "Debt, Action of," § 1.
Jurisdiction of suits by transferees as dependent upon citizenship or residence of parties, see "Courts," § 49.
Parol evidence, see "Evidence," § 68.

§ 85. Right of action.

If the plaintiff obtain possession of the defendant's acceptance by a fraudulent practice, he cannot recover upon it.—Wilson v. Cromwell, Case No. 17,799.

Where the drawer has no funds in the hands of the drawee, and the bill is not accepted, action may be brought before it is payable.—Baker v. Gallagher, Case No. 768.

In Illinois the indorsee of a promissory note, the maker of which has been adjudicated bankrupt, may proceed at once against the indorser.—National Bank of Commerce v. Booth, Case No. 10,036.

§ 86. Limitations.

The statute begins to run from the date of a note payable on demand.—Bartlett v. Rogers, Case No. 1,079.

In the case of a bill of exchange made payable at a particular place the statute does not commence to run until a demand is made at that place.—Picquet v. Curtis, Case No. 11,131.

The statute is no bar where the holder of an accepted bill of exchange was beyond seas at the time his cause of action accrued, and so continued until suit brought, though the indorsers always were residents of the United States.—Irving v. Sutton, Case No. 7,077.

The statute of one state is no bar to an action therein upon a note made by defendant in another state, in which plaintiff has always resided.—Lee v. Cassin, Case No. 8,184.

An action in New York on a promissory note made in Massachusetts is barred by the New York statute, though it would not be barred by the Massachusetts statute.—Nicolls v. Rodgers, Case No. 10,260.

§ 87. Defenses—In general.

Bona fide purchasers, see ante, §§ 50–58.

Defenses available against a bond given to secure a debt of another are available in action on a note given to extend the time of payment.—American Button-Hole, Over-Seaming & Sewing Mach. Co. v. Murray, Case No. 292.

The words "without offset," in common use on the face of negotiable paper, will not prevent an offset, as between the maker and payee.—Harmanson v. Bain, Case No. 6,073.

The acceptor of bills drawn under the usual forms of commercial letters of credit can compel the holder of the letter to furnish funds to meet the acceptances; and a bill due by the issuer of the letter to the holder cannot be set off against this obligation.—McCulloch v. Taylor, Case No. 8,740.

The mistake of arbitrators in making an award is not available as a defense to an action by the indorsee against the acceptor of a bill of exchange drawn for the amount of the award.—Miller v. Butler, Case No. 9,565.

The maker of the note, having acquired the equitable interest of the assignor, may use it in his defense to an action at law on the note.—Warren v. Emerson, Case No. 17,195.

§ 88. —— Accommodation paper.

A purchaser for value of an accommodation bill, though with notice of its character, is entitled to recover from the party for whose benefit it was issued.—Perry v. Crammond, Case No. 11,005.

A promissory note given by the treasurer of a manufacturing corporation for the accommodation of a third person without authority is valid in the hands of an innocent purchaser for value before maturity.—Ex parte Estabrook, Case No. 4,534.

One who takes drafts of a national bank with knowledge of the fact that they were issued as accommodation paper cannot recover thereon against the bank in the hands of a receiver.—Johnston v. Charlottesville Nat. Bank, Case No. 7,425.

Knowledge that a note was accommodation paper will not prevent one who took the same in payment of an overdue note, or as security for a subsisting debt, from recovering thereon.—Molson v. Hayley, Case No. 9,702.

It is no defense to an accommodation acceptor of a bill of exchange that plaintiff took the same from the drawers in payment of a pre-existing debt, with knowledge that it was an accommodation paper.—Jewett v. Hone, Case No. 7,311.

§ 89. —— Fraud in inception.

Fraud or deception in obtaining the note is no defense to a suit by a bona fide holder for value, without notice.—Riley v. Anderson, Case No. 11,835; Mason v. Jones, Id. 9,240.

A member of a company, who individually discounts a note belonging to the company, without knowledge of fraud in its origin, is yet affected by the fraud of the company's agent.—Mason v. Jones, Case No. 9,240.

The defense of fraud may be set up against an indorsee of a note, who took it after maturity.—Slacom v. Wishart, Case No. 12,933.

§ 90. —— Illegality.

No matter how illegal or immoral the consideration of a note or bill may be, it is valid in the hands of a bona fide holder for value, unless made absolutely void by statute.—Hatch v. Burroughs, Case No. 6,203.

Bills drawn for an illegal consideration, or for one that has failed, cannot be enforced in the hands of a purchaser with notice.—Perry v. Crammond, Case No. 11,005.

Notes, bills, or other securities issued in aid of the war of the Rebellion are valid in the hands of a bona fide holder for value.—Hatch v. Burroughs, Case No. 6,203.

Collusion between the captors of a Spanish vessel and an American citizen, by which she was wrecked within the territory of the United States, and the cargo landed and duties regularly paid, is no bar to a recovery on bills of exchange given by the American citizen on purchase of the cargo.—Hopner v. Appleby, Case No. 6,699.

§ 91. —— Failure of consideration.

In Georgia, both total and partial failure of consideration is pleadable in defense to sealed notes or single bills.—Martin v. Bartow Iron Works, Case No. 9,157.

A partial failure of the consideration cannot be set up as a defense to the note given on a purchase.—Elminger v. Drew, Case No. 4,416.

Under the Oregon Code a partial failure of consideration is not a defense to an action upon a promissory note, but must be pleaded as a counterclaim.—Packwood v. Clark, Case No. 10,656.

The bankruptcy of a mutual insurance company is no defense to an action by the assignee of a note given for the premium on a policy of insurance.—Carey v. Nagle, Case No. 2,403.

Want of consideration in the making and indorsing of a note can be shown, against a remote party, only where he took with knowledge of such want between nearer parties.—Bank of British North America v. Ellis, Case No. 859.

The bona fide holder of a note given to a railroad company as subscription for stock may enforce it without regard to existing equities between the original parties.—Cooper v. Laber, Case No. 3,198.

The accommodation indorser of a renewal note given to a bank may show, in defense to a suit thereon by the bank, that the cashier promised, as consideration for his indorsement, that the bank would set off accruing claims for services rendered by the maker, so that he would not be held liable.—First Nat. Bank v. Cleaver, Case No. 4,800.

§ 92. —— Stolen instruments.

It is no defense to a bank note taken in the usual course of business that it was stolen from the rightful owner.—City Bank of Columbus v. Farmers' & Planters' Bank, Case No. 2,738.

§ 93. Set-off.

A joint and several note in the hands of an assignee may be set off in an action by one of the makers.—Pate v. Gray, Case No. 10,794a.

A maker of a promissory note, when sued by the indorsee, may set off the payee's note to him, which he held at the time he had notice of the assignment of his own note to plaintiff, though it was not then payable.—Tooker v. Thompson, Case No. 14,097.

In an action by the indorsee against the maker of a promissory note, the defendant may set off the payee's note to him, which he held before and at the time he had notice of the assignment of his own note to the plaintiff, although not then payable, but becoming payable before his own note.—Stewart v. Anderson, Case No. 13,421.

Defendant cannot set off plaintiff's acceptance of defendant's draft, not due at the commencement of the action, but due before plea pleaded; nor can it be allowed as payment on the general issue of non assumpsit.—Deale v. Krofft, Case No. 3,698.

Damages on bills of exchange, paid by the defendant, upon bills drawn by him on the plaintiff, and which the plaintiff was bound to pay, may be set off.—De Taslet v. Crousellat, Case No. 3,827.

One of two joint makers of a promissory note cannot set off against him a note given by the payee to him individually.—Cobb v. Haydock, Case No. 2,923.

§ 94. Parties—Plaintiffs.

Possession of a note payable to bearer is prima facie evidence of right, and the holder may sue in his own name.—Halsted v. Lyon, Case No. 5,968.

The payee of a promissory note, who has been obliged to take it up on his indorsement, may recover the amount from the maker, upon a special count.—Reintzel v. Morgan, Case No. 11,683.

The indorsee of a promissory note not payable to order, but expressed to be "negotiable at" a certain bank, may maintain an action against the maker in his own name.—Muir v. Jenkins, Case No. 9,903.

Under an indorsement in blank the holder of a bill for collection may bring suit in his own name.—Orr v. Lacy, Case No. 10,589.

The acceptor of a bill which came into his hands after it was put in circulation is presumed to be the owner, and he may recover thereon against the maker.—Hunter v. Kibbe, Case No. 6,907.

An indorsement for collection merely may be disregarded, and the suit be brought by the indorser.—Greenhough v. Keyworth, Case No. 18,299; Cassel v. Dows, Id. 2,502.

The last indorser, who takes up a draft when due, may cancel the names of the prior indorsers without impairing his title to recover against the acceptor.—Deale v. Krofft, Case No. 3,698.

Where an assigned note has been lost, suit thereon can be brought only in the name of the assignee.—Leavitt v. Cowles, Case No. 8,171.

A bank which discounts a note for a partner, who drew the same in the name of the firm, and forged the name of the payee, cannot sue under the assignment, but may sue in the name of the payee for its benefit.—York Bank v. Asbury, Case No. 18,142.

Where the drawer of a bill of exchange may sue in the name of the payees for his own benefit, his payment of the bill to the payee is no bar.—Davis v. McConnell, Case No. 3,640.

The drawer, having paid the bill to the payees after the acceptors refused to pay it, had a right to sue the acceptors.—Davis v. McConnell, Case No. 3,640.

A person cannot sue as an indorsee unless he be the owner of the note, or have some legal or equitable interest therein. A mere agent, to whom a note is indorsed by his principal for the benefit of the latter, cannot maintain such suit.—Thatcher v. Winslow, Case No. 13,863.

A person paying a note while lying in a bank under protest cannot maintain a suit thereon in the name of the bank.—Patriotic Bank v. Wilson, Case No. 10,810.

§ 95. —— Defendants.

The holder of a note need not proceed against the maker before suing the indorser, where the maker is insolvent.—Patton v. Violett, Case No. 10,839.

Where the maker is insolvent, the holder may primarily sue the indorser of a promissory note, although the maker at such time has personal property in his hands, more than enough to pay the debt.—Vowell v. Lyles, Case No. 17,021.

The payee of a note signed in a firm name may sue one partner alone thereon under Rev. St. N. C. c. 31, § 39.—Palyart v. Goulding, Case No. 10,701.

The bank of Alexandria may sue the indorser without first bringing suit against the maker.—Bank of Alexandria v. Wilson, Case No. 855.

A suit may be prosecuted against two of three joint indorsers found within the district under Act Feb. 25, 1839.—Cooper v. Gordon, Case No. 3,195.

Bills, delivered after the death of the drawer to a person who had made advances upon their faith to the drawer, who had them in his possession for the purpose of raising the money for the drawer, may be enforced against his representatives.—Perry v. Crammond, Case No. 11,005.

The maker of an order on a general fund, or his assignee after bankruptcy, where acceptance has been refused, is a necessary party to a suit in equity on such order.—Walker v. Seigel, Case No. 17,085.

§ 96. Declaration or complaint.

A single bill or promissory note may be declared on according to its legal effect.—Turner v. White, Case No. 14,264; Spaulding v. Evans, Id. 13,216; Drake v. Fisher, Id. 4,061.

An averment in a declaration that A., by B., made a certain bill or check, is sufficient.—Sherman v. Comstock, Case No. 12,764.

A declaration on a bill of exchange is sufficient where it avers that plaintiffs are the holders of a certain bill drawn by defendant's agent, and accepted by him, pursuant to an agreement between the parties; that the bill was drawn on a sufficient consideration; that it was duly accepted by defendant, and was protested for nonpayment.—Central Ohio R. R. v. Thompson, Case No. 2,550.

In an action on a note, interest need not be demanded in the declaration.—Chinn v. Hamilton, Case No. 2,685.

Demand at the place named need not be averred in an action against the party primarily liable. Readiness to pay is matter of defense.—Kendall v. Badger, Case No. 7,691; Smith v. Johnson, Id. 13,067; Thompson v. Cook, Id. 13,952.

In an action against the indorser, assignor or guarantor of a note, a demand on the maker when it became due must be alleged.—January v. Duncan, Case No. 7,217; Bank of United States v. Smith, Id. 935.

Where an action is brought against two, as the survivors of one, who executed a joint note, it is not essential to allege that the note had not been paid by the deceased.—Silver v. Henderson, Case No. 12,854.

An averment that a note sued on was assigned on the day or at the time of its execution is sufficient.—Silver v. Henderson, Case No. 12,854.

Where a note was indorsed by two persons, *held*, that an averment that it was indorsed by defendants by the names of A. and B. was sufficient without averring that they were partners, for they assumed a joint liability whether they were general partners or not.—Kendall v. Freeman, Case No. 7,692.

An indorsement to the cashier of a bank may be declared on as an indorsement to the bank.—Bank of United States v. Davis, Case No. 915.

A note payable to a certain person, "cashier, or order," may be declared on by the bank of which he was agent without an indorsement.—Bank of United States v. Lyman, Case No. 924.

Where a bill was accepted by one of a firm without the knowledge of the partners, nor in the course of business, recovery can be had thereon under a count stating it was drawn on "B. & Co.," and accepted by B. by writing the name of "B. & Co."—City Bank of Columbus v. Beach, Case No. 2,737.

An averment that defendant put his name on the back of a note with intent to give it a credit and to induce the plaintiff to accept the same, and that the note so indorsed was delivered to the plaintiff for a full and valuable consideration, is a sufficient averment of a consideration for the promise.—Offutt v. Hall, Cases Nos. 10,449, 10,450.

A judgment in an action on a bill of exchange will not be arrested because the declaration fails to allege a consideration if the instrument as declared on imports a consideration.—Kemble v. Lull, Case No. 7,683.

A count upon the indorsement of a promissory note, not payable to order, without averring a consideration for the indorsement, *held* bad.—Janney v. Geiger, Case No. 7,212.

A declaration on note indorsed by one as agent in his own name should show that the note was made payable to such person as agent.—Wilson v. Porter, Case No. 17,827.

A note may be surrendered and canceled, and a recovery had on the original consideration, if the declaration contains a count founded thereon.—Bank of United States v. Lyman, Case No. 924.

The assignee of a note assigned by a firm need not aver and prove the names of the persons who composed the firm.—Thompson v. Cook, Case No. 13,952.

§ 97. Plea or answer.

A plea that defendant, sued as a principal, indorsed the note as guarantor, and not as principal, *held* good on demurrer.—Dibble v. Duncan, Case No. 3,880.

A plea of failure of consideration, in defense to a note, should distinctly allege the actual consideration, and that there was never any other.—Grunninger v. Philpot, Case No. 5,852.

A plea setting up fraudulent representations in defense to a note should allege all necessary incidents of time and circumstance, and that the note was given in reliance thereon.—Grunninger v. Philpot, Case No. 5,852.

A plea, in an action on a note, that the payee received another note and mortgage to be applied to the note, to be good, must aver the receipt of proceeds, etc.—Homas v. McConnell, Case No. 6,656.

A plea in an action against the indorser that the maker of the note, at the date of the writ, had goods and chattels to a greater amount than due thereon, is no answer to an averment of insolvency.—Janney v. Geiger, Case No. 7,212.

A plea in an action on a bill of exchange alleged to have been given in payment of freight on property transported by plaintiff is insufficient where it alleges a failure of consideration

by reason of the careless and tortious manner of transporting the goods, whereby defendant suffered damages in excess of the amount of the bills, but does not allege any nonperformance or tort in reference to the shipment.—Central Ohio R. R. v. Thompson, Case No. 2,550.

A plea of duress by the maker of a note is bad, as against an indorsee, unless it avers notice of such duress by the latter.—McClintick v. Johnston, Case No. 8,700.

A plea to an action on a note, which avers that the goods for which it is given are valueless, is not good.—Christy v. Cummins, Case No. 2,708.

A plea that the bill of exchange, on which the action is founded, was not drawn and accepted at the place alleged, constitutes no bar, and is bad on demurrer.—Jones v. Heaton, Case No. 7,468.

§ 98. Amendment of pleadings.

A plea of nonassumpsit to an action against the acceptor of a bill of exchange may be amended by annexing the affidavit required by statute.—Loving v. Fairchild, Case No. 8,556.

In a suit on several promissory notes, *held* that an amendment was proper which added a count on another note embraced in the same transaction.—Tiernan v. Woodruff, Case No. 14,027.

§ 99. Issues and proof.

An unsubstantial variance between the note and the declaration, where the note is described in effect, will be disregarded.—Conant v. Wills, Case No. 3,087.

A note substantially different from that described in the declaration cannot be given in evidence upon a writ of inquiry.—Farmers' Bank of Alexandria v. Lloyd, Case No. 4,661.

The omission of the payee to show protest, or that it was not required, can only be taken advantage of by special demurrer.—Baker v. Gallagher, Case No. 768.

In an action on a note, where the plea is nonassumpsit, the defendant cannot show damages by a breach of the contract on which the note was given.—Cheongwo v. Jones, Case No. 2,638.

Where the declaration avers a protest for nonacceptance as well as for nonpayment, and the action is brought on the protest for nonpayment, the nonacceptance need not be proved.—Nicholson v. Patton, Case No. 10,250.

In an action upon a promissory note, proof of the partnership of the plaintiffs *held* not necessary, under the rule of court, where defendants failed to file an affidavit denying their signatures.—Pratt v. Willard, Case No. 11,378.

In an action upon protest for nonpayment, it is not necessary to show a protest for nonacceptance, nor to give notice of nonacceptance.—Cox v. Simms, Case No. 3,306.

In an action by the payee of a bill having two subsequent indorsements in full, plaintiff need not show a new assignment to himself.—Cox v. Simms, Case No. 3,306.

A plea that the note had been assigned should be supported by some proof that the right was in the assignee.—Conant v. Wills, Case No. 3,087.

The plea of nonassumpsit puts plaintiff to the proof of all material averments in his declaration, and where he relies on an indorsement he must prove it.—Stroud v. Harrington, Case No. 13,546a.

Under a general averment that due notice of nonpayment was given the indorser of a note or bill, all the facts may be given in evidence.—Dwight v. Wing, Case No. 4,219.

Under a statute providing that the writing on which the suit is founded is receivable without proof of execution, unless the execution is denied, plaintiff must prove an indorsement, where he relies upon the same, but the suit is not founded thereon.—Stroud v. Harrington, Case No. 13,546a.

In an action on a note, if an intermediate indorsement is averred, it must be proved, although the suit is brought for the use of such intermediate indorser.—Coyle v. Gozzler, Case No. 3,312.

Words of surplusage, not descriptive of the bill, but of the place where it is payable, *held* no variance.—Orr v. Lacy, Case No. 10,589.

A declaration on a note averred that it was presented to the bank "when due, to wit, July 23, 1841." *Held*, that the words "to wit," etc., were surplusage.—Hyslop v. Jones, Case No. 6,990.

A seal and the words "witness my hand and seal," on an inland bill of exchange, may be rejected as surplusage, and the bill be declared on in the usual form.—Irwin v. Brown, Case No. 7,080.

The right of action on a bill of exchange is complete by the nonacceptance, protest, and notice, and, where these facts are averred and proved, subsequent averments of presentment for payment, nonpayment, and notice thereof need not be proved.—Wallace v. Agry, Case No. 17,096.

The words "in the state of Ohio," in the description of a note, may be rejected as surplusage and need not be proved.—Drake v. Fisher, Case No. 4,061.

A note not payable to plaintiff or order, as charged in the declaration, is inadmissible.—Carrington v. Ford, Case No. 2,449.

An averment of an indorsement to "Hyer and Burdett, survivors of Bremner," *held* not supported by an indorsement to "Messrs. Hyers, Bremner, and Burdett."—Hyer v. Smith, Case No. 6,979.

A declaration alleging the drawing of a bill by Elisha B. is not supported by proof of a bill signed by Elijah B.—Craig v. Brown, Case No. 3,326.

A note payable "with interest" will not support a count upon a note payable without interest.—Blue v. Russell, Case No. 1,568.

A note payable in sixty days, "with interest from date," will not support a declaration upon a note payable in sixty days without interest.—Coyle v. Gozzler, Case No. 3,312.

A special custom to demand payment on the day after the last day of grace may be given in evidence without being averred in the declaration.—Coyle v. Gozzler, Case No. 3,312.

A note, stating on its face where it is payable, cannot be given in evidence on a count on a note omitting such description, but it is admissible on a count for money had and received.—Stone v. Lawrence, Case No. 13,484.

The declaration alleged an authority to draw, but not in writing, for 100,000 francs. The proof was a letter authorizing blank francs to be drawn for. *Held*, that this was no variance.—Rabaud v. D'Wolf, Case No. 11,519.

Omission, in copy of note filed, of indorsement, which is alleged in the declaration, is not fatal.—Adams v. White, Case No. 68.

In an action on a note made by three persons, parol evidence is not admissible to show that a note set out in the record of confiscation proceedings as made by two of such persons was the same note.—Vogler v. Spaugh, Case No. 16,988.

§ 100. Presumptions and burden of proof.

The holder must show the insolvency of the maker, to maintain suit against the indorser.—McIver v. Kennedy, Case No. 8,830.

Plaintiff must show, in an action against the indorser, that he instituted his suit against the maker in due time, and prosecuted it diligently to an ineffectual execution.—Mandeville v. Mackenzie, Case No. 9,014.

In an action against a bank on a promissory note taken for collection, the burden of proof rests with the bank to show that the notary made the proper demand on the maker of the note, either at his place of business or at his residence.—Ellsworth v. Gunton, Case No. 18,294.

The acceptance of a draft drawn on another "if in funds" is evidence of the possession of funds of the drawer.—Kemble v. Lull, Case No. 7,683.

An acknowledgment of indorsement of a draft drawn by defendant, which was not produced, *held* prima facie evidence of indorsement in a suit against the drawer.—Hyer v. Smith, Case No. 6,979.

Due diligence in making demand and giving notice cannot be inferred from the fact that the parties to a check resided in the same town, and that the drawer was insolvent.—McKinder v. Dunlap, Case No. 8,863.

Query, whether an indorsement of the negotiable paper must be proved to have been made before it became due.—Stuart v. Greenleaf, Case No. 13,555.

A note imports a consideration.—Cook v. Gray, Case No. 3,156a.

The words "value received" in negotiable paper are not necessary.—Benjamin v. Tillman, Case No. 1,304.

Indorsee not required to prove consideration of negotiable paper until it is shown to have been put in circulation by fraud or undue means.—Adams v. White, Case No. 68.

Proof by the maker of a promissory note that it was fraudulently obtained puts the burden on the indorsee to show that he paid a valuable consideration.—McClintick v. Cummins, Case No. 8,698.

A promissory note signed by one as agent of a corporation does not upon its face import a personal obligation. The burden of proof in such case is upon the holder.—Bradley v. McKee, Case No. 1,784.

The burden of proof that a promissory note was given or indorsed without consideration is upon the party alleging it.—Packwood v. Clark, Case No. 10,656.

The payee of a bill drawn by a public officer upon a general agent of the United States must show that value was given therefor, where a strong ground is made out to show a want of consideration.—United States v. Price, Case No. 16,090.

Possession by the original indorser of bills of exchange, bearing uncanceled indorsements to others, is prima facie evidence of ownership.—Picquet v. Curtis, Case No. 11,131.

The payees suing on a note indorsed to another have the burden of showing that it has been retransferred, or was indorsed for collection, or that they have repaid the money.—Veitch v. Basye, Case No. 16,909.

An assignment of a note must be proved, to entitle the assignee to judgment.—Clark v. Cropper, Case No. 2,817a.

The possessor of a negotiable instrument is prima facie a bona fide holder for value in the usual course of business, without notice of facts impugning its validity.—Bank of British North America v. Ellis, Case No. 859.

The holder of negotiable paper which is proved to have been put in circulation by fraud must show that he is a bona fide holder for a valuable consideration.—Cummings v. Mead, Case No. 3,476.

§ 101. Admissibility of evidence.

Where there is a subscribing witness to a promissory note, its execution must be proved by him.—Turner v. Green, Case No. 14,256.

A bill of exchange is evidence under the general counts as between the holder and the acceptor, or a remote indorser.—Frazer v. Carpenter, Case No. 5,069.

As between the parties to a note, parol evidence is admissible to show that there was no consideration, and defendant did not indorse the note to give it credit.—Corcoran v. Hodges, Case No. 3,228.

An agreement made on the indorsement in blank of a dishonored note, that the indorser should not be liable except on the maker's insolvency, may be shown by parol.—Taylor v. Schofield, Case No. 13,804.

In Pennsylvania the equity follows a promissory note into the hands of an indorsee, unless dated at Philadelphia, and made payable "without defalcation."—Commercial & Farmers' Bank v. Patterson, Case No. 3,056.

The words, "without defalcation," do not prevent the maker of a Pennsylvania note from showing fraud in the payee in obtaining the note.—Commercial & Farmers' Bank v. Patterson, Case No. 3,056.

In an action of an indorsee against the maker on a promissory note, declarations of payee before he parted with it are competent evidence for defendant.—Commercial & Farmers' Bank v. Patterson, Case No. 3,056.

The testimony of a notary that he demanded payment of a note on the third day of grace, and gave notice of nonpayment on the following day, is competent, although he cannot recollect the day of the month.—Bank of United States v. Abbott, Case No. 906.

Extracts from the notarial book of a deceased *held* admissible to prove demand of payment of a promissory note and notice to the indorser.—Whitney v. Huntt, Case No. 17,589.

In an action by the indorsee against the indorser of a void note, such note is inadmissible in evidence.—Root v. Wallace, Case No. 12,039.

In an action against an indorser of a promissory note, a record of a judgment upon the same note between other parties cannot be given in evidence unless the note itself be produced, and the defendant's indorsement proved.—Welsh v. Lindo, Case No. 17,408.

In an action against an accommodation acceptor by a transferee, where the defense is that the acceptance was procured by fraud, a receipt by the drawer expressing a consideration for the transfer is inadmissible to show that the indorsee paid value.—Platt v. Jerome, Case No. 11,217.

Where the plaintiff bank's notary was the indorser, declarations of his son and deputy as to the giving of notice are inadmissible.—Bank of Columbia v. Mackall, Case No. 873.

Memorandum in a notary's book of demand and notice, supported by testimony as to his practice in making demand and giving notice, is competent evidence.—Coyle v. Gozzler, Case No. 3,312.

Proof of execution of the notes in suit cannot be made by testimony of an admission of the authenticity of certain notes, and that the witness believes the notes in the suit and those admitted are the same.—Brown v. Piatt, Case No. 2,026.

§ 102. Weight and sufficiency of evidence.

In an action by the indorsee against the indorser, it is necessary to prove only the in-

dorsement, and not the execution of the note by the maker.—Kendall v. Freeman, Case No. 7,692.

In an action against the last indorser of a promissory note, it is not necessary to prove the prior indorsements.—Whittemore v. Herbert, Case No. 17,602.

In an action by the indorsee of a promissory note against the maker, plaintiff need not produce written evidence of the authority of the indorser's agent to indorse.—Miller v. Moore, Case No. 9,584.

In an action against the indorser of a foreign bill of exchange, for nonpayment, it is not necessary to produce a protest for nonacceptance.—Hodgson v. Turner, Case No. 6,570.

Evidence of the confession of the maker of a note that he owes part of it, *held* not sufficient on the money counts.—Turner v. Green, Case No. 14,256.

In an action by the indorser against the bankrupt drawer of a bill of exchange it is sufficient to account for its nonproduction that it was lodged with the commissioners in bankruptcy.—Palmer v. Blight, Case No. 10,684.

§ 103. Trial—Filling in or striking out indorsements.

The holder of a note, with a blank indorsement, may fill up the blank at the trial.—Bank of United States v. Roberts, Case No. 946; Dennison v. Larned, Id. 3,798; Vowell v. Lyles, Id. 17,021.

An indorser of a negotiable bill or note may fill in prior blank indorsements and strike out subsequent indorsements, and sue on it in his own name, and this may be done on the trial.—United States v. Barker, Case No. 14,517; Neederer v. Barber, Id. 10,079; Stettinius v. Myer, Id. 13,385.

The payee of a negotiable bill or note in possession, may strike out all indorsements and bring the action in his own name, and this may be done at the trial.—Conant v. Wills, Case No. 3,087; Neederer v. Barber, Id. 10,079; Oneale v. Beall, Id. 10,513; Cassel v. Dows, Id. 2,502; Leavitt v. Cowles, Id. 8,171.

Such indorsements may be stricken out after the note is offered in evidence.—Blue v. Russell, Case No. 1,568.

The holder of a note cannot fill in the blanks in an indorsement in blank by a third person, written over the name of the payee on the back of the note.—Cooke v. Weightman, Case No. 3,180.

An indorsement in full cannot be struck out at the time of trial, so as to enable the indorser to recover on the bill.—Craig v. Brown, Case No. 3,327.

Plaintiff, who is not an indorsee, has no right at the trial to strike out the words of a special indorsement.—Bank of United States v. Moore, Case No. 930.

Judgment will not be arrested because plaintiff's name being indorsed upon the bill in blank, was not struck out at the trial.—Vowell v. Alexander, Case No. 17,017.

§ 104. —— Province of court and jury.

Due diligence in giving notice of dishonor to an indorser is a question for the jury.—Ish v. Mills, Case No. 7,104.

Where the facts have been found by the jury, it is within the province of the court to determine whether due diligence has been used in giving notice of dishonor.—United States v. Barker, Case No. 14,519.

The question of the residence of the indorser, and whether the notice was sent to the nearest post office, will be left to the jury.—Whitney v. Huntt, Case No. 17,589.

§ 105. Judgment and costs.

The measure of damages in an action on a bill of exchange is its value, at the time of notice of protest, in gold or silver, and not in a depreciated or fluctuating currency.—United States v. Barker, Case No. 14,517.

The recovery on a note for a certain sum of money, to be paid in sugar, must be for the sum of money mentioned, though by the law of the place the note must be paid in sugar.—Courtois v. Carpentier, Case No. 3,286.

In an action by an indorsee against a maker, where the maker has no defense against the payee, he cannot claim the indorsee should recover only so much as is due the indorsee from the payee.—Chillicothe Branch of State Bank of Ohio v. Fox, Case No. 2,683.

An indorser is not entitled to recover of the drawer damages incurred by nonacceptance, unless he has paid them or is liable to pay them.—Kingston v. Wilson, Case No. 7,823.

In an action on a note, judgment may be given for interest from its maturity or in damages.—Archer v. Morehouse, Case No. 18,225.

On a promise to pay a bill of exchange when able, if plaintiff would give time, plaintiff is entitled to interest on the amount of the bill only from the time when defendant was able to pay, and not to damages.—Lonsdale v. Brown, Case No. 8,494.

Interest before judgment will not be allowed where, by the law of the place where the note was made, no interest is payable until judgment is obtained.—Courtois v. Carpentier, Case No. 3,286.

In New York the holder of a bill of exchange is entitled to recover at the rate of exchange at the time the notice of protest was given.—United States v. Barker, Case No. 14,517.

The rate of exchange is not exclusively regulated by the expense of transporting specie from one place to the other, but rather by the current rates for drafts in specie.—Balch v. Colman, Case No. 791.

On a promissory note given in New York payable at Detroit, with the current rate of exchange on New York, the rate of exchange may be recovered.—Grutacap v. Woulluise, Case No. 5,854.

The holders of a promissory note may recover the costs of protest against an indorser, where such protest is evidence of a demand.—Doughty v. Hildt, Case No. 4,027.

In an action on a promise to accept bills of exchange on faith of which money was advanced on such bills, plaintiffs may recover the whole damages, costs, and expenses paid by them, including re-exchange, with interest of the place where the money was payable by them.—Russell v. Wiggin, Case No. 12,165.

In an action on the case by payees and indorsers of a bill of exchange, to recover from the acceptor the amount of the accepted bill, plaintiffs cannot recover damages and costs paid by them in a suit against them by the indorsee of the bill, there being no money count in the declaration.—King v. Phillips, Case No. 7,802.

The difference of exchange cannot be recovered in an action on a promissory note, where there is no allegation in the declaration to cover the rate of exchange.—Weed v. Miller, Case No. 17,346.

A judgment against an accommodation indorser, who is considered as a surety, and, also, the drawer, merges the relation of principal and surety.—Findlay's Ex'rs v. Bank of United States, Case No. 4,791.

A judgment and execution against the drawer of a bill of exchange is no bar to a judgment against the indorser.—Hodgson v. Turner, Case No. 6,570.

The indorser of a note is liable for costs in an action against him, where the maker paid the note after suit brought.—Otts v. Jones, Case No. 10,619.

BLOCKADE.

See "War," §§ 26–29, 39.

BODY EXECUTION.

See "Execution," §§ 24–26.

BONA FIDE PURCHASERS.

From executor or administrator, see "Executors and Administrators," § 27.
Of bills and notes, see "Bills and Notes," §§ 50–58; "Usury," § 18.
Of bonds, in general, see "Bonds," § 14.
—— of municipality, see "Municipal Corporations," §§ 33, 34.
Of goods, see "Sales," §§ 34, 53.
Of negotiable instruments, see "Bills and Notes," §§ 50–58; "Usury," § 18.
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BONDS.

I. REQUISITES AND VALIDITY.

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§ 17, Right of action in general. § 18, Defenses. § 19, Parties. § 20, Pleading—Declaration. § 21, Plea or answer. § 22, Issues and proof. § 23, Evidence. § 24, Recovery.

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Of levee districts, see "Levees," § 1.
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Sureties on bonds, see "Principal and Sureties."

Bonds for performance of duties of trust or office.

See "Ambassadors and Consuls," § 4; "Executors and Administrators," §§ 5, 75–78; "Sheriffs and Constables," § 11; "United States Marshals," §§ 24–26.
Of army or navy officers, see "Army and Navy," § 11.
Of assignee in bankruptcy, see "Bankruptcy," § 180.
Of auctioneers, see "Auctions and Auctioneers," § 1.
Of bank officer, see "Banks and Banking," § 6.
Of customs officers, see "Customs Duties," § 26.
Of guardian, see "Guardian and Ward," § 11.
Of insurance agent, see "Insurance," § 5.
Of internal revenue officers, see "Internal Revenue," § 3.
Of pension officers, see "Pensions," § 3.
Of postmaster or deputies, see "Post Office," §§ 2, 4–8.
Of public officers in general, see "Officers," §§ 7–9.
Of United States officers in general, see "United States," § 13.
—— of District of Columbia, see "District of Columbia," § 3.

Bonds in legal proceedings.

See "Appeal and Error," §§ 13, 17, 41–46; "Attachments," §§ 6, 12, 17; "Bail"; "Costs," §§ 7–11; "Injunction," §§ 17, 26; "Ne Exeat," § 4; "Replevin," §§ 7, 14–17.
For appearance as witness, see "Witnesses," § 6.
For release of property seized, see "Admiralty," §§ 67–77; "Forfeiture," § 13; "Internal Revenue," § 81; "Shipping," § 254; "War," § 55.
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I. REQUISITES AND VALIDITY.

§ 1. What law governs.

The validity of a bond of security given to the United States, so far as it depends upon the capacity of the parties to make it, is to be governed by the law of the place where it is made.—United States v. Garlinghouse, Case No. 15,189.

See, also, post, § 9.

§ 2. Parties.

A bond voluntarily given to the United States as security is valid and binding, if the United States, in their political and corporate capacity, have a legal, pecuniary interest in the performance of its condition, although not expressly required or authorized by any act of congress.—United States v. Garlinghouse, Case No. 15,189; Same v. Howell, Id. 15,405; Same v. Humason, Id. 15,420.

A bond made payable to "the United States of America" is binding at common law.—Dixon v. United States, Case No. 3,934.

A bond to convey to a board not in esse certain lots for public purposes, on the establishment of a county seat, is valid and enforceable.—Sargeant v. State Bank of Indiana, Case No. 12,360.

The sureties of litigants in the federal courts need not be residents of the state in which the suit is pending.—Souter v. La Crosse R. R., Case No. 13,180.

§ 3. Execution in general.

A verbal condition on signing a bond that certain other signatures shall be obtained is not available in defense unless known to obligee.—American Button-Hole, Over-Seaming & Sewing Mach. Co. v. Murray, Case No. 292.

A bond under seal, perfect in all respects, *held* valid against the sureties, notwithstanding their testimony that they signed on condition that another signature should be obtained.—In re Mayo, Case No. 9,353.

It is no defense to a bond that it was executed on the agreement that it should be signed by another, and that such other was falsely personated, when defendant procured such personation.—United States v. Quantity of Distilled Spirits, Case No. 16,099.

A printed form of bond was signed by persons who had consented to become sureties. The blanks were subsequently filled out without express authority from them, and the same was subsequently accepted by the United States. *Held* not a valid bond, as to the sureties.—United States v. Nelson, Case No. 15,862.

§ 4. Signatures.

The fact that a prior signature was forged is not available in defense.—American Button-Hole, Over-Seaming & Sewing Mach. Co. v. Murray, Case No. 292.

A bond given by W. and G., composing a firm, and C. and M. as sureties, for payment by the firm of taxes as manufacturers of tobacco, is the bond of the signers individually, and not of the firm.—United States v. Lawrence, Case No. 15,574.

§ 5. Consideration.

A bond is good at common law if entered into for a valuable consideration, and if not repugnant to any statute or the general policy of the law.—Greathouse v. Dunlap, Case No. 5,742.

§ 6. Duress.

A bond obtained by falsely representing to the obligors that the obligee had a requisition to take them to another state, to answer a criminal charge, is void.—Bell v. Nimmo, Case No. 1,258.

§ 7. Illegality.

A bond is void which shows upon its face an illegal consideration.—Greathouse v. Dunlap, Case No. 5,742.

A bond to pay an annuity in equal shares to a daughter and her husband if they should become reunited, and live together, and, in case of their separation, a certain sum to the husband, *held* void as to the latter provision, as against public policy.—Fry v. Grigg, Case No. 5,139.

Executor's bond to surety to pay him half of his commission *held* valid, and enforceable before final settlement of estate.—Culbertson v. Stillinger, Case No. 3,463.

A subsequent agreement, not under seal, not to claim certain commissions, is no defense in an action at law on the bond.—Culbertson v. Stillinger, Case No. 3,463.

Proper deductions in such case.—Culbertson v. Stillinger, Case No. 3,463.

§ 8. Instruments defective as statutory bonds.

A statutory bond which contains more than the statute requires is not vitiated by the surplus matter if easily separated, but is vitiated by the omission of a material condition required by the statute.—Dixon v. United States, Case No. 3,934; United States v. ———, Id. 14,413; Same v. Brown, Id. 14,663; Same v. Mynderse, Id. 15,850a, 15,851.

A bond given under a statute is void so far as it exceeds the requirements thereof.—Armstrong v. United States, Case No. 549.

A statutory bond with penalties and conditions substantially different from those prescribed by the statute is so far void.—United States v. Howell, Case No. 15,405; Same v. Humason, Id. 15,420.

A statutory bond taken in a penalty greater than that prescribed by law is void, whether the statute prescribes a specific sum as a penalty, or a standard by which that penalty is to be measured so as to give a precise sum.—United States v. Gordon, Case No. 15,232.

Where the statute declares that the bond shall be in a prescribed form, and no other, any variance is fatal.—United States v. Brown, Case No. 14,663.

A retrospective condition in a statutory bond is void.—United States v. Brown, Case No. 14,663.

II. CONSTRUCTION AND OPERATION.

§ 9. What law governs.

A bond taken under an act of congress is not governed by the local law, but is, in contemplation of law, given at the seat of the federal government.—United States v. Stephenson's Ex'rs, Case No. 16,386.

See, also, ante, § 1.

§ 10. Reference to other instruments.

If the condition of a bond does not specify the purposes for which it is given, but refers to a paper which does specify them, this is equivalent to an enumeration of those purposes in the bond itself.—United States v. Maurice, Case No. 15,747.

The statement in a bond issued by a railroad company to raise money to construct its road that payment is guarantied by a contract of lease with another company is binding upon the latter, where the statement was made at its request.—Opdyke v. Pacific R. R., Case No. 10,546.

§ 11. Conditions.

In a bond conditioned that the parties will perform the decree of the court, "the court" means the court which shall ultimately decide the cause.—United States v. The Little Charles, Case No. 15,613.

Where, in a bond taken at common law, the condition is bad in part only, a recovery may be had on it for breach of the good part.—United States v. Brown, Case No. 14,663.

III. NEGOTIABILITY AND TRANSFER.

§ 12. Negotiability.

A bond issued by an individual, under seal, with coupons attached for semiannual interest, payable to bearer, and secured by a mortgage of real estate to trustees, is a negotiable instrument.—In re Leland, Case No. 8,229.

The coupons of coupon bonds payable to bearer are negotiable, though not by themselves negotiable in form.—McCoy v. Washington County, Case No. 8,731.

A recital in the bond that the interest is to be paid on presentation of the coupons annexed is equivalent to making the coupons payable to

bearer.—Rockmulh v. Pittsburgh, Case No. 11,982.

A township bond containing the statement that it is to be converted into a county bond, on certain contingencies, is not negotiable, and is open to defenses in the hands of any holder.—Merriwether v. Saline County, Case No. 9,485.

Bonds containing a provision that they were to be exchanged for other bonds when an injunction against the issue of the latter should be finally dissolved are not negotiable, and are subject to defenses in the hands of innocent holders.—Pepper v. Saline County, Case No. 10,972.

Railroad bonds payable in different sums, according as the place of payment might be fixed by indorsement of the president, and bearing an indorsement in which the place of payment was left blank, *held* not negotiable, and not valid in the hands of a bona fide holder for value, where they were stolen from the company.—Jackson v. Vicksburg, S. & T. R. Co., Case No. 7,150.

§ 13. Assignment.

To enable a person, by assignment of a bond, to vest a legal title in the assignee, it must appear that he has the right to make the assignment.—Clark v. Phillips, Case No. 2,831a.

§ 14. Bona fide purchasers.

Possession of uncanceled coupons, detached from negotiable bonds, is prima facie evidence of title, with all the rights of purchaser.—Duncan v. Mobile & O. R. Co., Case No. 4,138.

A creditor, receiving a negotiable bond from his debtor as security for a loan, without notice of his want of title, acquires a valid title to the same as against the true owner.—In re Norris, Case No. 10,303.

Fraud of the payee is no defense to negotiable bonds in the hands of innocent holders for value, before maturity.—Muscatine v. Mississippi & M. R. Co., Case No. 9,971.

A railroad mortgage coupon bond, payable to bearer, containing a condition "to make the scrip preferred stock attached to this bond full-paid stock" upon surrender of the bond, *held* valid in the hands of a bona fide purchaser for value, where it was stolen from the owner, and sold with the certificate detached.—Hotchkiss v. Tradesmen's Nat. Bank, Case No. 6,719.

The bona fide purchaser in the regular course of business, and for their market price, before maturity of municipal coupon bonds, transferable by delivery, which had been stolen, takes a good title except as to matured coupons.—Gilbough v. Norfolk & P. R. Co., Case No. 5,419.

Pledgees of bonds payable to bearer hypothecated to secure a debt are legal holders, and are entitled to demand payment of coupons which fall due before the maturity of the debt which the bonds were pledged to secure.—Warner v. Rising Fawn Iron Co., Case No. 17,188.

Coupons taken after they are due are subject to all the equities which properly attach to them in the hands of the previous holder.—Union Bank v. New Orleans, Case No. 14,351.

IV. PERFORMANCE OR BREACH OF CONDITION.

§ 15. Performance.

A bond given in 1869, payable in "dollars" generally, was payable in gold and silver only; but, after the passage of the legal tender acts, it could lawfully be discharged by legal tender notes.—Williamson v. Richardson, Case No. 17,754.

§ 16. Breach of condition.

It is not a breach of a condition of a bond given to the United States for moneys to be advanced that the officer to whom the bond was given has accepted, but has not paid, orders drawn upon him by the persons to whom, by the terms of the condition, the advances were to be made.—Parker v. United States, Case No. 10,750.

V. ACTIONS.

§ 17. Right of action in general.

Upon a bond conditioned to pay certain installments, an action may be brought upon failure to pay the first installment.—Nailor v. Kearney, Case No. 10,004.

An action will not lie, until the end of the term, for breach of a bond conditioned that defendant shall conduct a certain manufactory for a certain time, and keep an exact account, and deliver to plaintiff one-tenth of the product when demanded.—Cottle v. Payne, Case No. 3,268.

A recovery may be had upon a coupon payable at a particular place without presentation for payment at such place.—Smith v. Tallapoosa County, Case No. 13,113.

Where bonds contained a provision for semi-annual interest "on the presentation of the respective coupons hereto attached, both principal and interest payable at the principal office of said company in the City of New York," but neither the act authorizing the issue of the bonds nor the mortgage securing them, nor the coupons themselves say anything about the presentation of the coupons as a condition of payment, an action may be maintained upon the coupons without previous presentation for payment.—Warner v. Rising Fawn Iron Co., Case No. 17,188.

§ 18. Defenses.

The relief which defendant might have in a court of equity cannot affect the determination of an action at common law upon a bond.—Culbertson v. Stillinger, Case No. 3,463.

An obligor may set up any defense to a bond, as against the assignee, which he had against the obligee.—Bell v. Nimmo, Case No. 1,258.

To an action on a bond to pay the sum that shall be recovered in a certain action then pending between different parties, a defense other than fraud cannot be set up which might have been available in the first action.—Greathouse v. Dunlap, Case No. 5,742.

The defense that the bond is in restraint of liberty must be specially alleged.—Greathouse v. Dunlap, Case No. 5,742.

§ 19. Parties.

Where a suit on a bond is brought in the name of the obligee, it is not material to the obligor that he is not the person interested.—Waller v. Adams, Case No. 17,107.

In a suit against the obligor in a bond paid in Confederate currency to an executor during the Civil War, to cause him to deliver it up and pay it again, the executor is a necessary party.—Howland v. Kelly, Case No. 6,796.

On a joint and several bond, plaintiff may sue one or all of the obligors, but not an intermediate number.—Chandler v. Byrd, Case No. 2,591b.

An action in a federal court in New York may be maintained on a joint and several bond to the United States, against those of the obligors who are living, and against the administrators or executors of those who are dead.—United States v. Lawrence, Case No. 15,574.

Suit on a joint and several bond may be brought against the executors of a deceased obligor, together with the surviving obligors, without showing the insolvency of the survivors.—United States v. Tracy, Case No. 16,536.

§ 20. Pleading—Declaration.

In a declaration on a bond several breaches may be assigned in the same count.—United States v. Truesdell, Case No. 16,543.

The holder of coupons payable to bearer may sue thereon without producing or being interested in the bond from which they were cut.—Kennard v. Cass County, Case No. 7,697.

Coupons cut from coupon bonds may be declared on without in any way declaring on the bonds themselves.—McCoy v. Washington County, Case No. 8,731.

Coupons declared on should be identified in the declaration by the number of the bond, date, sum, and time of payment.—Kennard v. Cass County, Case No. 7,697.

The assignment of the breach of a condition by a direct negative of its words is good.—United States v. Spalding, Case No. 16,365.

Breaches of a penal bond must be assigned before judgment.—Robins v. Pope, Case No. 11,931a.

The breach of the conditions of a penal bond should be assigned with certainty and particularity, so as to show the injury.—Burnett v. Wylie, Case No. 2,172a.

Breaches may be assigned either in the declaration or replication, when performance is pleaded or suggested on the record.—Burnett v. Wylie, Case No. 2,172a.

Separate profert need not be made of the condition of the bond, where the declaration states the condition in assigning the breach.—United States v. Spalding, Case No. 16,365.

§ 21. —— Plea or answer.

A plea of non damnificatus is only pleadable to indemnifying bonds.—Maryland v. Todd, Case No. 9,220.

In Ohio, both want of consideration and fraud can be pleaded to a bond.—Greathouse v. Dunlap, Case No. 5,742.

The question whether nil debet is properly pleaded to a declaration on a penal bond assigning breaches can only be raised by demurrer.—United States v. Spencer, Case No. 16,368.

If a plea of performance be too narrow, or contain a flat negative pregnant, it is bad.—United States v. Sawyer, Case No. 16,227.

A plea seeking to avoid a bond for being illegally taken colore officii should specially state all the facts which show such irregularity.—United States v. Sawyer, Case No. 16,227.

A breach of the condition of a penal bond is not sufficiently traversed by a plea averring that the obligors have not violated the condition to the extent charged in the declaration.—United States v. Dair, Case No. 14,913.

A special plea of non est factum, averring that the supposed bond sued on is a mere escrow, is bad, unless it aver that the condition on which it was delivered has not been performed.—United States v. Dair, Case No. 14,913.

If defendant on oyer does not set out the whole of the bond, plaintiff may relieve himself by praying it to be enrolled.—United States v. Sawyer, Case No. 16,227.

§ 22. Issues and proof.

Matters which make a bond void may be given in evidence, under the general issue of non est factum; but matters in avoidance must be pleaded.—Greathouse v. Dunlap, Case No. 5,742.

§ 23. Evidence.

Evidence of the handwriting of the obligor and subscribing witnesses residing abroad is only prima facie proof on the issue of non est factum.—Davies v. Davies, Case No. 3,612.

Where a claim arising out of breach of a bond is a stale one, plaintiff will be held to strict proof of damages.—Cottle v. Payne, Case No. 3,268.

§ 24. Recovery.

The judgment on a bond cannot exceed the penalty thereof and interest from the breach, though the sum actually be larger.—United States v. Arnold, Case No. 14,469; Goldhawk v. Duane, Id. 5,511; Bank of Mount Pleasant v. Sprigg, Id. 891; Bank of United States v. Magill, Id. 929.

Interest is recoverable on a bond with penalty only from commencement of suit, where no demand or acknowledgment is made.—Bank of United States v. Magill, Case No. 929.

A judgment on a penal bond with conditions, if not rendered for the penalty, to be discharged by the payment of the damages assessed, will be reversed.—Campbell v. Pope, Case No. 2,365a.

In debt on a bond with collateral condition, nothing is recoverable but what the obligee is entitled to on a breach of the condition.—Massey v. Schott, Case No. 9,262.

Where an interlocutory judgment is entered on a bond with a collateral condition, the jury, if either party so require, must ascertain the damages, if they be uncertain.—United States v. White, Case No. 16,686.

BOOKS.

See "Literary Property."
As evidence, see "Evidence," §§ 45, 52.
Copies of as evidence, see "Evidence," § 49.
Mutilation, see "Bankruptcy," § 592.

BOOKS OF ACCOUNT.

Effect of failure to keep, see "Bankruptcy," §§ 604–609.

BOTTOMRY.

Bonds, see "Shipping," §§ 105–127.
Jurisdiction over claims for, see "Admiralty," § 17.

BOUNDARIES.

§ 1, Description—Material and permanent objects. § 2, —— Courses and distances. § 3, —— Quantity and designation of land. § 4, —— Waters and water courses. § 5, Evidence, ascertainment, and establishment.

Declarations as to boundaries, see "Evidence," §§ 40, 42.
Description of, see "Deeds," § 10.
Hearsay evidence, see "Evidence," § 42.
Of mining claims, see "Mines and Minerals," §§ 4, 5.

Geographical or political divisions.

See "Counties," § 1; "States," § 3; "United States," § 2.

§ 1. Description—Material and permanent objects.

In determining the limits of the tract from the map, regard is to be had to the natural objects there laid down as bounding the tract, rather than to the distance of such objects from other natural objects as shown by the scale.—United States v. Wilson, Case No. 16,734.

Where a grant solicited described the first line as a certain parallel of latitude, which was delineated on the diseño by reference to natural monuments, *held*, that these must control where they differed from the natural parallel.—United States v. Larkin, Case No. 15,562.

§ 2. —— Courses and distances.

Courses and distances are controlled by fixed monuments.—Cleaveland v. Smith, Case No. 2,874; Brown v. Huger, Id. 2,013; McPherson v. Foster, Id. 8,921; Simms v. Baker, Id. 12,868; Robinson v. Moore, Id. 11,960.

Where the original corners and lines are established, they must control courses and distances. But courses and distances called for must govern where there are no established objects to control them.—Nelson v. Hall, Case No. 10,107.

§ 3. —— Quantity and designation of land.

Where land is granted with reference to a map which clearly indicated the quantity, it will be assumed that the intention was to grant all the land included in the boundaries, though in a subsequent condition the quantity was erroneously stated.—United States v. Pacheco, Case No. 15,982.

Under a grant of "three square leagues, a little more or less, as the respective diseño explains," *held*, that three leagues were granted to be taken anywhere within the tract bounded by the ranchos named.—United States v. Carrillo, Case No. 14,736.

The words "a little more or less" *held* operative for such fractional parts of a league as may be in excess of the quantity named in the grant.—United States v. Fossat, Case No. 15,137.

Where a grant is of a certain quantity of land to be taken in the form of a square, and at the place delineated on the diseño, but no boundaries are named, the condition as to quantity and shape must control, as against any natural objects represented on the map.—Weber v. United States, Case No. 17,329.

§ 4. —— Waters and water courses.

The right of a proprietor, bounded by a navigable river, extends to high-water mark.—Bowman v. Wathen, Case No. 1,740.

A deed of land described as bounded by lines and marks on a river bank conveys the land only to high-water mark.—Dunlap v. Stetson, Case No. 4,164.

The owner takes the bank as it is, and may continue to be, by alluvion or decrease, by the flow of the river.—Dunlap v. Stetson, Case No. 4,164.

A boundary "on" the bank of a river, referring to fixed monuments of the bank, limits the grant to the bank, and excludes the flats below it.—Thomas v. Hatch, Case No. 13,899.

Where the land, according to a plan referred to in the deed, is bounded "on" a river, with no other specific boundaries, the flats will pass by operation of law.—Thomas v. Hatch, Case No. 13,899.

A boundary "on," "by," or "to," to a stream, includes the land at least to low-water mark.—Thomas v. Hatch, Case No. 13,899.

The purchaser of land bordering upon a nonnavigable stream or lake takes to the center of the stream or lake.—Bowman v. Wathen, Case No. 1,740; Forsyth v. Smale, Id. 4,950.

Where land is purchased bordering upon a nonnavigable stream or lake, and the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary, the grant includes any land between the meandered line and the water.—Forsyth v. Smale, Case No. 4,950.

The boundary to lands bordering on rivers and lakes is the meandered line established by the government surveyors.—Granger v. Swart, Case No. 5,685.

Where land was described as bounded on the side of a creek by a line meandering down its center to a station on the bank, and thence from station to station on the bank, *held*, that the creek constituted the boundary.—Quicksilver Min. Co. v. Hicks, Case No. 11,508.

The line of a creek *held* the proper boundary, though not corresponding to the straight lines, of courses and distances run along the general course of the creek.—Hills v. Homton, Case No. 6,508.

The word "point" in the description, "a straight line drawn to the beach, and from that point" another line, *held* not to mean a mathematical point, but to refer to the beach as one of the boundaries.—United States v. Soto, Case No. 16,357.

§ 5. Evidence, ascertainment, and establishment.

The mention in the act of possession of the length of a certain line as fixing its point of termination is not to be regarded as conclusive merely because at or near that distance from the starting point a marked tree is found which is not identified by any witness as the tree to which measurement was made.—United States v. White, Case No. 16,681.

A map which has governed in the sale of lots, and has been treated for many years by the proprietors and purchasers as the original map, is admissible to prove boundaries.—Harmer v. Morris, Case No. 6,076.

The remarks, however, made on the map by the proprietor, are not evidence.—Harmer v. Morris, Case No. 6,076.

The line of a fence erected by agreement of parties in settlement of a boundary dispute, where possession continued according thereto for 20 years, will conclude persons claiming under the original owners.—Wakefield v. Ross, Case No. 17,050.

The court is not restricted to the patent, but may refer to the original entry, survey, and plat.—Brown v. Huger, Case No. 2,013.

Ancient boundaries may be proved by reputation, known to the public, but not by hearsay as to a specific fact.—Ellicott v. Pearl, Case No. 4,386.

Public reputation, to prove boundaries, must be the reputation in the neighborhood, and not what particular persons said.—Nelson v. Hall, Case No. 10,107.

Reputation is not admissible to prove particular facts in a contest as to private rights, and proof that a stone monument was reputed to have been put down to designate a private grant is not admissible.—Winter v. United States, Case No. 17,895.

BOUNTIES.

See, also, "Pensions."

Bounty lands, see "Public Lands," §§ 10, 26, 27, 35.

§ 1. Fishing bounties.

Construction of Act 1813, c. 34, and Act 1819, c. 212, relating to bounty upon vessels employed in fisheries.—The Harriet, Case No. 6,099.

A vessel is "at sea," within the intent of such acts, when she is without the limits of any port or harbor on the sea coast.—The Harriet, Case No. 6,099.

Act July 29, 1813, c. 35, § 7, in relation to bounties, does not require any oath to the agreement referred to therein.—United States v. Nickerson, Case No. 15,878.

A vessel whose enrollment is not legally made is not entitled to claim the fishing bounty under Act July 29, 1813, § 5.—United States v. Bartlett, Case No. 14,532.

The entire contract between fishermen and skipper must be in writing, and such as is pro-

vided by law, to entitle the vessel to a bounty.—Crowell v. United States, Case No. 3,447; United States v. Atkins, Id. 14,474.

A payment of bounty without the production of a shipping paper is without authority, and may be recovered back.—Crowell v. United States, Case No. 3,447.

Fishing bounty improvidently paid to a vessel not entitled to it may be recovered back by the United States in an action for money had and received.—United States v. Bartlett, Case No. 14,532.

An almanac with underscored or dotted dates *held* inadmissible to prove the date of sailing and returning of a vessel engaged in fisheries.—The Harriet, Case No. 6,099.

The forfeiture provided by Act July 29, 1813, for fraudulently obtaining bounty, attaches only when there is actual fraud and deceit used in obtaining it.—The Harriet, Cases Nos. 6,099, 6,100.

A vessel is not subject to forfeiture under the act of July 29, 1813, on the improvident payment of a bounty, where not entitled to it, but only for the act of fraud and deceit in obtaining it, whether rightfully entitled to it or not.—The Swallow, Case No. 13,666.

BREACH.

Of charter parties, see "Shipping," §§ 65–69.
Of condition in bond, see "Bonds," §§ 16–24.
Of contracts, in general, see "Contracts," §§ 29–35.
—— of affreightment, see "Shipping," §§ 132–134.
—— of insurance, see "Insurance," §§ 44–95.
—— of sale, see "Sales," §§ 16, 19–28; "Vendor and Purchaser," §§ 10–13.
—— of shipment of seamen, see "Seamen," § 41.
Of covenants, see "Covenants," §§ 8–11; "Insurance," §§ 66–95.
Of warranty, see "Insurance," §§ 44–95; "Sales," §§ 35–38, 51.

BREACH OF MARRIAGE PROMISE.

§ 1, Pleading. § 2, Issues and proof.

§ 1. Pleading.

The proper plea to a count on a breach of promise of marriage is "non assumpsit," and not "not guilty"; and a plea of "not guilty" will be stricken out, on special demurrer, as bad.—Wilkinson v. Pomeroy, Case No. 17,675.

A plea of the general issue, in an action for breach of promise of marriage, may be treated as a nullity, under rule 26, if not accompanied by the affidavit and the certificate required by that rule.—Wilkinson v. Pomeroy, Case No. 17,674.

A special plea in such an action may be treated as a nullity, under rule 27, if not accompanied by the certificate required by that rule.—Wilkinson v. Pomeroy, Case No. 17,674.

In such an action, matter, in a plea, which attributes to the plaintiff habits, disposition, temper, and acts in such wise as would warrant an action for libel against whoever should publicly make such charges by printing or writing, is irrelevant, impertinent, and scandalous, and will be stricken out on motion.—Wilkinson v. Pomeroy, Case No. 17,674.

§ 2. Issues and proof.

In such an action, evidence of acts of misfeasance, immediately connected with the cause of action, or evidence showing an equitable defense arising out of the cause of action, if admissible at all, can be given in evidence in mitigation of damages under a plea of the general issue.—Wilkinson v. Pomeroy, Case No. 17,674.

Matter pleadable in bar in such an action, if intended to show that the plaintiff had no subsisting cause of action when the suit was commenced, can be given in evdience under the general issue.—Wilkinson v. Pomeroy, Case No. 17,674.

BREACH OF THE PEACE.

See, also, "Disturbance of Public Assemblage"; "Riot."

§ 1. Nature and elements of offense.

Driving a carriage so rapidly through city streets as to endanger the safety of the inhabitants is an indictable offense at common law, and amounts to a breach of the peace.—United States v. Hart, Case No. 15,316.

BRIBERY.

§ 1. Nature and elements of offense.

Quære, whether a person is subject to indictment in the federal courts for attempting to bribe a federal officer, in the absence of an act of congress defining such offense.—United States v. Worrall, Case No. 16,766.

The offense of attempting to bribe an officer is completed at the time when and at the place where the letter containing the corrupt offer is written and delivered at a post office in the district, though addressed to the officer, residing in another state.—United States v. Worrall, Case No. 16,766.

BRIDGES.

Authority over, see "Commerce," § 2.
In cities, see "Municipal Corporations," § 23.
Jurisdiction of action for injury to, see "Admiralty," § 31.
—— of obstruction by, see "Admiralty," § 1.
—— over, see "Courts," § 2.
Over navigable waters, see "Navigable Waters," §§ 6–9.

§ 1. Bridge companies.

A bridge company having an exclusive franchise to maintain a bridge may waive or abandon the same by its corporate act so as to bind its stockholders.—Milnor v. New Jersey R. Co., Case No. 9,620.

BROKERS.

See, also, "Factors"; "Principal and Agent."
Insurance brokers, see "Insurance," §§ 5, 6.
Taxation, see "Internal Revenue," § 31.

§ 1. Authority.

A broker whose principal writes him to charter a vessel has authority to make a binding verbal agreement to that end.—Quirk v. Clinton, Case No. 11,518.

BUILDING AND LOAN ASSOCIATIONS.

See, also, "Associations."

§ 1. Loans.

Loans made to their members by building and loan associations, conducted in accordance with the ordinary and well-known methods adopted by such societies, are not usurious.—Johnson v. Potomac Bldg. Ass'n, Case No. 7,406.

Such associations are partnerships, and loans made to their members are dealings with part-

nership funds, in which the borrower has the same interest before and after the loan as the other members.—Johnson v. Potomac Bldg. Ass'n, Case No. 7,406.

The contracts made with the borrowing members upon the well-known and usual terms of such contracts are not such as equity will relieve from, as unconscionable and oppressive.—Johnson v. Potomac Bldg. Ass'n, Case No. 7,406.

The loans by building associations under an arrangement whereby the members bid for the amount and pay a premium are not usurious.—Johnston v. Clarke, Case No. 18,303.

BURDEN OF PROOF.

In civil action, see "Evidence," § 15.
In criminal prosecutions, see "Chiminal Law," § 52.

BURGLARY.

§ 1, Offenses—Intent. § 2, —— Situation of premises.

§ 1. Offenses—Intent.

A slave, lodging in the house, who lifts the latch of his master's sleeping room in the nighttime, and enters with an axe in his hand, with intent to murder him, is guilty of burglary.—United States v. Bowen, Case No. 14,629.

§ 2. —— Situation of premises.

A storehouse not within the curtilage, but in which the owner's clerk usually sleeps, is the mansion house, so that burglary may be committed therein.—United States v. Johnson, Case No. 15,485.

BY-LAWS.

Of corporations, see "Corporations," § 15.
Of municipal corporation, see "Municipal Corporations," § 7.

C

CANALS.

Condemning land for, see "Eminent Domain," § 1.
Jurisdiction of admiralty, see "Admiralty," §§ 4, 30, 31.

§ 1. Establishment, construction, and maintenance.

Statutes relating to construction of canals construed according to their spirit, though seemingly contrary to their letter.—Baring v. Erdman, Case No. 981.

The Louisville and Portland Canal Company, incorporated by Kentucky in 1825, all the stock of which is owned by the United States, is still in existence, with the right to use and control the canal and its revenues for the purposes contemplated by the Kentucky statute and the joint resolution of congress of May 24, 1860.—United States v. Louisville & P. Canal Co., Case No. 15,633.

Act June 10, 1872, in relation to such canal, construed, so as not to impair the rights of the bondholders.—United States v. Louisville & P. Canal Co., Case No. 15,633.

The president and directors of the said canal company enjoined, at the suit of the United States, from interfering with the engineer, officers, and contractors prosecuting repairs and improvements thereon.—United States v. Louisville & P. Canal Co., Case No. 15,633.

The right to construct a dam by the Blackstone Canal Company, under a special act, determined.—Farnum v. Blackstone Canal Corp., Case No. 4,675.

The canal corporation may permit water to be drawn through its canal for mill purposes, where neither the public use nor any private right is thereby injured.—Lonsdale Co. v. Moies, Case No. 8,496.

The nation which constructs an artificial channel may annex such conditions to its use as it pleases.—The Avon, Case No. 680.

CANCELLATION OF INSTRUMENTS.

I. RIGHT OF ACTION AND DEFENSES.

§ 1, Grounds of cancellation. § 2, Defenses. § 3, Restoring consideration and placing parties in statu quo. § 4, Effect of cancellation.

II. PROCEEDINGS AND RELIEF.

§ 5, Jurisdiction. § 6, Limitations and laches. § 7, Parties. § 8, Pleading. § 9, Evidence. § 10, Judgment or decree.

See, also, "Quieting Title"; "Reformation of Instruments."
Cancellation of charter party, see "Shipping," § 45.
—— of entries of public lands, see "Public Lands," § 47.
—— of insurance policy, see "Insurance," §§ 39–43.
—— of stipulation in admiralty, see "Admiralty," § 77.
Rescission of contract, see "Contracts," §§ 27, 28; "Sales," §§ 11–18; "Vendor and Purchaser," §§ 5–9.
Setting aside fraudulent conveyance, see "Fraudulent Conveyances," §§ 28–35.

I. RIGHT OF ACTION AND DEFENSES.

§ 1. Grounds of cancellation.

A conveyance will not be set aside for inadequacy of consideration unless the consideration be grossly inadequate, and such as to clearly indicate the existence of unfair dealing, fraud, imposition, or oppression.—Jenkins v. Einstein, Case No. 7,265; Walker v. Derby, Id. 17,068.

Where inadequacy of price is so great that the mind revolts at it, slight additional circumstance of advantage or oppression will be sufficient to set aside the sale, though mere inadequacy of price is not alone sufficient.—Holmes v. Holmes, Case No. 6,638.

A court of equity will not direct a deed, void upon its face, to be surrendered and canceled. This should only be done where a deed is void for matters wholly extrinsic.—Elliott v. Peirsoll, Case No. 4,395.

Equity will direct the cancellation of a contract for fraud or mistake, but it cannot alter the contract.—Brooks v. Stolley, Case No. 1,962.

Material misrepresentation of facts, even though inadvertently made through the mutual mistake of the parties, or by the mistake of the grantors alone, is ground of rescission in equity.—Daniel v. Mitchell, Case No. 3,562; Doggett v. Emerson, Id. 3,960; Hough v. Richardson, Id. 6,722.

Even though the complaining party was of sound understanding, and had time to detect the falsehood.—McAlister v. Barry, Case No. 8,656.

Equity will not entertain a suit to cancel a policy of insurance, and enjoin the insured from bringing action thereon, on the ground of fraud in obtaining it, which may be set up in defense of an action at law.—Home Ins. Co. v. Stanchfield, Case No. 6,660.

A deed will not be rescinded for fraudulent misrepresentations by a stranger; but they may afford ground for relief on account of mistake. —Fisher v. Boody, Case No. 4,814.

Where a daughter, immediately before marriage, conveyed land to her father, upon his advice, in the belief that she would be benefited thereby, and would receive the title on his decease, but his will proved ineffectual to transfer it, *held*, that equity would direct a conveyance to her.—Slocum v. Marshall, Case No. 12,953.

A conveyance by a daughter, owner of the reversion, to her father, who had a life estate, as tenant by the curtesy, set aside for want of consideration, and on the ground of undue influence.—Pye v. Jenkins, Case No. 11,487.

Rule that transfers between persons occupying fiduciary relations will be carefully scrutinized applied.—Atwater v. Hadley, Case No. 639.

A conveyance made to his attorney by a party in embarrassed circumstances will not be set aside unless it be shown that he had been consulted in regard to the particular transaction, or that he was in a position to take an unfair advantage.—Jenkins v. Einstein, Case No. 7,265.

A mistake of facts going to the essence of a contract is a ground for cancellation.—Hammond v. Allen, Case No. 6,000.

Courts will not relieve a party from a contract or agreement entered into by mistake, where the mistake is one purely of law.—In re Dunham, Case No. 4,146.

A mistake as to the value of the consideration given for the conveyance of land is not a sufficient ground for setting aside the conveyance, where the vendor had means of avoiding the mistake by inquiry, and no fraud or falsehood was used to influence his judgment.—Warner v. Daniels, Case No. 17,181.

In the absence of fraud or unfair practices, equity will not relieve from a release given to a joint debtor under a misapprehension of its operation to discharge a co-debtor.—Joy v. Wurtz, Case No. 7,555.

An agreement, coupled with a power of attorney, giving a person a large contingent compensation on the collection of a claim against a foreign government, *held*, should be canceled for mutual mistake, where, unknown to both parties, the claim, a few days prior thereto, was allowed and liquidated by treaty stipulation.—Hammond v. Allen, Case No. 6,000.

A recovery cannot be had on the ground of a mistake as to the land purchased, where full opportunities were given for examination, and an examination was made, and no falsehood or fraud appears in any material representations, or act in relation to them.—Ferson v. Sanger, Case No. 4,752; Hough v. Richardson, Id. 6,722.

Deed declared void because procured by fraud practiced upon the grantor.—Copeland v. Burtis, Case No. 3,208.

A bond given for the price of property will be canceled where the vendor, in default of the payment, conveys the property to a third person.—Castor v. Mitchel, Case No. 2,507.

A suit will lie by the legal owner, out of possession, to annul a deed to which his name is forged.—Bunce v. Gallagher, Case No. 2,133.

§ 2. Defenses.

A covenant not to sue some of the persons liable for such fraud will not preclude the remedy in equity.—Tuthill v. Babcock, Case No. 14,275.

It is no objection to a rescission that another remedy or a guaranty may exist against the person principally benefited by the sale, after he has become insolvent, but not against the other parties; especially in case of fraud.—Smith v. Babcock, Case No. 13,009.

A contract will not be set aside upon charges of fraud and misrepresentations in procuring it, where a rescission would disturb many large and important transactions, except upon clear proof.—Morgan v. New Orleans, M. & T. R. Co., Case No. 9,804.

A bill in equity will not lie to rescind a sale of timber land, for misrepresentations as to quantity, where the vendees, after exploration of the land, have cut large quantities of timber therefrom.—Hough v. Richardson, Case No. 6,722.

Rescission of contract not allowed after the purchaser had taken timber from the land, and the foreclosure of a mortgage given by him.—Ferson v. Sanger, Case No. 4,752.

§ 3. Restoring consideration and placing parties in statu quo.

A party who desires to rescind a contract on the ground of fraud must offer to return the thing purchased, whether it be land or personal property.—Murphy v. McVicker, Case No. 9,951.

On the rescission of the sale of timber lands, the purchaser who had not realized from the sale of timber cut by him was required to file a bond to pay the amount as soon as collected. —Doggett v. Emerson, Case No. 3,962.

Where a conveyance is set aside for gross misrepresentations and deceit, interest is to be paid on the money refunded from the time it was received, without demand.—Doggett v. Emerson, Case No. 3,962.

§ 4. Effect of cancellation.

The cancellation of a bond does not per se destroy it when it is canceled through fraud or evident mistake, but it may be declared upon as a good and subsisting obligation.—United States v. Williams, Case No. 16,724.

II. PROCEEDINGS AND RELIEF.

§ 5. Jurisdiction.

A court of equity has jurisdiction of a suit by heirs to set aside a deed from their ancestor, as obtained by undue influence, or as being taken in trust for his maintenance, and, after his death, for the benefit of the heirs.—Harding v. Wheaton, Case No. 6,051.

A proceeding under the jurisprudence of Louisiana to cause the erasure of a mortgage is properly instituted in the court of the parish where the premises lie.—New Orleans Nat. Banking Ass'n v. Adams, Case No. 10,184.

§ 6. Limitations and laches.

Long acquiescence and lapse of time is a good ground against permitting a deed to be impeached as fraudulent.—Sullivan v. Sullivan, Case No. 13,598.

A delay of two years after completion of an alleged fraudulent sale of land, and of one year after discovery of the fraud, *held* no bar to a suit for rescission.—Smith v. Babcock, Case No. 13,009.

A bill to set aside a deed for duress dismissed where there was a delay of 12 years, and defendant had made valuable improvements.—Murphy v. Paynter, Case No. 9,952.

Six years' delay in bringing suit to set aside a sale for fraud, *held* sufficient to bar relief.—Johns v. Slack, Case No. 7,363.

The occupation of premises for nearly six years without complaint is a strong circumstance disproving a material mistake or proof of negligence in seeking relief.—Ferson v. Sanger, Case No. 4,752.

§ 7. Parties.

In a suit to rescind a sale of lands, one of the purchasers may be joined as plaintiff though he has since released his interest to the others.—Mason v. Crosby, Case No. 9,234.

In a suit to rescind a sale of lands, if all the parties to the conveyance are made respondents, it is no objection to a recovery on the merits that some who had an equity in the land are not joined.—Mason v. Crosby, Case No. 9,234.

§ 8. Pleading.

A bill to cancel an agreement is defective which does not bring the proper parties before the court, and alleges mistake, without fraud, as a ground for relief.—Carter v. Swift, Case No. 2,479.

A bill charging falsehood and fraud in a sale, and alleging exaggeration of the quantity of timber on the land, may contain enough to justify rescission for gross mistake in quantity, without setting up the latter as a specific and separate cause; but it is better to plead such cause independently.—Smith v. Babcock, Case No. 13,009.

Fraud must be clearly alleged and satisfactorily proved in order to set aside a deed therefor after 20 years.—Lenox v. Notrebe, Case No. 8,246c.

It is no objection to a bill filed to set aside an assignment of a mortgage given in payment of a debt, and to recover a debt, that it does not contain an offer to reassign the mortgage.—Pagan v. Sparks, Case No. 10,659.

A bill to rescind a deed, when filed after considerable lapse of time, must state sufficient reasons for the delay, where there has been a material change in the character or value of the property.—Fisher v. Boody, Case No. 4,814.

Lying by, and acquiescence, may be sufficient to induce the court to refuse to rescind a deed, though not pleaded as a bar.—Fisher v. Boody, Case No. 4,814.

§ 9. Evidence.

In a suit for rescission, the person most benefited by the sale is to be suspected of fraud, if a fraud were actually committed.—Smith v. Babcock, Case No. 13,009.

A party seeking to set aside a contract on the ground of misrepresentation and concealment has the burden of showing the same.—Teakle v. Bailey, Case No. 13,811.

§ 10. Judgment or decree.

A conveyance obtained by undue influence may be allowed to stand as security for actual advances and charges, and set aside as to all other purposes, on account of imposition.—Harding v. Wheaton, Case No. 6,051.

CAPIAS.

See "Criminal Law," § 39a.

CAPITAL.

Of banks, see "Banks and Banking," § 4.
Of corporations in general, see "Corporations," §§ 16–25.

CARGO.

See "Shipping."

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

§ 1, In general.

II. CARRIAGE OF GOODS.

§ 2, Bills of lading, shipping receipts, and special contracts—Construction and operation of bill of lading. § 3, —— Negotiability and transfer of bill of lading. § 4, —— Receipts for goods. § 5, —— Contracts for transportation of goods. § 6, Custody and control of goods. § 7, Transportation and delivery—Route. § 8, —— To whom delivery may be made. § 9, —— Place of delivery. § 10, —— Notice to consignee. § 11, —— What constitutes delivery. § 12, —— Failure or refusal of consignee to receive goods. § 13, —— Liability for failure to deliver. § 14, —— Liability for misdelivery. § 15, —— Actions for failure to deliver. § 16, Delay in transportation or delivery. § 17, Loss or injury to goods—Care required of carrier. § 18, —— Character and value of goods. § 19, —— Condition of goods. § 20, —— Defective packing. § 20a, —— Commencement of liability. § 21, —— Termination of liability. § 22, —— Act of God or vis major. § 23, —— Inherent defects in goods. § 24, —— Contributory negligence of owner. § 25, —— Actions for loss or injury. § 26, Carrier as warehouseman. § 27, Limitation of liability—Liabilities subject to limitation. § 28, —— Mode or form of limitation. § 29, —— Assent of consignor or owner. § 30, —— Operation and effect of limitation in general. § 31, —— Limitation of amount of liability. § 32, —— Limitation of liability as ground of defense. § 33, Connecting carriers—Duties and liabilities in general. § 34, —— Contracts for through transportation. § 35, —— Actions against connecting carriers. § 36, Charges and lien.

III. CARRIAGE OF LIVE STOCK.

§ 37, Duties and liabilities of carriers in general.

IV. CARRIAGE OF PASSENGERS.

§ 38, Relation between carrier and passenger. § 39, Fares, tickets, and special contracts. §§ 40, 41, Personal injuries—Care required of carrier in general. § 42, —— Acts or omissions of carriers' employés. § 43, —— Sufficiency and safety of means of transportation. § 44, —— Who liable for injuries. § 45, —— Management of conveyance. § 46, —— Actions for injuries. § 47, Contributory negligence of person injured. § 48, Ejection of passengers and intruders. § 49, Passengers' effects—What constitutes personal baggage. § 50, —— Loss or injury. § 51, —— Actions for loss. § 52, Sleeping cars.

Loss of cargo as damages in collision cases, see "Collision," §§ 143, 144.
—— of freight as damages in collision cases, see "Collision," § 145.
Right to maintain suit for damages, see "Admiralty," § 51.
Unlawful carrying of mail matter, see "Post Office," § 16.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

§ 1. In general.

No person is a common carrier who is not a carrier for hire, though the compensation need

not be a fixed sum. — Citizens' Bank v. Nantucket Steamboat Co., Case No. 2,730.

There is no difference in point of law between common carriers on land and common carriers by water.—King v. Shepherd, Case No. 7,804.

Owners of ships which are employed in transporting goods for hire are common carriers.—The Gold Hunter, Case No. 5,513.

Carriers by water on the Mississippi river are subject to the full liability of common carriers.—The Keokuk, Case No. 7,721.

Transportation of money for an express company, under a special contract, does not make a railroad company a common carrier thereof.—Kuter v. Michigan Cent. R. Co., Case No. 7,955.

A charter requiring a railroad company to transport "all merchandise and property" does not oblige it to become a common carrier of money.—Kuter v. Michigan Cent. R. Co., Case No. 7,955.

The transportation of passengers or of merchandise by common carriers does not necessarily imply that the owners are not common carriers of bank notes or specie.—Citizens' Bank v. Nantucket Steamboat Co., Case No. 2,730.

II. CARRIAGE OF GOODS.

See, also, post, §§ 37, 49–51.
Bills of lading of goods carried by water, see "Shipping," §§ 136–141.
Carriage of goods by vessels, see "Shipping," §§ 128–193.
Measure of damages for injury or loss of property shipped, see "Damages," § 10.
Ownership of goods shipped, see "Sales," § 31.

§ 2. Bills of lading, shipping receipts, and special contracts—Construction and operation of bill of lading.

The words "in good order and well-conditioned," in a bill of lading of bales of cotton, have reference only to external condition.—Bradstreet v. Heran, Case No. 1,792a.

A custom founded upon a constant departure from the terms of bills of lading used in the trade is not available to control a bill of lading.—Bazin v. Liverpool & P. S. S. Co., Case No. 1,152.

A bill of lading is conclusive to establish the articles shipped unless fraud or mistake is shown.—Backus v. The Marengo, Case No. 712.

The bill of lading is prima facie evidence that the goods were shipped in good condition.—Turner v. The Black Warrior, Case No. 14,253.

The statement "shipped in apparent good order and condition five cases of merchandise, value and contents unknown," has reference only to external condition.—The California, Case No. 2,314.

A bill of lading in the usual form is a mere receipt for goods, and a different contract may be shown by parol.—Knox v. The Ninetta, Case No. 7,912.

A bill of lading considered as a receipt may be controlled or contradicted by parol evidence.—Cafiero v. Welsh, Case No. 2,286.

A bill of lading is both a receipt and a contract. As a receipt, it may be explained by parol, but not as a contract.—Goodrich v. Norris, Case No. 5,545.

Parol evidence is admissible to show a mistake in the statement of the quantity of goods received.—Goodrich v. Norris, Case No. 5,545.

Parol evidence is admissible to explain or rectify statements in the bill respecting the condition of the goods at the time of loading, as between the original parties, but not as against consignees who have made advances upon the faith of such statements, irrespective of the amount.—Bradstreet v. Heran, Cases Nos. 1,792, 1,792a.

Where the owner successfully repudiates a bill of lading, he cannot at the same time, set it up as merging a prior contract.—The Edwin, Case No. 4,300.

The words "contents unknown" merely require the shipper to prove that the goods were actually laden on board, not that they were in good condition when shipped.—English v. Ocean Steam Nav. Co., Cases Nos. 4,490, 4,490a.

A bill of lading, consigning the cargo to a certain person, does not preclude the court from ascertaining the true ownership of the property by other evidence.—Two Hundred and Sixty Hogsheads of Molasses, Case No. 14,296.

§ 3. —— Negotiability and transfer of bill of lading.

Act Pa. Sept. 24, 1866, making bills of lading negotiable, does not enable a wrongful taker to pass a good title.—Bank v. Shaw, Case No. 843.

Purchasers of a bill of lading, who have reason to believe that the seller held it as security merely, acquire no better title.—Bank v. Shaw, Case No. 843.

The indorsement of a bill of lading, unless made for value, or as security, does not pass the right of property in the goods.—United States v. Delaware Ins. Co., Case No. 14,942.

The indorsement of a bill of lading transfers all the legal right in the property to the indorsee, as against a consignee who did not have prior possession.—Ryberg v. Snell, Cases Nos. 12,189, 12,190.

The delivery of a bill of lading amounts to a transfer of the property subject to the right of the seller if the consideration be not paid to reclaim the property before it comes into the actual possession of the purchaser. — Walter v. Ross, Case No. 17,122.

The assignment of a bill of lading passes the property in the goods, and advances subsequently made to the consignor on the transmission of the goods are not a lien on them.—Curry v. Roulstone, Case No. 3,497.

Transfer of a bill of lading, as a mere collateral to previous obligations, without anything advanced, given up, or lost on the part of the transferee, does not affect the right of stoppage in transitu.—Lesassier v. The Southwestern, Case No. 8,274.

One who acquires bill of lading from rightful holder, though through his negligence, can pass good title to innocent purchaser.—Bank v. Shaw, Case No. 843.

A bona fide holder of a draft drawn against goods shipped, with bill of lading attached, has a lien upon the goods in the hands of the consignee, to whom the consignor is indebted on general account.—Lee v. Bowen, Case No. 8,183.

The assignee of a bill of lading is unaffected by a usage between the consignor and carrier in reference to delivery, contrary to the terms of the contract, of which he has no notice.—Myrick v. Michigan Cent. R. Co., Case No. 10,001.

Although the bona fide holder of a bill of lading is entitled to the proceeds, the consignee has the right to deduct his commissions, and also the charges and insurance advanced by him.—Wolf v. Smythe, Case No. 17,928.

§ 4. —— Receipts for goods.

Shipping receipts *held* to constitute through contracts, by which the carrier was liable for the proper transportation of the articles beyond the line of its own road.—Myrick v. Michigan Cent. R. Co., Case No. 10,001.

The words in a receipt "received in good order" make a prima facie case, but may be ex-

plained or contradicted by the carrier.—Seller v. The Pacific, Case No. 12,644.

As between the original parties, the carrier may show that the property receipted for was not all received by it.—The J. W. Brown, Case No. 7,590.

§ 5. —— Contracts for transportation of goods.

A freight bill is a contract, and its effect cannot be varied by parol evidence.—Dixon v. Columbus & I. R. Co., Case No. 3,929.

A freight bill ending "Acc't Henry Dixon," and signed "W. T. Noell & Co., Agents," may be construed as made to Henry Dixon, he being in fact the consignee.—Dixon v. Columbus & I. R. Co., Case No. 3,929.

The carrier may, by contract with the shipper, secure to itself, in case of damage or loss for which it is liable, the benefit of any insurance to be effected by the shipper.—Phoenix Ins. Co. v. Erie & W. Transp. Co., Case No. 11,112.

§ 6. Custody and control of goods.

A carrier in possession may maintain a suit to recover damages to the goods transported, resulting from the wrongful act of a stranger.—Hovey v. The Sarah E. Brown, Case No. 6,744.

The liability of a carrier is not diminished by the absence of a bill of lading, and his right to recover for damage to cargo depends upon his possession as a carrier at the time of the accident.—The General McCullum, Case No. 5,318.

A carrier from whom negotiable notes have been stolen, who has paid their value to their owner, may recover the same from a person to whom the thief transferred them after maturity.—United States v. Vermilye, Case No. 16,618.

See, also, post, § 26.

§ 7. Transportation and delivery—Route.

See, also, post, §§ 16, 33-35.

Where goods were to be shipped by water, the mere transshipment by rail and deposit in warehouse, subject to charges, and without notice to the consignee, is not a conversion entitling him to recover the full value.—Howe v. The Lexington, Case No. 6,767a.

§ 8. —— To whom delivery may be made.

A person who obtained possession of a note by fraud changed its time of payment, and, impersonating the maker, sent it by express to the payee bank for discount, and received through the express company the proceeds, addressed to the maker. *Held*, that the express company was not liable to the bank.—Norwalk Bank v. Adams Exp. Co., Case No. 10,354.

§ 9. —— Place of delivery.

A usage to deliver goods consigned to a particular person, though in different parcels, at one place, will relieve the carrier from his responsibility as insurer, where he offers to make such delivery, but the consignee claims the right to require a delivery at different places.—The Richmond, Case No. 11,796.

Long-established, uniform, and well-known usage as to the mode of delivery will be considered as a part of the contract of the carrier.—The Richmond, Case No. 11,796.

§ 10. —— Notice to consignee.

Under a bill of lading silent as to the method of delivery, the carrier must at least give notice of the time and place of unlading, or the place of deposit.—Howe v. The Lexington, Case No. 6,767a.

A usage or custom, to excuse such notice, must be so clear and notorious as to afford a presumption that all parties acted with an understanding of its character and application.—Howe v. The Lexington, Case No. 6,767a.

§ 11. —— What constitutes delivery.

Delivery is completed when there is nothing left to be done to finish the transportation.—Hall v. Nashville & C. R. Co., Case No. 5,940.

§ 12. —— Failure or refusal of consignee to receive goods.

A carrier is justified in selling goods which the consignee refused to receive on their arriving damaged and in a perishable condition from causes for which he is not responsible.—The Bobolink, Case No. 1,588.

§ 13. —— Liability for failure to deliver.

The common-law rule of liability as to personal delivery is not applicable to steamers and railroads having a regular time of arrival and departure.—Binford v. The Virginia, Case No. 1,412.

A carrier, upon delivery of only a part of goods shipped under one complete contract, is only liable for the part not delivered, unless the consignee, within a reasonable time after discovering the defect, tenders the goods already delivered.—Conner v. The Sarah Sands, Case No. 3,115.

Where part of the goods delivered are destroyed by fire, the consignee should in like manner tender the part not destroyed.—Conner v. The Sarah Sands, Case No. 3,115.

The carrier is not liable to the shipper for a deficiency from the amount receipted for where it has delivered to the consignee all of the property received for shipment.—The J. W. Brown, Case No. 7,590.

The fact that the shipper gave an order to warehousemen for the cargo, and then settled with them on the faith of the bill of lading, does not change the rule.—The J. W. Brown, Case No. 7,590.

§ 14. —— Liability for misdelivery.

Common carriers are liable for a loss caused by a wrongful delivery of goods.—The Huntress, Case No. 6,914.

Where a misdelivery is caused by the failure of the owner to properly mark the goods, or to present them to the carrier or his servant, the carrier, if without fault, is not liable.—The Huntress, Case No. 6,914.

The carrier is responsible where he delivers the goods to the wrong person, though by mistake or imposition.—The Santee, Case No. 12,328.

Express company *held* not liable for delivery by the agent of a railroad company, who was also its agent, of goods shipped by freight, and consigned to the shipper, but marked upon the railroad receipt to be delivered to another, against whom a draft was drawn and sent to the agent by express, with the receipt, for collection.—Bland v. Southern Exp. Co., Case No. 1,526.

§ 15. —— Actions for failure to deliver.

The carrier cannot, of his own motion, set up title in a third person in defense to an action for nondelivery to the shipper or his consignee; but he may set up a delivery to the real owner, upon demand made or suit brought by him.—Rosenfield v. Express Co., Case No. 12,060.

The delivery by the carrier to the actual owner is a good defense to an action by the shipper, who had no title.—The Idaho, Cases Nos. 6,997, 6,998.

The burden of proof is on the shipper or owner to show nondelivery of the goods.—The Falcon, Case No. 4,617.

The shipper of grain, who takes no bill of lading, is bound, in an action for short delivery, to prove the amount delivered to the carrier.—Manning v. Hoover, Case No. 9,044.

Where the bill of lading of goods specifies that they are to be delivered to A. or B., in an action

for nondelivery it is not enough to show nondelivery to A.—The Falcon, Case No. 4,617.

In a suit against a carrier, by the shipper or consignee, for nondelivery, plaintiffs can only recover nominal damages, where they have received the goods or their value from a third person, to whom they were delivered.—Rosenfield v. Express Co., Case No. 12,060.

The damages for refusal by a carrier to deliver goods to the owner is the difference in market price at the time of the demand and at the actual delivery.—Schmidt v. The Pennsylvania, Case No. 12,464.

The measure of damages for nondelivery of goods is their current value at the port of destination at the time when the goods ought to have been delivered, with interest from that time.—The Gold Hunter, Case No. 5,513; Greenway v. The Griffin, Id. 5,789.

The measure of damages for the refusal to transport goods at an agreed price is the difference in value of the same at the ports of shipment and delivery, less the agreed freight, and other necessary charges of transportation.—Harvey v. Grand Trunk Ry. Co., Case No. 6,180.

The measure of damages for not transporting unmanufactured lumber intended for specific manufacture by the owner is the price that the same would bring at the place of delivery when so manufactured, less its cost, including transportation, with interest from the time of the refusal to so transport the lumber.—Harvey v. Grand Trunk Ry. Co., Case No. 6,181.

§ 16. Delay in transportation or delivery.

A carrier is obliged to deliver the property placed in his charge within a reasonable time, the determination of which depends upon the special circumstance.—Broadwell v. Butler, Case No. 1,910.

A carrier is liable for damages caused by the delay in delivering an unmarked case of goods, whose outer covering, properly marked, was removed while in its custody, where the consignee made repeated demands therefor.—Rowe v. The City of Dublin, Case No. 12,094.

A common carrier is liable for any interruption to the transit of goods caused by a strike of its employés, which occasions loss to the owners.—Sherman v. Pennsylvania R. Co., Case No. 12,769.

A carrier's undertaking to deliver goods within a specified time is excused only by act of God or the public enemy.—Broadwell v. Butler, Case No. 1,910.

The subsidence of water in the Ohio river, preventing a boat from passing up the falls, will not excuse failure to deliver within a reasonable time.—Broadwell v. Butler, Case No. 1,910.

But proof of a usage, long established, uniform and well known, to wait for a rise in the water, will excuse failure to deliver within a reasonable time.—Broadwell v. Butler, Case No. 1,910.

Method of ascertaining damages for delay in the arrival of goods shipped, where there was no market quotation on the day on which the goods should have arrived.—The Colon, Case No. 3,025.

Where the season for the sale of the goods has passed, a carrier responsible for the delay in delivering them is liable for damages occasioned thereby, and the diminution in value is properly chargeable as an item of damage.—Rowe v. The City of Dublin, Case No. 12,094.

§ 17. Loss or injury to goods—Care required of carrier.

See, also, post, §§ 27–35.

If the circumstances under which property is received relieved from the responsibility of common carriers, there is yet an implied contract for ordinary care.—Kuter v. Michigan Cent. R. Co., Case No. 7,955.

When the question of diligence arises at all, the carrier is bound, like other bailees for hire, warehouseman, or wharfingers, to the exercise of due diligence only.—Binford v. The Virginia, Case No. 1,412.

§ 18. —— Character and value of goods.

If coin is so packed as to deceive the carrier as to the contents of the package, he is not liable as a common carrier. But, if there is anything from which he might infer that the box contains money, he is bound to inquire in regard to it.—Kuter v. Michigan Cent. R. Co., Case No. 7,955.

The company is liable for the exercise of ordinary care only, where a package of money is delivered to it without any express or implied notice of its contents.—St. John v. Southern Exp. Co., Case No. 12,228.

A carrier is responsible for loss of jewelry when he makes no inquiry as to the contents of the package, and the shipper had no notice of a rule requiring such a disclosure.—Fellows v. The Crescent City, Case No. 4,721a.

A common carrier is not, under all circumstances, entitled to know the contents of packages tendered for carriage, and a mere failure to ascertain whether the package contains anything dangerous, there being no reasonable ground for suspicion, does not of itself constitute negligence.—Parrott v. Barney, Case No. 10,773.

§ 19. —— Condition of goods.

A bill of lading acknowledging receipt, in good order and condition, of casks containing bristles, covered with matting, "weight and contents unknown," is no admission as to the condition of the goods beyond that visible to the eye or apparent from handling.—The Columbo, Case No. 3,040.

In such case the burden is on the shipper to prove the contents, and their condition at the time of shipment.—The Columbo, Case No. 3,040.

Otherwise, where the external covering is damaged when delivered, so as to account for an injury to the contents.—The Columbo, Case No. 3,040.

§ 20. —— Defective packing.

A carrier receiving goods improperly packed is bound to stow them with reference to their condition.—The David and Caroline, Case No. 3,593.

It is not sufficient for the carrier to show merely that the packages were insufficient and that the defect was not discovered by him, but he must show that the loss actually resulted from such insufficiency and from no fault of his.—Zerega v. Poppe, Case No. 18,213.

Damage to ribbons from discoloring *held* caused by dampness when packed, where the various coverings were in perfect condition when delivered.—Ordt v. Ocean Steam Nav. Co., Case No. 10,551.

A recital in a bill of lading that the goods were received in good order may be contradicted by showing that the cask, case, etc., in which they were packed was insufficient, and the injury to the goods was caused thereby.—Zerega v. Poppe, Case No. 18,213.

The words "in good order and condition" extend only to apparent external condition, and the carrier may show that the package, etc., was secretly defective.—The Olbers, Case No. 10,477; The Oriflamme, Id. 10,571.

But such words are sufficient to throw the burden upon the carrier to show secret defects to relieve himself from liability.—The Oriflamme, Case No. 10,571.

Goods shipped under a bill of lading containing the clause "weight, contents, and value unknown," found to be injured, after delivery on the opening of the cases in which they were shipped, will be presumed to have been properly packed, in the absence of evidence to the contrary.—English v. Ocean Steam Nav. Co., Cases Nos. 4,490, 4,490a.

Shippers of merchandise, of large experience, in the absence of evidence to the contrary, are presumed to use the best method of packing the same for the particular kind of carriage.—The Moravian, Case No. 9,789.

§ 20a. —— Commencement of liability.

The carrier is liable for goods from the time they are shipped, although the bill of lading may be actually signed subsequent to the loss.—Snow v. Carruth, Case No. 13,144.

§ 21. —— Termination of liability.

A carrier's liability ceases when he has delivered the goods according to the bill of lading.—The Tybee, Case No. 14,304.

The liability as carrier continues after arrival of goods, notwithstanding restrictions in bill of lading, if the carrier fails to give notice of arrival.—Ayres v. Western R. Corp., Case No. 689.

A carrier stowing goods in his warehouse, without notifying the consignee of their arrival, remains liable as a carrier until the consignee learns the fact from some source; and, if the goods are injured before such notice, the carrier is liable, though the consignee afterwards refuses to take them.—The Mary Washington, Case No. 9,229.

The fact that a carrier is accustomed to store goods in his warehouse until the consignee learns from the consignor of their arrival does not excuse the carrier from himself notifying the consignee, where it is not shown that the consignor knew of the practice.—The Mary Washington, Case No. 9,229.

§ 22. —— Act of God or vis major.

The "act of God" which excuses the carrier from liability must be the immediate and distinct result of providential events, sudden or overwhelming in their character, which human sagacity could not foresee, or human force prevent.—Tompkins v. The Dutchess of Ulster, Case No. 14,087a.

The carrier is liable if he negligently expose property to capture by a public enemy, in consequence of which it is captured and destroyed.—Caldwell v. Southern Exp. Co., Case No. 2,303.

Where liquors in the hands of a carrier for transportation are seized, forfeited, and destroyed in conformity to the state law, the shipper cannot recover of the carrier.—Wells v. Maine S. S. Co., Case No. 17,401.

In the absence of a special contract, the carrier can only relieve himself from liability for injury to goods by proving that it was the result of some natural and inevitable necessity superior to all human agency or control, or of a force exerted by a public enemy.—The Zenobia, Case No. 18,209.

§ 23. —— Inherent defects in goods.

The carrier is liable for a want of proper care and skill in guarding against damages or deterioration arising from the nature of the goods or of the voyage.—The Invincible, Case No. 7,056.

A shipper of lard in the summer months takes the risk of damage occasioned by the excessively hot weather, unless some neglect or fault can be charged upon the carrier contributing to the loss.—Nelson v. Woodruff, Case No. 10,117.

§ 24. —— Contributory negligence of owner.

Carriers are not liable for damage to goods resulting from the act of the owner.—Choate v. Crowninshield, Case No. 2,691.

Where damages to goods are attributable partly to the fault of the carrier, and partly to the fault of the shipper, the loss will be equally divided, where it is impossible to ascertain for what proportion each is responsible.—Snow v. Carruth, Case No. 13,144.

§ 25. —— Actions for loss or injury.

The owner may recover for injury to goods in transportation, discovered after delivery to him, though he sells them before making a claim against the carrier, and without giving it opportunity to inspect them.—The Elmira Shepherd, Case No. 4,418.

The carrier's liability for damages is not affected by the conduct of the consignee in holding damaged goods.—The Compta, Case No. 3,070.

One who sells goods on credit cannot maintain an action against the carrier for their loss. In shipping, he acts as agent of the purchaser.—Blum v. The Caddo, Case No. 1,573.

The signing of a bill of lading, after damage to the cargo, will not increase the liability of the carrier.—The Edwin, Case No. 4,300.

Carrier has burden of showing how loss occurred.—The Bay State, Case No. 1,148; Bazin v. Liverpool & P. S. S. Co., Id. 1,152.

The recitals, "shipped in good order and condition"; "quality, condition, and contents unknown"; "not accountable for breakage,"—are only evidence of external condition, and the shipper must show that internal injuries were caused by the negligence of the carrier.—The Moravian, Case No. 9,789.

The burden of proving breach of duty by the carrier, whether it be alleged as a malfeasance or a nonfeasance, is upon the party alleging it.—Dixon v. Columbus & I. R. Co., Case No. 3,929.

The fact that cases of goods were in good order when received, and broken when delivered, casts the burden on the carrier to show how the injury occurred.—The Moravian, Case No. 9,789.

Where there are no exceptions in a bill of lading, the carrier has the burden of explaining the cause of injury to the goods, which were received in good order.—Nordlinger v. The Catherina, Case No. 10,295.

Where goods are lost after receipt by the carrier, and before delivery, presumption is that it was occasioned by the carrier's neglect.—Choate v. Crowninshield, Case No. 2,691.

A presumption of want of proper care or diligence does not arise from the fact of nondelivery.—Brown v. The Elvira Harbeck, Case No. 2,005.

An acknowledgment that the goods were shipped in good condition raises an inference that an injury subsequently discovered arose from a cause for which the carrier is responsible.—Dill v. The Colombo, Case No. 3,910a; English v. Ocean Steam Nav. Co., Id. 4,490, 4,490a.

Evidence showing that the injury would not have resulted in the common course of events, with proper care, in the absence of explanation, proves it to have been caused by negligence.—The Moravian, Case No. 9,789.

Damages recoverable for injuries to goods while in the hands of a carrier *held* to be the difference in market value between the sound and damaged goods at the place of delivery, together with the expenses of appraisers and wardens, called under the custom of the place

to ascertain the amount.—Pendall v. Rench, Case No. 10,917.

A carrier *held* personally liable for salvage on property loaded on its cars while being transported by another across a river on flatboats.—Seaman v. Erie Ry. Co., Case No. 12,582.

The measure of damages for the loss of property shipped is its net value at the point of destination, with interest, deducting freight.—Woodward v. Illinois Cent. R. Co., Cases Nos. 18,006, 18,007.

The value of goods at place of delivery, with interest from the day when they should have arrived, is the measure of damages for their loss. Anticipated business profits are not allowed.—Bazin v. Liverpool & P. S. S. Co., Case No. 1,152.

The measure of damages for an injury in transit is the difference between the market value if sound and the value in the unsound condition at the time when goods should have been delivered.—The Colonel Ledyard, Case No. 3,027; The Compta, Id. 3,070.

When the property carried was Confederate notes, in case of their loss by the negligence of the carrier their value at the close of the war when demand was made is the proper measure of damages, and interest should be allowed from that time.—Caldwell v. Southern Exp. Co., Case No. 2,303.

Consignees can recover of the carrier for loss or injury to goods shipped, estimated as at the place of delivery, to the extent of advances made.—Burritt v. Rench, Case No. 2,201.

§ 26. Carrier as warehouseman.

A carrier which keeps a warehouse for the storage of goods until called for by the consignee is liable only as a warehouseman for goods stored therein after the carriage is ended.—White v. Colorado Cent. R. Co., Case No. 17,543.

Where the consignee is not present to receive the goods as they are unloaded, pursuant to a notice, the carrier is thereafter liable as an ordinary bailee for hire.—Salmon Falls Mfg. Co. v. The Tangier, Case No. 12,267.

§ 27. Limitation of liability—Liabilities subject to limitation.

A common carrier may, by special contract, limit his common-law liability to that of an ordinary bailee for hire, but he cannot exempt himself from liability for misconduct or negligence.—York Mfg. Co. v. Illinois Cent. R. Co., Case No. 18,143; Earnest v. Express Co., Id. 4,248.

A common carrier may limit his liability by an express agreement so far as the common law makes him an insurer, but not for the negligence of himself or servants.—Seller v. The Pacific, Case No. 12,644.

A carrier cannot, by contract, relieve himself from responsibility for the negligence of his servants, because such a contract is unreasonable and contrary to public policy.—The Colon, Case No. 3,023.

§ 28. —— Mode or form of limitation.

The mere taking of a receipt by a drayman of the shipper containing the words "not accountable for contents" does not constitute an agreement to limit liability.—Seller v. The Pacific, Case No. 12,644.

The shipper is bound by a limitation of the carrier's liability, where it is plainly written in a printed blank used as a bill of lading, where he accepted the same without objection, though he neglected to read it.—Leitch v. Union R. Transp. Co., Case No. 8,224.

The carrier may limit his common-law responsibility by special contract with the shipper.—Leitch v. Union R. Transp. Co., Case No. 8,224.

A common carrier may by special contract limit his common-law liability in case of fire.—Van Schaack v. Northern Transp. Co., Case No. 16,876.

A notice stamped on the bill of lading, "Not responsible for rust, breakage," etc., and a statement by the receiving clerk to the same effect, do not make a specific contract limiting the carrier's liability.—Merriman v. The May Queen, Case No. 9,481.

Contracts limiting the common-law liability of the carrier are to be strictly construed in favor of the shipper.—Menzell v. Chicago & N. W. Ry. Co., Case No. 9,429.

A baggage-transfer company, by conditions printed upon receipts given for baggage checks, may limit its liability for certain goods, and in certain amounts, unless specially agreed otherwise.—Hopkins v. Westcott, Case No. 6,692.

Construction of the words "any article," in a clause limiting liability in a receipt given by a transfer company for a baggage check.—Hopkins v. Westcott, Case No. 6,692.

A person who delivers his baggage check to a transfer company for delivery to his house, and receives a receipt therefor, is chargeable with notice of a printed condition therein limiting the liability of the transfer company in case of loss.—Hopkins v. Westcott, Case No. 6,692.

A condition as to "privilege of reshipping," does not limit the carrier's responsibility.—Broadwell v. Butler, Case No. 1,910.

§ 29. —— Assent of consignor or owner.

A person employed to construct glass cases and superintend their shipment cannot bind the owner by a contract limiting the carrier's liability for loss from breakage.—Merriman v. The May Queen, Case No. 9,481.

The shipper is bound by a limitation of liability in case of fire contained in a bill of lading delivered to the agent or person bringing the goods or placed in a box from which the shippers were accustomed to obtain bills of lading for shipments from time to time made.—Van Schaack v. Northern Transp. Co., Case No. 16,876.

§ 30. —— Operation and effect of limitation in general.

An express company which has limited its responsibility to ordinary care is not liable for a loss caused by the negligence of a railroad which carried its freight.—Bank of Kentucky v. Adams Exp. Co., Case No. 889.

Under an exemption of loss by "fire or other casualty while in transit," *held*, that the company was not liable where the goods were burned in the cars by a mob who took possession while operations on the road were stopped during a strike of the employés.—Sherman v. Pennsylvania R. Co., Case No. 12,769.

The exception from fire liability inserted in a bill of lading does not excuse the carrier in all cases of destruction by fire. He is, notwithstanding, bound to use reasonable care and vigilance, such as an ordinarily prudent man would exercise over his own property.—Woodward v. Illinois Cent. R. Co., Cases Nos. 18,006, 18,007.

A contract releasing the carrier from damage from "leakage or decay, chafage or breakage, or from any other cause not the result of collision of trains," etc., *held* not to apply to loss by fire while the goods were stored in the carrier's warehouse.—Menzell v. Chicago & N. W. Ry. Co., Case No. 9,429.

Under a bill of lading excepting leakage, the carrier is not liable for a loss of wine by leakage caused by a latent defect in the cask.—The Olbers, Case No. 10,477.

The carrier is liable for loss of oil by leakage caused by the casks not being properly wet,

where the bill of lading stipulates for such wetting, notwithstanding a clause, "Not accountable for leakage."—Hunnewell v. Taber, Case No. 6,880.

Though liability for fire is excepted, the carrier is bound to do all that reasonable and prudent men could do to prevent the entire destruction of the property after it has caught fire.—Woodward v. Illinois Cent. R. Co., Cases Nos. 18,006, 18,007.

Though the damage was the result of a clause excepted against, the carrier is still liable if it could have been avoided by skill and diligence.—Turner v. The Black Warrior, Case No. 14,253.

§ 31. —— Limitation of amount of liability.

A notice that the express company will not be liable for more than $50 on unvalued packages will prevent a recovery of a greater sum by a shipper, who, with knowledge thereof, failed to disclose the value of a package to avoid paying a greater rate.—Earnest v. Express Co., Case No. 4,248.

§ 32. —— Limitation of liability as ground of defense.

Where the damage is shown to have been caused by an excepted peril, the burden is on the shipper to prove want of skill or diligence.—Turner v. The Black Warrior, Case No. 14,253.

Where plate glass is shipped under a bill of lading excepting liability for breakage, and the cases as delivered are found to contain broken glass, the burden is upon the shipper to prove negligence.—The Pereire, Case No. 10,979.

A printed clause, "not responsible for leakage," in a bill of lading for oil, changes the general rule that the acknowledgment of goods being received in good order casts the burden on the carrier of showing want of negligence.—The Invincible, Case No. 7,055.

§ 33. Connecting carriers—Duties and liabilities in general.

A railroad company receiving goods from a connecting road is liable to the owner for failure to deliver them.—Knowles v. Pittsburgh, Ft. W. & C. R. Co., Case No. 7,899.

Each member of a connecting line of carriers who receives goods for shipment under a through bill of lading is liable for damage, on whatever part of the line received.—Harp v. The Grand Era, Case No. 6,084.

A carrier receiving goods for transportation to a point beyond its terminus is not bound to account for a loss, where it has delivered at its own terminus to a proper person.—Dixon v. Columbus & I. R. Co., Case No. 3,929.

A shipper cannot hold a connecting line responsible except through the contract made by the original carrier with himself.—St. Louis Ins. Co. v. St. Louis, V. & T. H. R. Co., Case No. 12,238.

The connecting carrier is *held* to the obligations of a common carrier, subject to the lawful restrictions made by the contract with the original carrier.—St. Louis Ins. Co. v. St. Louis, V. & T. H. R. Co., Case No. 12,238.

A forwarding carrier who pays past freight charges, according to usage, may recover the amount from the consignee.—Monteith v. Kirkpatrick, Case No. 9,721.

Where such forwarding carrier has no connection with the previous carriers, it is not liable for damage to the goods while in its possession.—Monteith v. Kirkpatrick, Case No. 9,721.

§ 34. —— Contracts for through transportation.

A statement in the receipt that the company is to forward to the place nearest or most convenient to the destination only, for delivery to other parties, who shall complete the transportation, on which its liability is to cease, does not change its liability where it has arrangements for through transportation.—St. John v. Southern Exp. Co., Case No. 12,228.

A receipt by a carrier for transportation beyond its line, where the whole charge is paid in advance, makes out a prima facie case of a contract to deliver at the destination.—St. John v. Southern Exp. Co., Case No. 12,228.

§ 35. —— Actions against connecting carriers.

A carrier receiving goods from a connecting carrier under a through bill of lading may be sued primarily for goods lost by her.—Maxwell v. The Powell, Case No. 9,324.

The burden is upon plaintiff to show that a railroad company which received goods for transportation to a point beyond its terminus undertook to carry the whole distance by rail.—Dixon v. Columbus & I. R. Co., Case No. 3,929.

§ 36. Charges and lien.

A carrier, in the absence of special contract, may demand and recover a reasonable sum as freight for the transportation of merchandise, and no more.—Harvey v. Grand Trunk Ry. Co., Case No. 6,180.

Shipper bound to pay freight only on actual weight where freight is to be paid at a certain rate per pound, and printed bill of lading has written condition "contents and weight unknown."—The Andover, Case No. 366.

The carrier is not bound to part with the possession of the goods or to make actual delivery until freight is paid, though the goods must be first discharged from the vessel and an opportunity given to examine them.—One Thousand Two Hundred and Sixty-Five Vitrified Pipes, Case No. 10,536.

The consignee is liable for full freight where he demands and receives the property before it reaches its ultimate destination.—Violett v. Stettinius, Case No. 16,953.

Neither party can require of the other, as of right, that goods under one bill of lading shall be delivered in parcels, on the freight of such parcels being separately paid.—One Thousand Two Hundred and Sixty-Five Vitrified Pipes, Case No. 10,536.

The right to freight and the lien therefor is not affected by a contest between the consignee and another as to ownership of the cargo, as that a cargo of guano was tortiously taken from intervener's land.—Crapo v. The Arctic, Case No. 3,361.

Although there is no limit of rate charges in its charter, the company can only charge a reasonable rate, dependent upon the nature of the goods, etc.—Camblos v. Philadelphia & R. R. Co., No. 2,331.

A railroad company cannot make the same charge for a package made up of separate parcels of goods owned by different persons, but consigned to one person as the aggregate of the separate parcels.—Camblos v. Philadelphia & R. R. Co., Case No. 2,331.

The stipulation "only half freight to be paid for all barrels delivered in a broken state" covers all barrels broken when delivered, though some were broken when shipped.—Durkee v. Workman, Cases Nos. 4,194, 4,195.

Under a bill of lading for a certain quantity of coal deliverable to M. or his assigns, "he or they paying freight for the same at" so much per ton, no freight is due until all the coal is

delivered.—One Hundred and Seventy-Five Tons of Coal, Case No. 10,522.

A shipper whom the receiver of a railroad company had charged more than the statutory rate of freight allowed to sue the receiver in the federal court for the excess.—In re McElrath, Case No. 8,780.

Evidence of charges for freight two years previous to the charges in controversy, for like freight, *held* competent upon the question of their reasonableness.—Harvey v. Grand Trunk Ry. Co., Case No. 6,180.

Damage to goods may be set up in defense to suit for freight.—Bearse v. Ropes, Case No. 1,192.

The question of the reasonableness of a freight charge is for the jury.—Camblos v. Philadelphia & R. R. Co., Case No. 2,331.

Cargo is not devested of a lien for freight by merely being discharged into a warehouse, and placed with the consignee.—Crapo v. The Arctic, Case No. 3,361.

A contract to settle for freight on coal on the 10th of the succeeding month by giving a note at 60 days is a waiver of the carrier's lien, and the contract cannot be rescinded, and a lien asserted, before the note is dishonored.—Sicard v. Buffalo, N. Y. & P. Ry. Co., Case No. 12,831.

A carrier may deliver part of a shipment without impairing his right to hold the residue for freight on the whole consignment.—Sears v. Four Thousand Eight Hundred and Eighty-Five Bags of Linseed, Case No. 12,589.

III. CARRIAGE OF LIVE STOCK.

§ 37. Duties and liabilities of carriers in general.

Carriers of live stock must provide accommodations whereby the stock can be safely and properly kept and cared for until a delivery can be made to the consignee according to the terms of the shipment.—Myrick v. Michigan Cent. R. Co., Case No. 10,001.

In the case of a horse, in apparent good condition when shipped, delivered in a dying condition but without any fractures or external or visible injury, the shipper must show some negligence of the carrier, to charge him with liability.—Hussey v. The Saragossa, Case No. 6,949.

IV. CARRIAGE OF PASSENGERS.

Carriage of passengers by vessels, see "Shipping," §§ 194–207.
Discrimination against passengers by reason of race, color, or condition, see "Civil Rights," § 2.

§ 38. Relation between carrier and passenger.

The proprietors of steamboats engaged regularly in carrying passengers between certain points are common carriers, and are bound to receive all persons on board to whose character and conduct there is no reasonable objection.—Jencks v. Coleman, Case No. 7,258.

§ 39. Fares, tickets, and special contracts.

The placing of a ticket on the counter of a ticket office, after the purchaser has laid down his money and gone away, is not a delivery.—Quigley v. Central Pac. R. Co., Case No. 11,510.

A check given by a railroad conductor for "one continuous passage" to a certain point on taking up a ticket which, by its terms, was not transferable, is also not transferable.—Cody v. Central Pac. R. Co., Case No. 2,940.

A passenger traveling on a railroad ticket at a reduced rate, entitling him to a continuous trip between two points, has no right to stop over at an intermediate station.—Pierce v. Pennsylvania Co., Case No. 11,146.

Printed conditions of a ticket inconsistent with a valid oral contract of carriage are not conclusive against the passenger.—Morrison v. The John L. Stephens, Case No. 9,847.

The federal court declined to order its receiver to disregard a state statute fixing maximum rates for freight and passengers on all the roads within the state.—In re McElrath, Case No. 8,780.

§§ 40, 41. Personal injuries — Care required of carrier in general.

Common carriers of passengers are bound to use extraordinary care and diligence, and are excused only by reason of force or pure accident.—The Oriflamme, Case No. 10,572.

The slightest negligence will render the carrier liable for injury to a passenger if, by the exercise of the strictest care or precaution reasonably within its power, the injury would not have been sustained.—Seymour v. Chicago, B. & Q. Ry. Co., Case No. 12,685.

A stage proprietor is not responsible for casualties which could not be foreseen nor guarded against.—McKinney v. Neil, Case No. 8,865.

A railroad company carrying passengers on freight trains is under the same obligation to carry them safely as if they were on regular passenger trains.—Hazard v. Chicago, B. & Q. R. Co., Case No. 6,275.

§ 42. —— Acts or omissions of carriers' employés.

The proprietor of a steamboat is liable for personal injuries maliciously inflicted upon a passenger by its clerk while collecting fares, arising out of a dispute in regard to payment, irrespective of the merits of such dispute, though the act of the clerk was not authorized by such proprietor.—Pendleton v. Kinsley, Case No. 10,922.

The failure of the stage driver to act with skill and prudence will render the proprietor liable, though the accident was caused by the recklessness of the driver of a rival stage line.—Peck v. Neil, Case No. 10,892.

Stage owners are bound to the greatest care; and the least neglect or want of skill by the driver makes them liable for injuries to a passenger.—Maury v. Talmadge, Case No. 9,315.

It is the duty of a stage driver to caution the passengers when about to pass over a dangerous bridge, or piece of road.—Maury v. Talmadge, Case No. 9,315.

Proprietor of stagecoach is liable for injury to passenger due to intoxication of driver, though his reputation previously was of the highest character.—Bishop v. Stockton, Case No. 1,440.

§ 43. —— Sufficiency and safety of means of transportation.

A stage proprietor is bound to furnish proper coaches, horses, and harness, and a skillful and careful driver, and he is liable for the smallest degree of negligence in this particular.—McKinney v. Neil, Case No. 8,865.

A railroad company is bound to construct platforms for the safety rather than the convenience, of its passengers, and is bound to the highest degree of care and skill in such construction.—Harkey v. Texas & P. Ry. Co., Case No. 6,065.

§ 44. —— Who liable for injuries.

A railroad company allowing trains of another to run over its track is responsible, as to its own passengers, in the same manner as if all the trains belonged to itself.—Barron v. Illinois Cent. R. Co., Case No. 1,053.

§ 45. —— Management of conveyance.

Owners of a freight train are liable for carelessness in loading causing injury to a passenger on another train.—Curtis v. Central Ry., Case No. 3,501.

§ 46. —— Actions for injuries.

In the case of injury to a passenger by the carelessness of a stage driver, he may waive the tort and sue in assumpsit.—Saltonstall v. Stockton, Case No. 12,271.

In the case of injuries by a collision to a passenger on a railroad, the burden is on the carrier to show that the accident was not caused by fault of its servants.—Goble v. Delaware, L. & W. R. Co., Case No. 5,488a.

Proof of the upsetting of defendant's stage-coach, and injury to the passengers, casts the burden on defendant of showing that he exercised proper skill and care.—Saltonstall v. Stockton, Case No. 12,271.

Where the accident is imputed to the misconduct of the driver, defendant must show that the driver possessed and exercised that degree of skill which competent drivers usually possess, and ought to possess to convey passengers with safety and comfort.—Saltonstall v. Stockton, Case No. 12,271.

A contract by passengers with an agent of a stage line, limiting the number of passengers for the trip, is not admissible in an action for damages by a passenger not a party to it, who entered the coach on the way.—Maury v. Talmadge, Case No. 9,315.

In such case, defendant may prove a general custom as to number of passengers carried, but not the practice of its own line.—Maury v. Talmadge, Case No. 9,315.

The upsetting of a stage is prima facie evidence of negligence in the proprietor, and the passenger need not show more.—McKinney v. Neil, Case No. 8,865.

Exemplary damages will be given where an injury is caused by great recklessness of the carrier's servants.—Peck v. Neil, Cases Nos. 10,892, 10,893.

§ 47. Contributory negligence of person injured.

It is not contributory negligence for a passenger to ride in the smoking car next to the locomotive.—Goble v. Delaware, L. & W. R. Co., Case No. 5,488a.

A passenger not rightfully in a certain position cannot complain of the absence of the proper safeguards.—Hazard v. Chicago, B. & Q. R. Co., Case No. 6,275.

A passenger cannot recover for injuries in an accident caused by the negligence of the carrier's servants, if he was in a position where a prudent man would not have been.—Hazard v. Chicago, B. & Q. R. Co., Case No. 6,275.

The carrier is not liable if the passenger proceeds where there is apparent risk of danger, even though guilty of negligence.—Seymour v. Chicago, B. & Q. Ry. Co., Case No. 12,685.

Where a passenger is placed in imminent danger by the negligence of the carrier's servants, and makes an error in judgment in attempting to save himself, the carrier is, nevertheless, liable.—Saltonstall v. Stockton, Case No. 12,271.

§ 48. Ejection of passengers and intruders.

A carrier may grant exclusive privilege for transaction of business on its vehicles, and eject a person transacting business without its consent.—Barney v. The D. R. Martin, Case No. 1,030.

The proprietors of a steamboat may exclude therefrom one who takes passage for the purpose of soliciting passengers for a connecting line running in opposition to a line with which the steamboat proprietors have a contract to carry passengers through to a distant point.—Jencks v. Coleman, Case No. 7,258.

Common carriers may inquire into the habits and motives of persons offering themselves as passengers, and exclude all persons of bad character or habits, or those whose objects are to interfere with their interests, or to disturb their line of patronage, or who refuse to obey reasonable regulations.—Jencks v. Coleman, Case No. 7,258.

Gamblers and monte men, whose purpose in traveling upon a train is to ply their vocation, may be excluded.—Thurston v. Union Pac. R. Co., Case No. 14,019.

In an action for wrongful expulsion from a train, plaintiff is entitled to recover damages for loss of time, expenses while delayed, cost of another ticket, and compensation for the indignity put upon him.—Quigley v. Central Pac. R. Co., Case No. 11,510.

A verdict of $1,052 for wrongful expulsion from a train, *held* should be set aside, unless plaintiff should elect to reduce his judgment to $152.—Quigley v. Central Pac. R. Co., Case No. 11,510.

§ 49. Passengers' effects—What constitutes personal baggage.

Valuable laces *held* reasonable apparel and baggage, reference being had to the social position and wealth of the plaintiff, the state of her health, and the object of her journey to this country from abroad.—Fraloff v. New York Cent. & H. R. R. Co., Cases, Nos. 5,025, 5,026.

A gold watch and chain, gold ornaments for presents, and American coin are not baggage.—The Ionic, Case No. 7,059.

A gold watch and gold spectacles *held* necessary to the traveler's personal convenience.—Walsh v. The H. M. Wright, Case No. 17,115.

Articles which it is usual for persons to carry with them from necessity or convenience or amusement, and also money not exceeding a reasonable amount, fall within the term "baggage."—Walsh v. The H. M. Wright, Case No. 17,115.

Manuscript books, the property of a student, and necessary to the prosecution of his studies, are to be regarded as baggage.—Hopkins v. Westcott, Case No. 6,692.

The carrier is not liable for baggage in excess of that usually carried by passengers of like station, pursuing like journeys.—Fraloff v. New York Cent. & H. R. R. Co., Case No. 5,026.

§ 50. —— Loss or injury.

Where the passenger informed the carrier that his trunk contained nothing but clothing, whereas it contained a large amount of coin and gold ornaments, *held*, that the carrier was not liable for any of the contents, where it was lost.—The Ionic, Case No. 7,059.

A steamboat is not liable for the loss of jewelry usually worn by a passenger as a part of her apparel, but left in her stateroom, in a handbag, with other articles of personal use, and stolen while she was at supper.—The R. E. Lee, Case No. 11,690.

The carrier is not liable for the loss of personal baggage gratuitously carried, unaccompanied by the owner, in the absence of proof of actual negligence or misconduct.—Brown v. The Elvira Harbeck, Case No. 2,005.

Whether the baggage accompanies the passenger or not, the carrier is responsible for its safe delivery.—The Elvira Harbeck, Case No. 4,424.

Where personal baggage, not arriving in time to be carried with the passenger, is put on board a later vessel, and a bill of lading given therefor, the vessel is liable as on the ordinary shipment of goods on freight.—The Elvira Harbeck, Case No. 4,424.

A passenger who, by concealment, attempts to get valuable articles carried without paying the extra rates charged therefor, cannot recov-

er in case of loss.—Hellman v. Holladay, Case No. 6,340.

If the carrier, with knowledge of the fact, carries such article as extra baggage, on paying the usual charges therefor, it is liable for a loss.—Hellman v. Holladay, Case No. 6,340.

Liable for loss of coin in a trunk with wearing apparel, though it had no notice, where the passenger pays for excess baggage.—Baldraff v. Camden & A. R. R., Case No. 794.

§ 51. —— Actions for loss.

An action for the loss of baggage of a married woman containing her personal effects is properly brought in her name.—The State of New York, Case No. 13,328.

The question whether a passenger has carried an excess of baggage, considering his position in life, and the journey, is one of fact for the jury.—Fraloff v. New York Cent. & H. R. R. Co., Case No. 5,026.

§ 52. Sleeping cars.

A sleeping-car company is neither liable as a common carrier nor as an innkeeper.—Blum v. Southern Pullman Palace Car Co., Case No. 1,574.

A sleeping-car company is liable for a loss, caused by its negligence, of articles usually carried by a passenger about his person, and of money reasonably necessary for traveling expenses, in failing to take reasonable care to prevent thefts.—Blum v. Southern Pullman Palace Car Co., Case No. 1,574.

A sleeping-car company, which furnishes a suitable car with proper connections and in readiness for a continuous passage, is not liable to a passenger therein for the failure of a connecting line to send forward the train, on account of a riot.—Simms v. Pullman South. Car Co., Case No. 12,869a.

CASE.

On motion for new trial, see "New Trial," § 20

CASE CERTIFIED OR RESERVED.

By register in bankruptcy, see "Bankruptcy," §§ 315, 331.
Criminal prosecutions, see "Criminal Law," §§ 112, 113.
Effect of equal division of opinion on appeal, see "Appeal and Error," § 40.
For determination of question of law, see "Appeal and Error," § 10.

CASE ON APPEAL.

Necessity for purpose of review, see "Appeal and Error," § 20.

CATTLE.

See "Animals."

CAUSA MORTIS.

See "Gifts," § 2.

CERTAINTY.

In deeds, see "Deeds," § 1.
In pleading, see "Pleading," § 7.

CERTIFICATE.

As evidence, see "Evidence," § 46.
Certified copies, as evidence, see "Evidence," §§ 47–50.
Of acknowledgment of written instruments, see "Acknowledgment," §§ 4, 5.
Of corporate stock, see "Corporations," § 23.
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Of naturalization, see "Aliens," § 12.
Of probable cause of seizure, see "Searches and Seizures," § 3.
Of protest, see "Bills and Notes," § 71.
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Of taking deposition, see "Depositions," §§ 28–31.
To affidavit, see "Affidavits," §§ 4, 5.
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CERTIORARI.

§ 1, When writ will issue. § 2, Jurisdiction. § 3, Writ of procedendo.

As auxiliary in habeas corpus proceedings, see "Habeas Corpus," § 8.
—— to removal proceedings, see "Removal of Causes," § 45.
To review proceedings before justices of the peace, see "Justices of the Peace," § 17.
—— in forcible entry and detainer, see "Forcible Entry and Detainer," § 2.

§ 1. When writ will issue.

Certiorari cannot issue from a superior court, district Arkansas, to bring up from the county court a case for adjudication.—Carr v. Tweedy, Case No. 2,440a.

§ 2. Jurisdiction.

A federal court has jurisdiction to issue a writ of certiorari as ancillary to a writ of habeas corpus, and to render their jurisdiction under the latter writ effective.—In re Martin, Case No. 9,151.

The federal circuit court has no power to issue a writ of certiorari to a United States commissioner to review proceedings before him under the fugitive slave act of September 18, 1850.—Ex parte Van Orden, Case No. 16,870.

§ 3. Writ of procedendo.

Where a case has been improperly taken out of the hands of a magistrate through a writ of certiorari, on a motion presented to the court by way of a writ of error coram nobis, the court will issue a writ of procedendo.—Blagden v. Broadrup, Case No. 18,238.

CESSION OF PROPERTY.

By Indians, see "Indians," § 4.
Effect of cession of territory on status of resident, see "Aliens," § 1.
To United States, see "District of Columbia," § 1.

CHALLENGE.

Of jurors, see "Grand Jury," § 10; "Jury," §§ 21–27.

CHAMPERTY AND MAINTENANCE.

§ 1, What constitutes, and effect. § 2, Actions.

§ 1. What constitutes, and effect.

A deed executed for land, which is held adversely to the grantor by an individual in possession, is void under the champerty act.—Dubois v. McLean, Case No. 4,107.

A cestui que trust may lawfully dispose of his trust estate, though his title is contested by the trustee.—Baker v. Whiting, Case No. 787.

An agreement giving plaintiff the exclusive right to collect claims for damages for infringement of a patent, he to bear all expenses, and to receive half the recovery as compensation,

held void for champerty and maintenance.—Gregerson v. Imlay, Case No. 5,795.

A patentee may maintain an action in New York for damages against a person who, not being interested in defending suits brought upon the patent, assists infringers to defend with money, and otherwise.—Goodyear Dental Vulcanite Co. v. White, Case No. 5,602.

The fact that a contract tainted with champerty and maintenance was made in a state where the common-law doctrines concerning such subject were abrogated by law cannot uphold it, in equity, where such contract was to operate in many states where it was clearly void.—Gregerson v. Imlay, Case No. 5,795.

§ 2. Actions.

An action will lie for maintenance in this country.—Fletcher v. Ellis, Case No. 4,863a.

The pendency of the suit, the court, and time, place, and circumstances must be alleged, so as to show the maintenance,—Fletcher v. Ellis, Case No. 4,863a.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

Of civil action, see "Venue," § 2.
Of criminal prosecutions, see "Criminal Law," § 24.

CHARACTER.

Impeachment of witness, see "Witnesses," §§ 76–79.
Of accused in criminal prosecutions, see "Counterfeiting," § 10; "Criminal Law," §§ 55, 75; "Disorderly House." § 3; "Homicide," § 7.

CHARGE.

By carrier, see "Carriers," § 36.
Of legacies on property by will, see "Wills," §§ 56, 57.
On land, see "Vendor and Purchaser," § 19.
To grand jury, see "Grand Jury," § 7.
To jury in civil actions, see "Trial," §§ 16–20.
—— in criminal prosecutions, see "Criminal Law," §§ 94, 95.

CHARITIES.

§ 1, Statutory provisions. § 2, Purposes of gift—Relief of poor. § 3, —— Education. § 4,—— Promotion of religion. § 5, —— Public institutions and improvements. § 6, Capacity of trustees or donees to take. § 7, Certainty of beneficiaries. § 8, Certainty as to purpose of gift. § 9, Administration and enforcement of gift.

Gifts to, see "Perpetuities," § 3.
Restrictions as to charitable devises or bequests, see "Wills," § 1.

§ 1. Statutory provisions.

The statutes of mortmain are in force in Maryland, but the statute of charitable uses is not.—Barnes' Heirs v. Barnes, Case No. 1,014.

The English statutes of mortmain and superstitious uses were never adopted by the colony or state of Pennsylvania.—Magill v. Brown, Case No. 8,952; Miller v. Lerch, Id. 9,579.

The principles of the common law relative to charitable uses, which were resorted to in England by the statute of charitable uses, were, however, adopted, as well as the principles of equity, in the administration of such trusts.—Magill v. Brown, Case No. 8,952.

§ 2. Purposes of gift—Relief of poor.

A gift to a religious society for the relief of the poor members thereof is a good charitable use.—Magill v. Brown, Case No. 8,952.

A devise of lands in trust for the formation and support of a home for aged, infirm, or invalid men, with a provision for its perpetuation by bequests of its inmates, *held* valid as a charitable use.—Cresson v. Cresson, Case No. 3,389.

§ 3. —— Education.

A gift for a library and academy of arts and sciences is for an "educational purpose." Code Ga. § 3157.—Jones v. Habersham, Case No. 7,465.

A bequest to the Educational Society of Virginia, an unincorporated association, "for the benefit of the theological students at the Protestant Episcopal Theological Seminary of Virginia, * * * $1,000, the interest only to be annually expended" is void under the Maryland law.—Meade v. Beale, Case No. 9,371.

A gift to the treasurer of a society organized for the civilization and improvement of certain Indian tribes, for the benefit of such Indians, is a good charitable use.—Magill v. Brown, Case No. 8,952.

§ 4. —— Promotion of religion.

An annual subscription to the stock of a religious society, which is applied to the printing and dissemination of books and writings approved by such society, is a good charitable use.—Magill v. Brown, Case No. 8,952.

A gift to a religious society to enable it to enlarge and improve its meeting house, is a good charitable use.—Magill v. Brown, Case No. 8,952.

A devise or bequest to a society for its purposes, with which testator is familiar, where such purposes are proper objects of charitable uses, is a good devise or bequest for such charitable uses.—Magill v. Brown, Case No. 8,952.

A gift to the trustees of a church on condition that they shall not allow any alteration in the pulpit and galleries of the church, and shall not alien the Sabbath school lot, is valid.—Jones v. Habersham, Case No. 7,465.

§ 5. —— Public institutions and improvements.

A gift to a town for a fire engine and hose is a good charitable use.—Magill v. Brown, Case No. 8,952.

§ 6. Capacity of trustees or donees to take.

A religious corporation created under Act Pa. April 6, 1781, may take the title as trustee for the heir at law of the testator, who devised certain lands to it in trust for uses that were void.—Miller v. Lerch, Case No. 9,579.

Unincorporated religious, literary, or charitable associations, in Pennsylvania, may take property by devise or bequest, for pious or charitable purposes, without a license from the state.—Magill v. Brown, Case No. 8,952.

A church is capable of taking and executing a trust for the benefit of destitute and needy churches, and to care for testator's cemetery lot.—Jones v. Habersham, Case No. 7,465.

Societies of Friends, unincorporated associations in Pennsylvania, *held* capable of taking property by devise or bequest for the purposes of their organization.—Magill v. Brown, Case No. 8,952.

The fact that a charitable society has already a surplus of funds does not vitiate a gift to it.—Jones v. Habersham, Case No. 7,465.

§ 7. Certainty of beneficiaries.

A bequest of a fund to be "applied to the support of missionaries in India," under the

direction of a certain board of missions, is void for uncertainty.—Board of Foreign Missions of the Presbyterian Church v. McMaster, Case No. 1,586.

Devise in trust, to lay out $200 a year in wood, meal, and clothing, to be distributed among the poor and necessitous widows and orphans within the corporation of Georgetown, is void for uncertainty.—Barnes' Heirs v. Barnes, Case No. 1,014.

A devise for the establishment of "a hospital for females within the city of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for," is not void for uncertainty as to the beneficiaries. —Jones v. Habersham, Case No. 7,465.

A general direction that an act of incorporation should be obtained for the hospital does not render the devise void.—Jones v. Habersham, Case No. 7,465.

§ 8. Certainty as to purpose of gift.

A gift to "The Widows' Society of Savannah," for "the benevolent purposes of said society," where such society was incorporated for the relief of indigent widows and orphans, *held* sufficiently definite.—Jones v. Habersham, Case No. 7,465.

A conveyance of realty and other property, in trust "for the purpose of founding an institution for the education of youth" in a certain county, *held* valid.—Russell v. Allen, Case No. 12,149.

A gift to the trustees of a church to devote the income to such destitute and needy churches in the state as they may select, so as to promote the cause of religion, *held* not void for uncertainty.—Jones v. Habersham, Case No. 7,465.

§ 9. Administration and enforcement of gift.

Where a charity is definite, the court of chancery will provide a trustee if none is named, or if the one named is incompetent to act.—Jones v. Habersham, Case No. 7,465.

The jurisdiction of chancery over charitable uses and gifts therefor does not depend upon the statute of charitable uses (43 Eliz. c. 4).—Magill v. Brown, Case No. 8,952.

CHARTER.

Of banks, see "Banks and Banking," § 3.
Of colleges, see "Colleges and Universities," § 1.
Of corporations in general, see "Corporations," §§ 1–9.
Of municipal corporations, see "Municipal Corporations," § 1.

CHARTER PARTIES.

See "Shipping," §§ 41–73.
Enforcement in admiralty, see "Admiralty," §§ 14, 15.

CHATTEL MORTGAGES.

I. REQUISITES AND VALIDITY.

§ 1, Nature of transfer of chattels as security—What constitutes a mortgage. § 2, Delivery. § 3, Validity—Property mortgaged in general. § 4, —— Stock in trade. § 5, —— Crops. § 6, —— Retention of possession, control, and power of sale or use. § 7, —— Sufficiency of change of possession. § 8, —— Cure of defects by taking possession or recording.

II. FILING, RECORDING, AND REGISTRATION.

§ 9, Original—Necessity of filing or recording. § 10, —— Place of recording or filing. § 11, —— Priority over unrecorded mortgage. § 12, Renewal.

III. CONSTRUCTION AND OPERATION.

§ 13, Property mortgaged. § 14, Lien and priority.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 15, Right to possession before default. § 16, Action by mortgagor against third person.

V. RIGHTS AND REMEDIES OF CREDITORS.

§ 17, Rights in general. § 18, Actions to set aside mortgage.

VI. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 19, Effect of assignment.

VII. SATISFACTION.

§ 20, Satisfaction by taking possession. § 21, Substitution of security.

VIII. FORECLOSURE.

§ 22, Effect of foreclosure. § 23, Action to foreclose.

See, also, "Pledges."
Mortgage of vessels, see "Shipping," §§ 37, 38. When fraudulent as to creditors, see "Fraudulent Conveyances."

I. REQUISITES AND VALIDITY.

§ 1. Nature of transfer of chattels as security—What constitutes a mortgage.

A bill of sale, with a lease back, containing an agreement of the seller to buy back the property at a fixed price, will be construed as a mortgage.—In re Gurney, Case No. 5,873.

Where the right of reconveyance on default of payment of purchase price is reserved on a sale of property, the conveyance will be construed as a mortgage.—Mitchell v. McKibbin, Case No. 9,666.

Contract to buy machinery and let another have it to manufacture cloth from, to be paid by sales of such cloth, construed as equitable mortgage.—Almy v. Wilbur, Case No. 256.

§ 2. Delivery.

Record of a mortgage of personal property pursuant to the laws of the state is equivalent to a delivery.—Jones v. Sleeper, Case No. 7,496.

§ 3. Validity—Property mortgaged in general.

See, also, post, §§ 9, 11.

A chattel mortgage permitting substitution of property *held* not binding on the substituted property in the absence of a formal delivery by the mortgagor.—McDermott v. Yeatman, Case No. 8,749.

Property subsequently acquired may be bound by the provisions in the mortgage to that effect, as against other creditors.—Mitchell v. Winslow, Case No. 9,673.

See, also, post, § 13.

§ 4. —— Stock in trade.

A mortgage of "the whole of my stock of books and stationery now remaining in my

possession, and also such additions thereto as I may hereafter make from time to time to the same," is not void for uncertainty, but does not convey future additions.—Wagner v. Watts, Case No. 17,040.

A mortgage covering fixtures, a stock of goods on hand kept for sale, and all such as should afterwards be purchased and put into the store, may be valid as to the fixtures while void as to the goods.—In re Kahley, Case No. 7,593.

A mortgage covering a stock in trade and all renewals thereof, and other property, though void as to the stock in trade, may still be valid as to the other property.—In re Perrin, Case No. 10,995.

§ 5. —— Crops.

The owner or lessee of land may give a valid mortgage upon his crop before it is raised.—Ellett v. Butt, Case No. 4,384.

§ 6. —— Retention of possession, control, and power of sale or use.

In Indiana an unrecorded chattel mortgage, where the property is not delivered to the mortgagee, is absolutely void, as against the assignee in bankruptcy of the mortgagor.—Moore v. Young, Case No. 9,782.

A mortgage of a stock in trade to secure an antecedent debt is void as to creditors, where not accompanied by possession, though it is duly recorded under Act Md. 1729, c. 8, § 5.—Noyes v. Brent, Case No. 10,373.

A chattel mortgage permitting the mortgagor to retain possession, and act as apparent owner, is not void upon its face by the common law, or the law of Massachusetts.—Brett v. Carter, Case No. 1,844.

A recorded chattel mortgage upon merchandise and fixtures, the mortgagor to remain in possession, with implied permission to sell the merchandise, but not the fixtures, is void in Missouri as to the merchandise, but valid as to the fixtures.—In re Kirkbride, Case No. 7,839.

In Nevada a chattel mortgage is void as to creditors, unless immediate possession of the mortgaged property is taken and retained by the mortgagee.—In re Morrill, Case No. 9,821.

Possession of slaves by the mortgagor, either before or after condition broken, is neither fraudulent, nor a badge of fraud requiring explanation.—Merrill v. Dawson, Case No. 9,469.

The retention of possession of the property by the mortgagor after condition broken will not affect the validity of the mortgage as between the parties.—Hallack v. Tritch, Case No. 5,956.

A chattel mortgage is void, as against the creditors of the mortgagor, where it is the intention of the parties that the mortgaged property should remain in possession of the mortgagor, and to be used and disposed of by him.—Catlin v. Currier, Case No. 2,518; In re Cantrell, Id. 2,389; In re Bloom, Id. 1,557; Johnson v. Patterson, Id. 7,403; In re Burrows, Id. 2,204; McLean v. Lafayette Bank, Id. 8,888; In re Manly, Id. 9,031; In re Morrill, Id. 9,821; In re Kahley, Id. 7,593; Wait v. Bull's Head Bank, Id. 17,043.

In Indiana a parol agreement that the mortgagor of a stock of goods shall have possession and sell them in the usual course of his business, and apply the proceeds to the payment of the debt, does not render the mortgage fraudulent and void as to creditors.—Overman v. Quick, Case No. 10,624.

In Georgia a mortgage of a stock of goods is valid, though possession is given to the mortgagor with power of sale, and is binding on subsequent additions to replenish the stock as against sellers who had no notice of the mortgage.—Johnson v. Patterson, Case No. 7,403.

The parties may agree that the possession and use of the mortgaged chattels shall be retained by the mortgagor until condition broken.—Mitchell v. Winslow, Case No. 9,673.

A clause constituting the mortgagor agent of the mortgagee to sell the goods and account for their proceeds does not render the mortgage fraudulent on its face.—Hawkins v. Hastings Bank, Case No. 6,244.

A mortgage on a stock of goods given to a retiring partner by the continuing partner, which contains no provision for applying the proceeds of sales to the debt, or for reinvesting them to augment the trust fund, is void upon its face.—Smith v. McLean, Case No. 13,074.

§ 7. —— Sufficiency of change of possession.

The delivery of possession must be immediate, and a mortgage, void at its inception for want of such delivery, is not made valid by a subsequent taking of possession before a creditor acquires his lien.—Edmondson v. Hyde, Case No. 4,285.

§ 8. —— Cure of defects by taking possession or recording.

Possession taken by the mortgagees before the rights of any other party attach cures any irregularity in the acknowledgment of the mortgage.—In re Burnett, Case No. 2,172.

In Illinois, recording a chattel mortgage in which material changes have been made since its acknowledgment gives it no additional validity.—Harvey v. Crane, Case No. 6,178.

II. FILING, RECORDING, AND REGISTRATION.

See, also, ante, § 8.

§ 9. Original—Necessity of filing or recording.

Unrecorded chattel mortgage valid, as between the parties, although possession not taken.—In re Barman, Case No. 999; Winsor v. McLellan, Id. 17,887.

A contract in effect an equitable mortgage need not be recorded as between the parties and third persons with notice.—Almy v. Wilbur, Case No. 256.

A chattel mortgage, valid as between the parties, though not filed as required by the state law, is good as against the assignee in bankruptcy of the mortgagor.—Coggeshall v. Potter, Case No. 2,955; In re Collins, Id. 3,004; Ex parte Dalby, Id. 3,540.

In New Jersey a chattel mortgage is good against subsequent creditors from the time of filing.—Miller v. Jones, Case No. 9,576.

Until March 19, 1839, there was no law in Arkansas requiring chattel mortgages to be recorded. If recorded prior to that time, the record was not notice, but tended to give publicity and repel fraud.—Merrill v. Dawson, Case No. 9,469.

A bill of sale intended for security operates (in Massachusetts) as a pledge and not as a mortgage, and does not require, or admit of, registration.—Ex parte Fitz, Case No. 4,837.

§ 10. —— Place of recording or filing.

A mortgage not filed in the county of the mortgagor's residence is void as to creditors, under Laws N. Y. 1833, c. 279, § 2.—Platt v. Stewart, Case No. 11,220.

In Michigan the mortgage must be filed in each township in which any of the mortgagors reside, to render the same valid as against

creditors where the mortgagors retained possession.—Kane v. Rice, Case No. 7,609.

A chattel mortgage covering property in New York and New Jersey, and recorded in the latter state alone, will be *held* valid as to the New York property.—In re Soldiers' Business Messenger and Dispatch Co., Case No. 13,163.

§ 11. —— Priority over unrecorded mortgage.

A person who has knowledge of the giving of a mortgage is bound to ascertain whether the same has been paid, and cannot rely upon a statement to that effect by the person in charge of the record books.—Pickert v. The Independence, Case No. 11,124.

§ 12. Renewal.

The assignee in bankruptcy cannot claim that the mortgage is invalid because not renewed under the statutes of New York, if valid when bankruptcy proceedings were commenced.—Carlisle v. Davis, Case No. 2,411.

After the filing of the original, and once refiling of a copy, of a mortgage on a canal boat, no further filing is necessary to make the mortgage a continuing security, under Act N. Y. April 28, 1864.—Pickert v. The Independence, Case No. 11,124.

A statement which notifies creditors of the extent of the mortgagee's lien is sufficient to accompany the refiling of the mortgage.—Miller v. Jones, Case No. 9,576.

A description, in the renewal statement, of the property by reference to a prior mortgage on file, and the schedule thereto attached, "and all other goods and chattels" in a certain building, *held* insufficient.—Platt v. Stewart, Case No. 11,220.

A statement in renewal of a mortgage given to secure rent, that "the interests of the parties remain unchanged, except so far as the same have been altered by payment of rent accrued," *held* insufficient under Laws N. Y. 1833, c. 279, § 3.—Platt v. Stewart, Case No. 11,220.

III. CONSTRUCTION AND OPERATION.

§ 13. Property mortgaged.

A mortgage "of all the goods and merchandise" in a certain store does not include fixtures.—In re Eldridge, Case No. 4,330.

Articles purchased to supply the place of articles sold by a trustee in a deed of trust, conveying certain articles to secure certain creditors, are not protected by the deed unless so stipulated therein.—Letourno v. Ringgold, Case No. 8,282.

A mortgagee of an unfinished article will hold the additions by accretion.—Ex parte Ames, Case No. 323.

A mortgage of future additions to a stock in trade is valid, and operates upon the goods as fast as they are added.—Brett v. Carter, Case No. 1,844.

§ 14. Lien and priority.

Quære as to the effect of provisions as to subsequently acquired property, as between incumbrances of different date.—Mitchell v. Winslow, Case No. 9,673.

See, also, ante, § 11.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 15. Right to possession before default.

The filing by the mortgagor of a voluntary petition in bankruptcy is "an attempt to sell," within the meaning of the provision giving the right to take possession.—Moore v. Young, Case No. 9,782.

§ 16. Action by mortgagor against third person.

Equity has no jurisdiction to enjoin the levy of an execution against a mortgagor upon mortgaged goods in possession of the mortgagee, as the mortgagee has an adequate remedy at law.—La Mothe v. Fink, Case No. 8,032.

V. RIGHTS AND REMEDIES OF CREDITORS.

§ 17. Rights in general.

A mortgagee leaving the mortgagor in possession of personal property, as his agent, is chargeable, as against other creditors, with the amount sold by the mortgagor, whether applied on the debt or not.—Smith v. Ely, Case No. 13,044.

To defeat the title of the grantee in an absolute bill of sale third persons cannot avail themselves of a collateral agreement between the parties by which the title is defeasible on certain conditions.—The Ocean, Case No. 10,401.

Creditors who have not by judgment and execution obtained a specific lien cannot attack a chattel mortgage as not accompanied by delivery and change of possession of the property mortgaged (3 Rev. St. N. Y. p. 222, § 9), and the assignee in bankruptcy of the mortgagee has no greater right.—In re Collins, Case No. 3,007.

§ 18. Actions to set aside mortgage.

Where a mortgage provides that the mortgagor may retain possession, and act as apparent owner, the question of fraud is one of fact for the jury.—Brett v. Carter, Case No. 1,844.

A power of sale, which permits the mortgagor to replace them "in such manner as he may determine," may be proved by parol, or inferred from circumstances and the conduct of the parties.—In re Kahley, Case No. 7,593.

VI. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 19. Effect of assignment.

The transfer to the purchaser of land of a note given to the former owner for rent, and the transfer of a mortgage on the crop to secure the note, invests such purchaser with the lien created by the mortgage.—Ellett v. Butt, Case No. 4,384.

VII. SATISFACTION.

§ 20. Satisfaction by taking possession.

The title of the mortgagee becomes absolute after condition broken, and where he takes possession the debt is satisfied to the extent of the value of the property at the time he took possession.—In re Haake, Case No. 5,883.

§ 21. Substitution of security.

A subsequent agreement to deliver the mortgaged property to the mortgagor on his giving security to sell the same and account for and pay over the proceeds, *held* a substitute for the mortgage.—Harper v. Neff, Case No. 6,089.

VIII. FORECLOSURE.

§ 22. Effect of foreclosure.

Foreclosure of a chattel mortgage does not affect rights of third person in the mortgaged property.—Catlin v. Currier, Case No. 2,518.

The practice on foreclosure is, by interlocutory decree, to allow until the next term to redeem, and, in default of redemption, to then foreclose by final decree barring redemption.—Merrill v. Dawson, Case No. 9,469.

§ 23. Action to foreclose.
Bill against third person to enforce equitable mortgage of chattels—Sufficiency of averments.—Almy v. Wilbur, Case No. 256.

CHATTELS.

See "Property."

CHEAT.

See "False Pretenses"; "Fraud."

CHECKS.

See "Bills and Notes."
As evidence, see "Evidence," § 53.
As payment, see "Payment," §§ 5, 6.

CHILD.

See "Adoption"; "Bastards"; "Guardian and Ward"; "Infants"; "Parent and Child."
Contributory negligence, see "Negligence," § 3.

CHINESE.

Exclusion or expulsion, see "Aliens," §§ 2, 5.
Right to naturalization, see "Aliens," § 8.

CHOSE IN ACTION.

Assignments, see "Assignments."

CHURCH.

See "Religious Societies."

CIRCUIT COURTS.

See "Courts," §§ 82–92.

CIRCULATING NOTES.

See "United States," §§ 22, 23.

CITATION.

See "Process."
On appeal in admiralty, see "Admiralty," § 119.

CITIES.

See "Municipal Corporations."

CITIZENS.

§ 1, Who are citizens. § 2, Citizens of the United States and of the several states. § 3, Expatriation.

See, also, "Aliens"; "Indians," § 9.
Citizenship, ground of jurisdiction of United States courts, see "Courts," §§ 41–63; "Removal of Causes," §§ 12–22.
Equal protection of laws, see "Constitutional Law," § 12.
Privileges and immunities, see "Constitutional Law," § 11.
Protection of civil rights, see "Civil Rights."
Right to vote, see "Elections," § 1.

§ 1. Who are citizens.
Free persons of color born within the allegiance of the United States have always been regarded as citizens.—United States v. Rhodes, Case No. 16,151.

Colored persons, equally with white persons, are citizens of the United States.—In re Turner, Case No. 14,247.

The emancipation of a native-born slave by the thirteenth amendment removed the disability of slavery, and made him a citizen of the United States, subject, however, to any lawful restriction imposed upon his right to vote, or other powers or privileges.—United States v. Rhodes, Case No. 16,151.

The status of a child whose mother was a citizen of the United States, and his father an Indian maintaining a tribal relation, is that of the father.—Ex parte Reynolds, Case No. 11,719.

A child of a member of an Indian tribe within the territory of the United States, though born within the limits of the United States, is not a citizen thereof.—McKay v. Campbell, Case No. 8,840.

By the common law, a child born within the allegiance of the United States is born a subject thereof, without reference to the political status or condition of its parents.—McKay v. Campbell, Case No. 8,840.

Defendant, born in New York, in 1760, of Irish parents, left in 1771, and resided in the British dominions until his return to America, in 1785. *Held* not a citizen of the United States.—Hollingsworth v. Duane, Case No. 6,615.

Under the treaty with Great Britain of October 20, 1818, art. 3, a child born in the Oregon territory in 1823, of British subjects, was born in the allegiance of the king of Great Britain.—McKay v. Campbell, Case No. 8,840.

A person born in 1823, in the Oregon territory, whose father was a British subject, and whose mother was a member of the Chinook Indian tribe, is not a citizen of the United States.—McKay v. Campbell, Case No. 8,840.

Inhabitants of the territory of Orleans became citizens of Louisiana and of the United States by the admission of Louisiana to statehood.—United States v. Laverty, Case No. 15,569a.

A person born abroad on board an American vessel, whose parents are citizens of the United States, temporarily absent only, is to be regarded as a citizen of the United States.—United States v. Gordon, Case No. 15,231.

§ 2. Citizens of the United States and of the several states.
An American citizen has two classes of privileges: (1) Those which he has as a citizen of the United States; and (2) those which he has as a citizen of the state where he resides.—Ex parte Kinney, Case No. 7,825.

By the fourteenth amendment, citizenship in the United States is defined and is made independent of citizenship in a state, and the privileges and immunities secured by the constitution are such as belong of right to citizens of all free states, and those which in the constitution are secured to the people, either as against the action of the federal or of the state government.—United States v. Hall, Case No. 15,282.

§ 3. Expatriation.
A person's allegiance to the government continues to be due as long as its courts of justice are open to maintain peace and protect the citizen.—United States v. Greiner, Case No. 15,262.

In the United States expatriation is considered a fundamental right. To sustain it the government to which allegiance is sworn, if independent in fact, need not have been recognized as such by the United States.—Juando v. Taylor, Case No. 7,558.

The right of expatriation recognized in the case of an American citizen accepting from a foreign government a commission authorizing him to cruise as a privateer.—Jansen v. The Vrow Christina Magdalena, Case No. 7,216.

Quære, whether a native-born American citizen can expatriate himself.—Chacon v. Eighty-Nine Bales of Cochineal, Case No. 2,568.

A citizen of the United States cannot expatriate himself without the consent of his government; and no consent is to be implied from the policy of the United States to permit the naturalization of foreigners without inquiring whether their allegiance to their native countries has been dissolved.—Williams' Case, Case No. 17,708.

A citizen of the United States cannot throw off his allegiance without a law authorizing the same.—United States v. Gillies, Case No. 15,206.

A citizen of one country may enter the military service of a foreign government without compromising the neutrality of his own, or devesting himself of his rights of citizenship.—Chacon v. Eighty-Nine Bales of Cochineal, Case No. 2,568; Juando v. Taylor, Id. 7,558.

CIVIL RIGHTS.

§ 1, Constitutional and statutory provisions and effect thereof. § 2, Discrimination by reason of race, color, or condition. § 3, Offenses and criminal prosecutions.

See, also, "Constitutional Law," §§ 4, 11, 12.
Denial ground for removal of cause from state court, see "Removal of Causes," § 24.
Jurisdiction to enforce rights, see "Courts," § 39.
Marriage between negroes and white persons, see "Marriage," § 2.
Right to vote, see "Elections," § 1.

§ 1. Constitutional and statutory provisions and effect thereof.

The thirteenth amendment gave to the freed slave no right of protection from the federal government superior to that of his white fellow citizens, and no exemption from the power of state control which might be exercised against others.—Charge to Grand Jury, Civil Rights Act, Case No. 18,260.

The provision of the fourteenth amendment that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," prohibits the action of the state alone. It gave congress no power to legislate against the wrongs and personal violence of citizens.—Charge to Grand Jury, Civil Rights Act, Case No. 18,260.

The privileges and immunities which this clause forbids the states to abridge are only that limited class which depend immediately upon the constitution of the United States, such as the right to pass from state to state and to the national capital, to protection upon the high seas and in foreign countries, and the like.—Charge to Grand Jury, Civil Rights Act, Case No. 18,260.

These laws, state and national, were intended to secure political and legal equality of rights to all citizens, but were not intended to establish social equality, or to enforce social intercourse between different classes of citizens.—Charge to Grand Jury, The Civil Rights Act, Case No. 18,258.

The civil rights act of 1866 was within the power conferred upon congress by the thirteenth amendment, on the subject of slavery, under which it had full power to pass all laws deemed proper for its entire eradication in any form.—United States v. Cruikshank, Case No. 14,897.

Congress is authorized to protect the rights secured by the thirteenth, fourteenth, and fifteenth amendments.—United States v. Given, Case No. 15,210.

The civil rights act of April 9, 1866, was intended to protect against legal disabilities and legal impediments, and not private infringements of the rights secured, through prejudice or otherwise, when the laws are impartial and sufficient.—Louisiana v. Dubuclet, Case No. 8,538.

The civil rights bill, while not intended to enlarge the privileges and immunities of white citizens, furnishes additional guaranties and remedies to secure their enjoyment.—Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., Case No. 8,408.

The civil rights bill is not a penal statute, but a remedial one, and is to be liberally construed.—United States v. Rhodes, Case No. 16,151.

A corporation is included within the word "person" in Act April 20, 1871.—Northwestern Fertilizing Co. v. Hyde Park, Case No. 10,336.

The statutes of South Carolina requiring the arrest and detention in jail of colored seamen coming into ports of the state during the time their vessel remained in such state are valid and constitutional.—Roberts v. Yates, Case No. 11,919.

In North Carolina, the equal rights, in inns and public conveyances, of all persons without distinction of class, are fully protected by state statutes, and existed as to inns at common law: and the "Civil Rights Bill" was unnecessary in the state, and its only effect is to give jurisdiction of wrongs committed against citizens on account of class to the federal courts.—Charge To Grand Jury—The Civil Rights Act, Case No. 18,258.

Civil incapacities and disqualifications under the law of the domicil are not regarded in other countries, as to acts done or rights acquired within another jurisdiction, where no such disqualifications are acknowledged.—Polydore v. Prince, Case No. 11,257.

When state laws have imposed duties, the performance or nonperformance of which affects rights under the federal government, congress may make the nonperformance of those duties an offense against the United States, and may punish it accordingly.—United States v. Given, Case No. 15,210.

§ 2. Discrimination by reason of race, color, or condition.

Common carriers may provide separate accommodation for white and colored passengers, providing they be equally suitable, and may exclude passengers who refuse to comply with reasonable regulations in this particular.—Green v. The City of Bridgeton, Case No. 5,754.

A colored female passenger may be required to ride in a car set apart for colored female passengers, where it is equally fit and appropriate in all respects with that set apart for the use of white female passengers.—United States v. Dodge, Case No. 14,976.

An indenture of apprentice of a negro child, which does not contain the provisions for his security and benefit required by the general laws of the state in indentures of white apprentices, is void, under the civil rights bill of 1866.—In re Turner, Case No. 14,247.

A crime inflicted upon a colored person, not by reason of his race, color, or previous condition, is not within the civil rights act of 1866.—United States v. Cruikshank, Case No. 14,897.

It is a violation of the civil rights bill of 1866 to inflict upon a negro the punishment of banishment from the state.—United States v. Horton, Case No. 15,392.

There is a deprivation of equal protection of the laws where the officers of the law, with knowledge of the public outrages and crimes committed by defendants, willfully failed to

employ legal means to bring the offenders to trial because of the color of their victims.—United States v. Blackburn, Case No. 14,603.

§ 3. Offenses and criminal prosecutions.

Congress has no authority, under the thirteenth and fourteenth amendments or otherwise, to declare it a crime for any individuals to deny to negroes the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of the theaters and inns of a state.—Charge To Grand Jury—Civil Rights Act, Case No. 18,260.

An indictment under the civil rights bill of 1866 should state that the offense charged was committed against the person injured, by reason of his race, color, or previous condition of servitude.—United States v. Cruikshank, Case No. 14,897.

An indictment against a state tax collector for depriving a Chinaman of a right secured to him by Act May 31, 1870, by exacting money under a state law relating to miners, *held* demurrable, in the absence of an averment that he was a miner, so as to be within its provisions.—United States v. Jackson, Case No. 15,459.

A clerk in charge of the reception of travelers at an hotel is liable under Act March 1, 1875, for refusing accommodations to a negro traveler by reason of his color.—United States v. Newcomer, Case No. 15,868.

A state officer, empowered by law to select jurors to serve in the courts of the state in the trial of civil and criminal cases, who for a series of years selects only white jurors, and fails to select colored jurors, is amenable to indictment in a court of the United States, under Act March 1, 1875, § 4 (18 Stat. 335), entitled "An act to protect all citizens in their civil rights."—Charge To Grand Jury—Civil Rights Act, Case No. 18,259.

A railway employé who denies to a female passenger a right to ride in the only car in the train appropriated for the accommodation of ladies alone, solely because she is a person of African descent, is guilty under the civil rights law of March 1, 1875, whether he acts under the instructions of his employer or not.—United States v. Dodge, Case No. 14,976.

The crime of conspiring to injure or intimidate citizens in the exercise of their civil rights is an infamous crime, which must be proceeded against by indictment, and not by information.—United States v. Butler, Case No. 14,701.

Act May 31, 1870, was designed not to punish abuse of authority by state officers, but to forbid the execution of state laws, which the act makes void.—United States v. Jackson, Case No. 15,459.

In Act May 31, 1870, § 6, to enforce the rights of citizens irrespective of race, color, or previous condition of servitude, the words "any right or privilege granted or secured to" include the rights of peaceably assembling and of free speech.—United States v. Mall, Case No. 15,712.

CIVIL WAR CLAIMS.

See "War," §§ 79–90.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against bankrupt's estate, see "Bankruptcy," §§ 368–456.
—— counties, see "Counties," § 6.
Against estate assigned for creditors, see "Assignment for Benefit of Creditors," § 11.
—— of decedent, see "Executors and Administrators," §§ 28–31.
—— of insolvent, see "Insolvency," § 11.
Against railroads, see "Railroads," § 63.
—— United States, see "United States," §§ 24–27.
False claims to bounty lands, see "Public Lands," § 10.
For destruction of property by neutrals, see "Treaties," § 2.
In suits in admiralty, see "Admiralty," § 64; "Salvage," §§ 68–74.
Mining claims, see "Mines and Minerals," §§ 2–9.
Of patent, see "Patents," §§ 69, 126–137.
Proof of in bankruptcy, see "Bankruptcy," §§ 168–171.
To property levied on, see "Attachments," § 15; "Execution," § 13.
—— seized as prize, see "War," § 59.

CLASS LEGISLATION.

See "Constitutional Law," § 11.

CLERKS OF COURTS.

§ 1, Deputies. § 2, Compensation of clerks. § 3, Reimbursement of expenses.

Fees in admiralty, see "Admiralty," § 142.
—— in bankruptcy, see "Bankruptcy," § 655.
Taxation of fees and commissions, see "Costs," §§ 17–19, 24.

§ 1. Deputies.

The clerk is not bound by the acts of his deputy where not in the ordinary course of business.—Welddes v. Edsell, Case No. 17,375.

Clerk of circuit court of District of Columbia *held* not liable for the act of his deputy in making an erroneous indorsement on an execution.—Patons v. Lee, Case No. 10,800.

§ 2. Compensation of clerks.

Where the office of clerk of the district court and that of the clerk of the circuit court are held by the same person, he is entitled to the salary of each office. Act May 18, 1842, c. 29.—United States v. Bassett, Case No. 14,539.

The fees of each office are to be kept distinct, and a deficiency in the amount of one cannot be made up by excess in the amounf of the other.—United States v. Bassett, Case No. 14,539.

Reasonable compensation (Act Feb. 28, 1799, § 3), when no provision is made by law, will be determined by allowance in similar cases.—Anonymous, Case No. 472.

Fees for filing and recording paper.—Amy v. Shelby County, Case No. 345.

Fees of clerks of courts on continuance of a case in equity.—Ex parte Lee, Case No. 8,177.

Fees for seizure on water for breach of revenue laws determine amount for seizure on land.—Anonymous, Case No. 472.

The clerk is entitled to fees in admiralty cases for filing the record, making the docket and indexes, for order to cancel stipulations, taxing costs, receiving and disbursing money, entering order check, entries in ledger, and filing clerk's costs.—The Siren, Case No. 12,910.

The clerk is entitled to a fee of two dollars for services in making up the calendar, and sending notice to the proctor that the cause is on the calendar, with its number.—The Siren, Case No. 12,910.

The clerk is entitled to commissions upon money deposited in a bank under a decree of the court, and subject to its order (Act 1793, c. 20, § 2) as "money deposited in court."—Ex parte Prescott, Case No. 11,388.

The clerk has no right to commissions on money subject to the decree of the court, unless it is in the court's registry, or has passed through his hands. (Act Feb. 26, 1853).—Ex parte Plitt, Case No. 11,228.

Money must be actually received, kept, and paid out, to entitle the clerk to the one per cent. commission. Rev. St. § 828.—In re Goodrich, Case No. 5,541.

The clerk is not entitled to such commission on moneys which, although ordered to be, are not in fact, paid into his hands.—In re Goodrich, Case No. 5,541.

The clerk is entitled to commissions upon proceeds of interlocutory sales of prize paid into court.—The Avery, Case No. 671.

The clerk of the circuit court of the District of Columbia may have an attachment for the nonpayment of his fees.—Lee v. Patterson, Case No. 8,198.

Fees paid to the officers of the court by the claimant of property seized are not to be repaid by the United States, under Act Feb. 28, 1799, § 8, where the libel is dismissed.—In re Stover, Case No. 13,506.

A third person, who appears and defends in behalf and in the absence of the party to a suit in admiralty, is personally liable for the clerk's fees.—In re Stover, Case No. 13,507.

The losing party is liable for the clerk's costs for orders actually entered on behalf of the succeeding party in the progress of the cause. —Sancho v. Atwood, Case No. 12,291a.

A dismissal "without costs to either party" does not relieve the parties from liability to the clerk for fees for services rendered at their request.—In re Stover, Case No. 13,507.

§ 3. Reimbursement of expenses.

Expenses incurred for board and lodging at hotels while attending at terms of the court held away from the place where the clerk is required to keep his office are not allowable as "necessary expenses of his office." (Act Feb. 26, 1853).—United States v. Gorham, Case No. 15,235.

CLOUD ON TITLE.

See "Quieting Title."

CLUBS.

See "Associations."

COIN.

See "Counterfeiting."
Amount of judgment, see "Judgment," § 3.
Medium of payment, see "Payment," §§ 2, 3.

COLLATERAL ATTACK.

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On judgment, see "Judgment," §§ 43–45, 66.
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COLLATERAL INHERITANCE TAXES.

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See "Frauds, Statute of," § 1; "Guaranty."

COLLECTION.

By bank, see "Banks and Banking," § 10.
Of assessment, see "Insurance," § 33.
Of duties, see "Customs Duties," §§ 55–76.
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COLLEGES AND UNIVERSITIES.

§ 1, Charter. § 2, Officers.

Subscriptions, see "Subscriptions."

§ 1. Charter.

Construction ot the charter of Bowdoin College and its amendments and modifications.—Allen v. McKean, Case No. 229.

Rights and powers given to Bowdoin College trustees by its charter can only be devested in the manner pointed out therein.—Allen v. McKean, Case No. 229.

The power to make alterations and modifications in the charter of Bowdoin College and the manner of its exercise.—Allen v. McKean, Case No. 229.

A college (Bowdoin) privately founded, though chartered by the state, is not a public corporation.—Allen v. McKean, Case No. 229.

§ 2. Officers.

The approval of the board of trustees of a college cannot give effect to an unconstitutional act taking away their visitorial powers.—Allen v. McKean, Case No. 229.

COLLISION.

I. RULES AND PRECAUTIONS FOR PREVENTING COLLISIONS IN GENERAL.

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III. STEAM VESSELS MEETING OR CROSSING.

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sels in general. § 42, Sail vessel to hold her course. § 43, Sail vessel to run out her tack. § 44, Contributive fault of sail vessel. § 45, Burden of proof. § 46, Particular instances of collision.

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§ 47, What are overtaking vessels. § 48, Duty of overtaking vessel. § 49, Duty of vessel ahead. § 50, Attempting to pass. § 51, Racing. § 52, Particular instances of collision.

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§ 53, Duty and liabilities of tug. § 54, Duties and liabilities of tow. § 55, Joint liability. § 56, Faulty management of tow. § 57, Contributive fault. § 58, Burden of proof. § 59, Particular instances of collision.

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I. RULES AND PRECAUTIONS FOR PREVENTING COLLISIONS IN GENERAL.

§ 1. Adoption of rules.

The district court for the Eastern district of Pennsylvania adopts, without limitation, what it supposes to be the rule of the English trinity house for avoiding collision. Rules stated.—Lyle v. The Conestoga, Case No. 8,622.

The rules of navigation for avoiding collision, the use of lights, etc., before the adoption of the statutory rules.—Jones v. The Hanover, Case No. 7,466.

§ 2. Operation and effect.

The British merchants' shipping act has no application to the equipment or conduct of a British vessel when meeting a foreign ship on the high seas.—The Belle, Case No. 1,269.

The ordinary rules of navigation designed to prevent collision are binding on fishing vessels while engaged on their fishing grounds.—The Summit, Case No. 13,606.

Courts of admiralty of the United States may apply the rule of the general maritime law in regard to the liability of owners of foreign vessels for collisions on the high seas.—Churchill v. The British America, Case No. 2,715.

A foreign vessel in collision with an American schooner off the east end of Long Island may set up the failure of the schooner to show a torch light, as required by the act of congress, as a fault, on a libel by the schooner for collision.—Leonard v. Whitwill, Case No. 8,261.

Barges navigating the Ohio and Mississippi are subject to the rules of navigation.—The Dick Keys, Case No. 3,898.

A steamboat carrying the mail is bound by the same laws and rules of navigation that govern other steamers.—Haney v. The Louisiana, Case No. 6,021.

A custom that vessels lying aground in a Hatteras Inlet channel must bear their own loss from collision cannot control the liability under the law of the colliding vessel.—The Ellen S. Terry, Case No. 4,378.

A steamer used as a harbor ferryboat, in violation of law, is liable for collision with a vessel in the lawful use of the harbor.—The Maverick, Case No. 9,316.

§ 3. Local rules in general.

The local rules of navigation established by general usage must be observed.—Halderman v. Beckwith, Case No. 5,907.

District court in admiralty is not in all cases bound by the city ordinances regulating navigation.—The B. S. Sheppard. Case No. 2,072.

City ordinances concerning vessels are binding only as police regulations. They cannot change the demands of maritime law.—The Palmetto, Case No. 10,699.

St. Mass. 1847, c. 234, § 2, requiring vessels in Boston harbor to rig in jib booms in certain cases, is valid.—The Clover, Case No. 2,908.

Rules and regulations for landings made by Mississippi towns, when authorized by state laws, will be enforced in federal courts.—Culbertson v. The Southern Belle, Case No. 3,462.

Act N. Y. April 12, 1848, requiring steamboats passing up and down the East river to be navigated in the center of the river, applies to a tug whose business is to cruise along the docks, and move vessels from one pier to another, or into or out of the harbor.—Vandewater v. Westervelt, Case No. 16,846a.

Act N. Y. April 12, 1848, requiring steamers navigating the East river to keep to the middle of the stream, will be enforced in the admiralty courts.—Lonan v. The C. H. Northram, Case No. 8,473.

A Louisiana law adopting regulations as to the navigation of the Mississippi river cannot affect vessels engaged in carrying on commerce between that and other states.—Halderman v. Beckwith, Case No. 5,907.

§ 4. Rules of supervising inspectors.

Supervising inspectors have power to make rules not inconsistent with general rules of navigation.—The American Eagle, Case No. 301.

Pilot rules of supervising inspectors are controlled by Act 1864.—The Atlas, Case No. 633.

A rule of supervising inspectors adopted before but not promulgated at the time of a collision, is not applicable thereto.—The Narragansett, Case No. 10,016.

The rule of the supervising inspectors of steam vessels requiring a vessel on the port tack in a fog to sound two blasts of her fog horn *held* to be binding as a usage of the sea.—The Eleanora, Case No. 4,335.

Quære, whether rule 9 of the board of supervising inspectors (Act Feb. 28, 1871) has the force of law in respect to the lights to be carried on tows.—The Jesse Williamson, Jr., Case No. 7,296.

§ 5. Departure from rules in general.

Vessels have a right to assume in the absence of knowledge to the contrary that other vessels are complying with statutory regulations.—The Ariadne, Cases Nos. 524, 525.

The rules of navigation are not inflexible, and a vessel which strictly adheres to them may be guilty of a tortious injury to another which fails to observe them.—The Santa Claus, Case No. 12,327.

A sail vessel is in fault where adherence to the rule that she shall keep her course necessarily results in a collision, which a change would probably have averted.—Brooks v. The D. W. Lenox, Case No. 1,952.

A vessel will not be pronounced in fault for adhering to a rule of navigation, unless a very clear case for departure is shown.—The Clement, Case No. 2,879.

Mere apprehension of danger of collision will not justify change of course in a vessel whose duty under the rules is to keep her course. A change should only be made where there is actual danger.—The General U. S. Grant, Case No. 5,320.

It is not enough for the party who departs from the rule to show that they would have gone clear if each had kept its course; he must also show the other party ought to have perceived there was no possible chance of collision by so doing.—Wheeler v. The Eastern State, Case No. 17,494.

A failure to keep to the middle of the East river, as required by law, will not be considered a fault where the approaching vessel was seen in time to take the necessary steps to clear.—The Frederick M. Wilson, Case No. 5,078.

The swinging out of steamboat when meeting cross tide *held* not a change of course.—The General Franz Sigel, Case No. 5,311.

The failure to comply with the local regulation, where it did not contribute to the collision, will not render the vessel liable.—Fagan v. The Pluto, Case No. 4,605; The Fanita, Id. 4,635.

§ 6. Obligation to take precautions.

All vessels are required to use reasonable diligence to avoid collisions.—Buzzard v. The Petrel, Case No. 2,261.

Nothing in the rules will excuse neglect of precautions required by ordinary practice of seamen or the special circumstances.—Lane v. The A. Denike, Case No. 8,045.

Where measures of precaution have been neglcted which would have rendered the collision less probable, it is no excuse that it could not have been prevented at the moment it occurred.—Nelson v. The Goliah, Case No. 10,106.

Carrying the statutory lights will not exonerate a vessel from responsibility for a collision, where the special circumstances reasonably called for extraordinary measures to apprise other vessels of her proximity and character.—The R. W. Burrowes, Case No. 12,180.

The steamer need not slacken her speed nor change her course, where she sees the lights of another vessel, and has no reasonable ground to apprehend a collision.—The Scotia, Case No. 12,513.

A vessel having the right of way must keep a proper lookout and use proper seamanship to avoid collision.—The Mary C., Case No. 9,201.

A vessel which comes into the wind, for the purpose of shortening sail without first having made a careful survey to discover approaching vessels, is at fault.—The Starlight, Case No. 13,310.

The running of a steamer in a thoroughfare of vessels, at night, with no more precaution than is usual in the daytime, raises an inference that she could have discovered an approaching vessel in time to avoid collision.—Fish v. The Black Warrior, Case No. 4,813.

§ 7. Negligence in general.

Any negligence, inattention, or want of skill in the navigation or care of a vessel resulting in injury to others will entitle the sufferer to damages.—Ward v. The Ogdensburgh, Case No. 17,158.

A steamer, having placed herself in a position involving danger of collision, is responsible for the consequences.—The City of Paris, Case No. 2,765.

Exertions to avoid a collision will not relieve a vessel whose original wrongful maneuver made

it inevitable.—Beardsley v. The Metamora, Case No. 1,186.

A vessel wrongfully or carelessly placing herself in the course of another, so as to render collision inevitable, is liable therefor.—The New Jersey, Case No. 10,161.

The keeping of schedule time will not excuse a ferryboat starting from her slip at such a time as to endanger collision with another vessel.—The Columbus, Case No. 3,043.

The relative situation of a vessel, and the probability of a change therein at the time that a course is decided upon by another, will determine the question of negligence of the latter.—The Thomas A. Scott, Case No. 13,921.

The master of a vessel will be *held* justified in bearing down on another vessel to leeward, which has hoisted her colors, as if to speak him, if it is the custom to do so.—Stone v. Ketland, Case No. 13,483.

A vessel whose crew was disabled by yellow fever *held* not in fault in failing to put back to port, or anchoring, where she took reasonable precautions to avoid collision.—The Southern Home, Case No. 13,187.

It is a fault for the entire crew of a sail vessel, including the lookout, to be engaged in handling the sails.—The H. P. Baldwin, Case No. 6,812.

The master or pilot in command of a vessel is only bound to exercise ordinary skill and prudence in getting his vessel under weigh.—The Eliza and Abby, Case No. 4,349.

Bad management, which is not the proximate cause of the collision, will not subject a vessel to damages.—The Eliza and Abby, Case No. 4,349.

An approaching vessel, considering the white light to be that of a vessel at anchor, *held* not excused where, by the exercise of ordinary nautical skill and care, the error might have been discovered in time to avoid a collision. Case No. 5,734 reversed.—The Gray Eagle, Case No. 5,735.

§ 8. Contributory negligence.

Faulty management of one vessel does not excuse want of proper care and skill of the other.—Lucas v. The Thomas Swann, Case No. 8,588.

Absence of all hands from posts of duty save the pilot, though inexcusable, yet if it did not contribute to collision does not render vessel liable.—The America, Case No. 284.

The fact that the vessel whose duty it was, under the rules, to give way, was disabled and partly unmanageable, does not impose upon the other vessel the duty to avoid her, unless the disability was manifest.—The H. P. Baldwin, Case No. 6,812.

Negligence by a vessel having the right of way in not seasonably discovering an approaching vessel will not charge the former with fault, unless such negligence contributed to the collision.—The Starlight, Case No. 13,310.

§ 9. Inevitable accident.

Inevitable accident is never admitted as a defense unless it appear that neither vessel was in fault.—Sterling v. The Jennie Cushman, Case No. 13,375.

Where no fault can be found on either side, the collision will be deemed an inevitable accident.—Ward v. The Fashion, Case No. 17,154.

"Inevitable accident" means one happening after due care and caution and a proper display of nautical skill.—The Baltic, Case No. 823.

Inevitable accident is that which cannot be prevented by ordinary caution and maritime skill.—Brainard v. The Worcester, Case No. 1,804a; Lucas v. The Thomas Swann, Id. 8,588.

Inevitable accident occurs only when the collision results from natural causes, without any fault of the owners or the crews of either vessel.—Killam v. The Eri, Case No. 7,765.

A collision occurring in the daytime in fair weather may be an inevitable accident.—The Java, Case No. 7,234.

The fact that a collision was caused by a hurricane is no defense if it could have been avoided by foresight, precaution, and nautical skill.—Bodin v. The Thule, Case No. 1,595.

A collision is not an inevitable accident merely because it could not have been prevented after realization of the dangerous position of the vessels, if they were negligently brought into that position.—The Falcon, Case No. 4,619.

The effect of the tide upon a steamer entering a harbor does not make out a case of inevitable accident.—The Russia, Case No. 12,168.

A tug will not be held in fault for her engine's catching on the center, whereby she drifted towards rocks, and, in trying to get away, collided with a floating bath house.—The M. R. Brazos, Case No. 9,898.

Where a vessel injured by a collision with another at a wharf in a violent storm is cut adrift to prevent her sinking at the wharf, and collides with another vessel, *held*, that the latter collision is not a case of inevitable accident.—Sherman v. Mott, Case No. 12,767.

A steam ferryboat was *held* to be justified in attempting to run between New York and Brooklyn, in broken and running ice, and a collision with a schooner in a slip was *held* a case of inevitable accident.—The Brooklyn, Case No. 1,939.

§ 10. Speed.

Risk of collision, requiring reduction of speed, exists whenever vessels are so near that a collision might result from any departure from the rules.—The Milwaukee, Case No. 9,626.

A rate of speed in steamers which, under the circumstances, necessarily endangers the property of others, is unjustifiable, and makes the owners responsible for the consequences.—Ward v. The Fashion, Case No. 17,154.

"Moderate speed" (Act 1864, c. 69, art. 16) is a speed sufficiently moderate to enable the steamer, under ordinary circumstances, when approaching another ship so as to involve risk of collision, seasonably and effectually to slacken her speed, or, if necessary, stop and reverse.—Dolner v. The Monticello, Case No. 3,971.

The obligation to slacken speed under article 16 of the collision act was not intended to be contemporaneous with the duty of porting under article 13.—The Free State, Case No. 5,090.

The obligation to slacken speed arises in case of continuous approach, or when the approaching light is found to be closing in, instead of opening out.—The Manitoba, Case No. 9,029.

Excessive speed in a steamer is not excused by the fact that she is under contract with the government to carry the mails in a specified time.—The James Adger, Case No. 7,188; The Northern Indiana, Id. 10,320.

The speed of a steamer in fair weather in open sea, being the usual rate, *held* not an element in the collision, where she stopped as soon as the necessity was apparent.—Brennan v. The Virgo, Case No. 1,831.

The inability of a steamer to reverse her engine at once where she is running at full speed is not a fault.—The Northfield, Case No. 10,326.

A vessel will be *held* at fault for racing under full sail with another vessel on a dark night, when other vessels on the same course have taken in their light sails.—The Thomas Martin, Case No. 13,926.

The fact that a vessel is on the wrong side of the channel does not relieve another from the duty to reduce her speed to avoid a collision.—The Brothers, Case No. 1,969.

A steamboat meeting a tow, if she cannot pass at a safe distance, must reduce her speed to prevent injury to the tow by the swell.—The C. H. Northam, Case No. 2,690.

Where a steamboat passes a tow without much reduction of speed, whereby the tow was damaged by the swell, the steamboat is liable.—The C. H. Northam, Case No. 2,689.

A steamer is liable whose speed prevents avoiding a collision with a sail vessel suddenly revealed to view on rounding a bend in the river.—The Cambridge, Case No. 2,333.

The attempt to pass a ferryship at such a rate of speed as renders it impossible to stop in time to avoid hitting a ferryboat, in case one should come out, is negligence.—The D. R. Martin, Case No. 4,091.

It is a gross fault in a steamer to pass along the mouths of the ferry slips in the East river, in close proximity thereto, at a speed at which all efforts to stop her, when danger of collision with a ferryboat coming out of her slip appears, are ineffectual.—The Favorita, Case No. 4,695.

A steamer will be *held* in fault in keeping up a high rate of speed in a narrow channel full of vessels ahead of her, some of which did not become visible, owing to the presence of others, until too late to avoid collision.—The James Roy, Case No. 7,201.

A steamer will be *held* in fault for running at a speed of 17 miles an hour in the nighttime, through a crowd of vessels, whose lights are seen by her.—The Syracuse, Case No. 13,718.

It is a neglect of proper precaution to put a steamboat under full headway just as she is entering a narrow part of the channel in the night.—Bulloch v. The Lamar, Case No. 2,129.

Steamer *held* in fault in maintaining a speed of eight miles an hour on the river St. Clair, on a very dark night.—Hall v. The Buffalo, Case No. 5,927.

Steamer *held* in fault for running six or seven knots an hour, on a boisterous and dark night, 15 miles off Sandy Hook.—The Leo, Cases Nos. 8,251, 8,254.

A speed of nine miles an hour, in the East river, in a crowd of vessels, is an unreasonable speed.—The Florida, Case No. 4,889.

It is negligence for a steamer to enter Milwaukee harbor at a speed of eight miles an hour.—The Alleghany, Cases Nos. 204, 205.

A tug is in fault which in a crowded thoroughfare, like the Chicago river, proceeds at the rate of over five miles an hour.—The Little Giant, Case No. 8,401.

A steamer entering a narrow and crowded harbor without slowing down will be *held* in fault, though the colliding vessel was also in fault for taking a wrong course and not signaling.—Maxwell v. The Brothers and The Lady Franklin, Case No. 9,332.

The cases upon the subject of speed reviewed and criticised.—The Free State, Case No. 5,090.

§ 11. Ferryboats.

Ferryboats are not absolved from general rules of navigation in making slips.—The Armitage Brearley, Case No. 537.

A ferryboat must take the ordinary precautions to avoid collisions, though she is compelled to make a certain number of trips within an hour.—Randolph v. United States, Case No. 11,562.

Ferryboats crossing harbors at night or in fog should proceed with great caution.—Amoskeag Mfg. Co. v. The John Adams, Case No. 338.

Ferryboats running between Peck's slip and Williamsburgh, on the East river, are within the local law requiring vessels navigating the river to keep to the middle. (Act N. Y. April 12, 1848.)—The E. C. Scranton, Case No. 4,273.

A ferryboat ascending the East river is not entitled to hug the shore as against a sail vessel coming down the river.—The E. C. Scranton, Case No. 4,273.

A ferryboat is culpably negligent in running on a dark night, through a crowded harbor, relying solely upon a defective compass.—Lenox v. Winisimmet Co., Case No. 8,248.

II. SAIL VESSELS MEETING OR CROSSING.

§ 12. Application of rules in general.

The rule that a vessel sailing free must give way to one closehauled applies to pilot boats and other vessels on bays and harbors, as well as on the high seas.—The Clement, Case No. 2,879.

A vessel approaching another so circumstanced as to be difficult of control is in fault for colliding with her, if, by proper exertions and management, she could keep out of the way.—The Maud Webster, Case No. 9,303.

§ 13. Vessels out of command.

When a vessel is tacking and out of command, other vessels must avoid her.—The A. G. Brooks, Case No. 98.

A pilot boat under reefed sails, with helm lashed to leeward, and alternately luffing up and falling off, must unlash her helm, and keep a steady course, on the approach of another vessel.—The Transit, Case No. 14,137.

A sail vessel is in fault for coming in stays across the bows of another sail vessel, which she has just passed.—Bartlett v. Williams, Case No. 1,081.

§ 14. Comparative duty of vessels running free and closehauled.

The vessel sailing free must give way to the one closehauled, and take the proper measures to avoid a collision, and the latter must hold her course, regardless of the tacks they are on.—The Argus, Case No. 521; The Blossom, Id. 1,564; The Catharine and Martha, Id. 2,512; The Clement, Id. 2,880; Dodge v. The John Stuart, Id. 3,952a; The M. M. Hamilton, Id. 9,685; Poole v. The Washington, Id. 11,271; The Radama, Id. 11,521; Saunders v. The Hanover, Id. 12,374.

The vessel closehauled must keep her course, though not carrying lights.—The Belle, Case No. 1,269.

The vessel going free should pass astern of the vessel closehauled.—The A. G. Brooks, Case No. 98.

The vessel sailing free has no right to go ahead of the one closehauled and compel the latter to go about before running out her tack.—The Mary Eveline, Case No. 9,211.

A vessel with the wind free, attempting, without necessity, to cross the bows of a ves-

sel closehauled, is liable if a collision ensues.—The Clara M. Porter, Case No. 2,792.

A vessel closehauled, crossing the course of another sailing free, will not be *held* in fault for luffing, where the vessels are brought into imminent danger of collision through the fault of the latter in not keeping away.—The John Stuart, Case No. 7,427.

A vessel sailing free attempted to pass so close to a vessel closehauled that a mistake of the latter in luffing caused the collision. The latter had no lookout. *Held*, that the damages should be divided. Case No. 10,607 reversed.—The Osseo, Case No. 10,608.

In case of a collision between a vessel running free and one closehauled, the former must show that all possible care and skill were used by her, and that the collision was the fault of the other vessel, or was inevitable.—The Clement, Case No. 2,879; The Osseo, Id. 10,607; The Rebecca, Id. 11,618.

A vessel sailing free, which mistakes the course of another closehauled, and causes a collision by luffing, will be held liable.—Aumach v. The Queen of the South, Case No. 657a.

Failure of a sloop running before the wind in the East river to foresee the point at which an approaching schooner will run out her tack, so as to keep out of her way when she comes about, is a fault barring recovery for an ensuing collision.—Winne v. The Carroll, Case No. 17,876a.

§ 15. Closehauled—In general.

Vessels sailing, one within seven points of the wind, and the other two points free, are neither closehauled.—The M. M. Chase, Case No. 9,684.

A vessel hove to and making both headway and leaway is a vessel closehauled.—The Ontario, Case No. 10,543.

When it is doubtful which of approaching vessels closehauled on opposite tacks is to windward, the vessel on a starboard tack should keep her course.—The Cynosure, Case No. 3,528.

Where a square rigged vessel and a schooner, both closehauled, are sailing on courses which converge because of the ability of the schooner to line nearest to the wind, the schooner must give way.—The Clement, Case No. 2,880.

§ 16. —— On different tacks.

In the case of vessels closehauled on opposite tacks, the vessel on the starboard tack must keep her course and the other must keep out of the way.—The F. W. Gifford, Case No. 5,166; The Mary Doane, Id. 9,205; Wells v. The Anne Caroline, Id. 17,389a.

A bark closehauled upon the starboard tack, approaching a schooner closehauled upon her port tack, at an angle of about six points, has the right to keep her course.—The H. P. Baldwin, Case No. 6,812.

In thick or foul weather, a vessel on the port tack must exercise all possible vigilance. There should be some one on deck to give orders instantly on an emergency.—The Mary Doane, Case No. 9,205.

A vessel on the starboard tack, nearly closehauled, with the wind baffling, and perhaps at times one or two points free, need not give way to one on the port tack, closehauled, on crossing courses.—The Mary C., Case No. 9,201.

The vessel on the privileged tack will not be *held* in fault for keeping her course, unless it appear that there was time, after the risk was apparent, to avoid the collision, by changing her course; and a failure in extremis will not be *held* a fault. Case No. 6,232 reversed.—The Havre, Case No. 6,233.

A collision in open sea, in broad daylight, between vessels on crossing tacks, cannot be attributed to unavoidable accident.—The F. W. Gifford, Case No. 5,166.

A vessel closehauled on the privileged tack has the right to suppose that the other is performing her duty in keeping a lookout, and will avoid her.—Morgan v. The Philip De Peyster, Case No. 9,805.

A vessel on the port tack, with hardly sufficient headway to give control, is yet in fault for colliding with one on the starboard tack, if the former could have gone clear by keeping strict watch and either going about or taking her boom in board.—The Maud Webster, Case No. 9,303.

§ 17. Running free—With wind on different sides.

In the case of sail vessels on different tacks having the wind free, the one on the port tack must give way.—The Thomas Martin, Case No. 13,926; The M. M. Chase, Id. 9,684.

Where it is doubtful which vessel has the wind free, the one on the port tack must give way in time.—Poole v. The Washington, Case No. 11,271.

Where neither vessel is closehauled, and they are upon different tacks, both must seasonably port their helms, under rule 16, when approaching and in danger of collision.—The M. M. Chase, Case No. 9,684.

In the case of vessels sailing on meeting courses nearly opposite, where both have the wind free and neither ports her helm, as required by Admiralty Rule 11, both will be *held* in fault.—The Sylvester Hale, Case No. 13,712.

Query, whether such rule is applicable in the case of sailing vessels meeting end on, or nearly so, one being closehauled and the other sailing free.—The Sylvester Hale, Case No. 13,712.

§ 18. —— With wind aft.

A bark sailing almost directly before the wind will be *held* in fault for collision with a schooner to leeward, sailing within two points of closehauled. (Rev. St. § 4233, Rule 17.)—Higbee v. The Nipoti Accame, Case No. 6,465.

Where a ship sailing within two points of closehauled on the starboard tack meets a schooner sailing nearly before the wind with booms to starboard, the former will be held in fault for not holding her course.—The Pride of the Ocean, Case No. 11,419.

§ 19. Meeting from opposite directions.

When sailing vessels are meeting "end on or nearly end on," so as to be governed by the eleventh sailing rule.—Lane v. The A. Denike, Case No. 8,045.

Where the wind is equally free to both vessels, approaching in opposite directions, or both have it abeam, each must port her helm.—The Radama, Case No. 11,521.

The vessel which does not seasonably port her helm will be held solely in fault where the other seasonably ported her helm.—The M. M. Chase, Case No. 9,684.

§ 20. Particular instances of collision.

Between sail vessels of different speed, due to hazardous movement of one.—The Alaska, Case No. 130.

Between sail vessels in thick weather where held to be inevitable accident.—Alliance Ins. Co. v. The Morning Light, Cases Nos. 246b, 246c.

Between sail vessels meeting in Long Island sound on different tacks.—The Annie Lindsey, Case No. 422.

Between ship and brig, closehauled on crossing courses at the mouth of New York harbor, where one changed tack shortly before collision.—The British America, Case No. 1,895.

Between schooner and bark at sea, where the latter, sailing free, failed to keep off.—Crowel v. The Radama, Case No. 3,442.

Change of course of vessel closehauled meeting another sailing free, *held* excused by nearness of danger.—Cummings v. The Emily Johnson, Case No. 3,474.

Between two sail vessels, one closehauled and the other sailing free, where the latter was *held* in fault for an insufficient lookout and failure to keep away.—Dickinson v. The Catharine, Case No. 3,897; The Douglass, Id. 4,031.

Between two schooners, one of which, having no side lights, was *held* solely in fault.—The D. P., Case No. 4,056.

Between sloop proceeding to dock in East river under a jib, and schooner sailing free with plenty of sea room, the latter being *held* solely in fault.—Dubois v. The T. B. Abeel, Case No. 4,109a.

Between vessel closehauled and vessel sailing free, off Barnegat, where the latter was *held* in fault for not keeping off, and failed to establish the claim that the former did not keep her course.—The Elizabeth English, Cases Nos. 4,359, 4,360.

Between two schooners on crossing courses,—one closehauled, the other two points free,—where the latter was *held* in fault for not keeping away.—The Ellen Tobin, Case No. 4,379.

Between schooner closehauled and brig sailing free, near Sandy Hook, the latter, having no adequate lookout, being *held* in fault.—The Emily, Cases Nos. 4,452, 4,453.

Between sail vessels on courses which would have cleared each other, where one, failing to discover the other's lights, until she was within a short distance, made a wrong maneuver in the moment of peril.—Ferdon v. The Justus E. Earle, Case No. 4,737a.

Between vessels closehauled, beating up a narrow channel, where the overtaking vessel, being on the port tack, failed to keep away, and the other made no effort to avoid the collision, and both were *held* in fault.—French v. The Victoria, Case No. 5,106.

Between schooners beating up the Hudson river after the vessel ahead came about on her port tack, and failed to keep away from the other, which was running out her starboard tack.—The Greene County Tanner, Case No. 5,770.

Between schooner closehauled and schooner sailing free in Chesapeake Bay, where the latter was *held* in fault for not keeping away.—The Helen J. Holway, Case No. 6,331.

Between schooner and brig off Barnegat, where the latter was *held* in fault for a change of course.—The Jeremiah, Case No. 7,289.

Between sloop beating up the East river and sloop coming down with wind free, where the latter was *held* solely in fault for failure of lookout, though the former, in extremis, undertook to go about, and missed stays because of a defective tiller.—The John H. Abeel, Case No. 7,349.

Between bark sailing free and ship closehauled, where the latter was not *held* in fault for luffing when danger of a collision was imminent.—The John Stuart, Case No. 7,427.

Between schooner and bark in the North Sea, where the latter, being on the port tack, was *held* in fault for not keeping away.—The Jupiter, Case No. 7,585.

Between sail vessels, where one was *held* in fault for failing to keep her lights brightly burning and to have some person specifically stationed as a lookout.—Killam v. The Eri, Case No. 7,765.

Between sailing vessels, one having the wind two points free, the other closehauled; both *held* in fault, the former for porting so as to cross the latter's bow, the latter for negligent lookout.—Lane v. The A. Denike, Case No. 8,045.

Between sail vessels beating down the East river on the same tack, caused by the one in advance luffing to avoid a ferry boat, where the collision was considered an inevitable accident.—Lockwood v. The Grace Girdler, Case No. 8,450.

Between schooner and sloop, where latter was *held* solely in fault for failure to have a light.—McCready v. The Robert I. Poulson, Case No. 8,734.

Between schooner going out of harbor and sloop anchored in channel outside harbor master's line, where both were *held* in fault, the former for want of lookout, the latter because anchored in an improper place.—The Marcia Tribou, Case No. 9,062.

Sloop sailing free and attempting to pass ahead of two schooners beating, being struck by one of the schooners, *held* solely in fault.—The Mary Eveline, Case No. 9,211.

Between schooners at sea on a dark night, where it was *held* that neither was in fault, and the libel was dismissed.—Pharo v. Smith, Case No. 11,063.

Between schooner sailing free and schooner closehauled, where the latter was *held* in fault for coming about, where the other vessel had taken proper measures to avoid her.—The Richard R. Higgins, Case No. 11,768.

Between schooner and bark at the mouth of Chesapeake Bay, coming together on converging courses, where the former was *held* solely in fault.—Stetson v. The Pepita, Case No. 13,382.

Between schooner sailing free and pilot boat under reefed sails, with her helm lashed to leeward, where both were *held* at fault; the former for not changing her course, and the latter for not unlashing her helm, and keeping steadily on her course.—The Transit, Case No. 14,137.

Between brig and bark, where the former, sailing closehauled, was *held* in fault for changing her course.—The Vincenzo Perotto, Case No. 16,947.

Between brig and schooner, where the latter, being closehauled on her starboard tack, was *held* solely in fault for a change of course after the brig had taken proper measures to avoid her.—The Wesley Seymour, Case No. 17,420.

A vessel sailing free *held* liable for a collision with one closehauled on a crossing course, which missed stays in going about, fell off, and went astern, and was struck by the former.—Westcott v. The Ann Barton, Case No. 17,431.

III. STEAM VESSELS MEETING OR CROSSING.

§ 21. Application of rules in general.

A tug with a tow drawn by a hawser is bound by the rule requiring vessels meeting to pass to the starboard.—Hern v. The Anthracite, Case No. 6,412.

A tug incumbered with a ship in tow, proceeding stern foremost from a slip, *held* not subject to the rule of navigation requiring the vessel on the port hand to give way where steamers are meeting on crossing courses.—The Electra, Case No. 4,339.

A vessel will be *held* in fault in attempting to run across the track another is known to be intending instantly to take.—The Boston, Case No. 1,672.

Large steamers are *held* to extreme diligence when in the neighborhood of smaller and weaker vessels.—The Sampson, Case No. 12,280.

In the case of two tugs racing to reach a sailing vessel, to speak for employment, the one which first arrives is entitled to its position, and the other must take the proper measures to avoid a collision.—The R. L. Maybey, Case No. 11,870.

§ 22. Meeting end on.

The general rule of navigation is that where two steamboats are approaching each other in opposite directions it is the duty of each to port her helm and pass to the right.—The Washington, Cases Nos. 17,220, 17,223.

The rule which requires two steamers approaching each other to port their helms, and so pass on the starboard hand, must be acted on when there is any possible chance of collision by keeping their courses.—Wheeler v. The Eastern State, Case No. 17,494.

The rule of porting the helm when meeting on parallel courses is inapplicable to a vessel moving slowly against the tide, when out of the channel of a river which is left free to the other vessel.—The Sampson, Case No. 12,280.

Where vessels are approaching each other with berth enough to exclude the possibility of their coming together, porting the helm, under such circumstances, may be a fault.—Ward v. The Ogdensburgh, Case No. 17,158.

Article 13 of Act 1864 requiring steamers to port, only applies when they are meeting end on with risk of collision.—The America, Case No. 281.

The rule requiring steamers meeting to pass to the right does not apply where both colored lights are anywhere but ahead.—The Manitoba, Case No. 9,029.

§ 23. Crossing courses.

Where two vessels under steam are crossing, so as to involve risk of collision, the ship which has the other on her starboard side shall keep out of her way.—The Hansa, Case No. 6,038.

A steamer approaching another on a crossing course has a right to presume that the latter will keep on, if she has the right of way and is not in fault in running at full speed.—The Northfield, Case No. 10,326.

Embarrassment by proximity to vessels at anchor is no excuse for not observing the rule requiring the vessel on the port hand, on a crossing course, to keep out of the way, where there is no justification for being in such proximity.—The Hansa, Cases Nos. 6,036, 6,038.

A steamer descending a river, meeting a ferryboat on a crossing course on her port hand, will be *held* at fault for starboarding her helm instead of keeping her course.—Schuyler v. The Corsica, Case No. 12,495.

A propeller coming down the East river, meeting a ferryboat crossing on her starboard hand, where the latter keeps her course, will be *held* liable for a collision caused by crossing the bows of the ferryboat.—The Chesapeake, Cases Nos. 2,642, 2,643.

The not slackening of speed by the vessel bound to observe such rule, condemned; and the keeping of her course by the other vessel, approved.—The Hansa, Case No. 6,038.

§ 24. Duty to slacken speed, stop, or reverse.

When two vessels are approaching each other, and the character and course of either cannot be determined by the watch on board, the vessel should be slowed or stopped until the character and course of the other can be ascertained.—Ward v. Chamberlain, Case No. 17,151.

Where steam vessels are approaching each other, and from the darkness or fog there is the least uncertainty as to the course or position of the other, it is the duty of each instantly to check her speed, and then, if necessary, to stop and back.—Ward v. The Ogdensburgh, Case No. 17,158.

If a steamer, owing to any cause, cannot see its way clear in entering a harbor at night, it is its duty to stop.—Ward v. The A. Rossiter, Case No. 17,147.

Steamboat passing tow in narrow channel on the Hudson river at night *held* in fault for failure to slow down, and observe position of tow.—Fitzhugh v. The Commerce, Case No. 4,841.

A propeller will be held equally in fault for passing at full speed a tug within 100 feet, where she comes into collision with the tow astern, which is improperly handled.—The Maria Martin, Case No. 9,079.

A steamer coming down the East river at night is in fault for approaching, at 10 miles an hour, a group of three vessels crossing the river both ways in front of her.—United States v. The Mineola, Case No. 15,779a.

§ 25. River and harbor navigation—In general.

Steamer running into harbor or through common thoroughfare must take extra precautions.—The Bay State, Case No. 1,148.

And in night, or in case of fog, must move with great circumspection, or lay to or anchor, according to danger.—The Bay State, Case No. 1,148.

The law of the river is established by usage to which navigators must conform.—Barrett v. Williamson, Case No. 1,051.

A steamer navigating a river leaving the ordinary and usual track of vessels, under the circumstances is bound to show some palpable necessity for the deviation.—The Magnolia, Case No. 8,958.

A tug towing canal boat stern foremost from a pier into the East river must use great care and give due warning to approaching vessels.—The Edmund Levy, Case No. 4,288.

A towboat leaving a landing just outside of a ferry slip and crossing the course of an incoming ferryboat is in fault in not making at once for the center of the stream, as required by the local laws.—Clark v. The Ellen, Case No. 2,819.

In a collision between a steamer and a ferryboat just leaving her slip in the East river, both were *held* in fault, the former for not slackening speed, and the latter for not holding back for the steamer to pass ahead.—The Electra, Case No. 4,337.

On the western rivers, the ascending boat may indicate a preference as to her course, and descending boat is bound to conform thereto.—Western Ins. Co. v. The Goody Friends, Case No. 17,436.

The rule requiring the up-stream boat to give the first signal to indicate its choice of sides does not apply when there are 18 feet of water above the bars.—Keys v. The Ambassador, Case No. 7,747.

The proper signal must be given an approaching vessel by one wishing to go to the opposite side of the channel.—The Brothers, Case No. 1,969.

Steamers navigating near piers, in violation of harbor regulations, liable for collision with steamer in proper track, taking due precaution.—The Bay State, Case No. 1,149.

A tug is chargeable with notice when a steamer is to leave her berth on regularly appointed and notorious trip.—Annette v. The Storm, Case No. 413.

The maneuver of forereaching in a harbor is not objectionable, unless there be some reason to apprehend a collision by reason of making it.

—Red Bank Co. v. The John W. Gandy, Case No. 11,626.

A vessel which attempts to pass another while struggling in Hell Gate, there being no fault on the part of the latter, will be responsible if a collision occurs.—The Rhode Island, Case No. 11,743.

A vessel which attempts to pass another under circumstances where it cannot be done without imminent danger of collision, where the latter is not in fault, will be *held* solely liable for resulting damages.—The Rhode Island, Case No. 11,743.

§ 26. —— Chicago river.
Rules of navigation on the Chicago river.—The Louis Dole, Case No. 8,534.

It is the established rule of the Chicago river that a steamer must take the starboard side of the channel.—The Brothers, Case No. 1,969.

A steamer entering the harbor of Chicago at night at a speed of four miles an hour *held* in fault for collision with another steamer, in the act of turning just above a bend in the river, for too great speed.—Ward v. The A. Rossiter, Case No. 17,147.

§ 27. —— East river.
Vessels navigating the East river must keep to the center of the stream.—The Relief, Case No. 11,693.

Steamers plying upon the East river must use special watchfulness not to interfere with the course of ferryboats crossing the river.—The Relief, Case No. 11,693.

An alleged custom of steamers coming down the East river above Corlear's Hook with the ebb tide to keep off and allow steamers ascending on the New York shore the benefit of the eddies *held* not established.—The Niagara, Case No. 10,220.

§ 28. —— Mississippi river.
Rules of navigation on the Mississippi river.—The Magenta, Case No. 8,946; The Magnolia, Id. 8,958.

General rules of navigation of Mississippi river and the law of Lousiana require descending steamboat to keep the middle of the river, and to allow an ascending boat to choose her course.—Bates v. The Natchez, Case No. 1,102.

Steamers and other water craft navigating the Mississippi river have the right to follow the usual channels.—Fawcett v. The Natchez, Case No. 4,703.

On the Mississippi, a descending steamboat, by the uniform rule, runs down the bend in the strongest current and deepest water, and the ascending boat hugs the bar.—Sinnott v. The Dresden, Case No. 12,908.

The Mississippi below the mouth of the Ohio is not, at any point or at any stage of water, a "narrow channel," within the meaning of supervising inspector's rule 3; the term only refers to the "chutes" running behind the island.—Sinnott v. The Dresden, Case No. 12,908.

The rule on the Mississippi that ascending boats shall run the points, and descending boats the bends, will be enforced.—Shirley v. The Richmond, Case No. 12,795.

A descending boat on the Mississippi river, when apprehensive of a collision, should stop her engine and float, leaving the ascending boat to choose the best mode of avoiding her.—Halderman v. Beckwith, Case No. 5,907.

A boat running at great speed up the Mississippi river on a dark night, when a descending boat is visible, of whose course she is in doubt, takes the risk of a collision.—The Magnolia, Case No. 8,958.

When there is danger of collision between steamboats on the Mississippi, it is the duty of the descending boat to ring her bell and shut off steam, and of the ascending boat to do the maneuvering.—Sinnott v. The Dresden, Case No. 12,908.

Seven or eight miles an hour is excessive speed for a steamboat towing barges at a dangerous point on the Mississippi.—The Milwaukee, Case No. 9,625.

§ 29. —— North river.
Customs of navigation of North river are the same as the nautical usages at sea.—The Argus, Case No. 521.

§ 30. —— Ohio river.
Navigators on the Ohio river must conform to usage that descending boat must keep in the current, and ascending boat to the right shore.—Barrett v. Williamson, Case No. 1,051.

The rule of navigation on the Ohio river, giving the ascending boat the right to choose her course, does not give her the right, where the boats are on opposite sides of the river with ample water between, unnecessarily or capriciously to require the descending boat to change her course.—Thorp v. The Defender, Case No. 14,003.

The ascending boat on the Ohio river should not cross the channel, when a descending boat is so near as to involve risk of collision.—Thorp v. The Defender, Case No. 14,003.

A steamboat descending the Ohio river 200 yards from the Indiana shore has no right to signal by one tap of the bell, and attempt to take the starboard side of another boat near that shore.—Keys v. The Ambassador, Case No. 7,747.

During a high stage of water in the Ohio river, a descending steamboat should keep near the middle of the river without regard to the channel.—Keys v. The Ambassador, Case No. 7,747.

Descending boat in approaching ascending boat on Ohio river must stop her engines, and float, leaving other boat to choose her course.—Barrett v. Williamson, Case No. 1,051.

An upgoing boat on the Ohio river may signal which side of the down boat she will take, but she cannot insist upon such rule when its observance will render a collision probable.—Schenck v. The Fremont, Case No. 12,448.

§ 31. —— St. Clair river.
There is no general obligation requiring vessels navigating rivers to keep to the right of mid-channel. No such custom is proven in respect to the St. Clair flats.—The Milwaukee, Case No. 9,626.

It is not a fault for a tow to enter the channel of St. Clair flats while another tow is coming through in an opposite direction.—The Sweepstakes, Case No. 13,687.

§ 32. —— Dangerous channels.
It being the custom in navigating the waters of the Chesapeake and Albemarle, when two boats are about to enter a narrow channel at the same time, for the ascending boat to stop below until the descending boat has passed through, *held*, that a vessel disregarding it was liable for a resulting collision.—McCoy v. The Currituck, Case No. 8,730.

§ 33. Contributive fault.
An error or fault of one vessel will not justify the other in inflicting an injury which she might, by due diligence, have avoided.—Western Ins. Co. v. The Goody Friends, Case No. 17,436.

The fact that the engineer of the injured boat was not licensed will not prevent a recovery where the evidence shows that the want of a licensed engineer did not contribute to the collision.—The Vancouver, Case No. 16,838.

§ 34. Deceiving maneuvers.

A vessel who sees approaching vessel stop her engine is entitled to consider that such approaching vessel intended to allow her to pass her bows, and the sudden starting of the approaching vessel's engine was a fault.—The Cayuga, Case No. 2,536.

§ 35. Burden of proof.

In the case of collision between two steamers, libelant must not only show fault on the part of the other steamer, but also that his vessel was free from fault.—The Relief, Case No. 11,693.

§ 36. Particular instances of collision.

Between steamers, both of which failed to port in time and were held liable.—The Albemarle, Case No. 135.

Between steamboat and ferryboat in East river, where the former was held in fault for attempting to cross the latter's bows.—The America, Cases Nos. 281, 284.

Between ferryboat and propeller, where former was *held* in fault for failure to observe general rules of navigation.—The Armitage Brearley, Case No. 537.

Between steamer and lighter attempting to cross her bows in North river.—The Bermuda, Case No. 1,344.

Between competing passenger steamboats attempting to gain advantage in starting from the same pier at the same time.—The Boston, Case No. 1,672.

Between tug in East river, suddenly changing her course to avoid ferry boat, and Sound steamer in her usual course.—Caldwell v. The State of Maine, Case No. 2,304.

A steamtug, meeting a steamboat end on, *held* in fault for starboarding instead of porting.—The City of Hartford, Case No. 2,752.

Between two steamers in the night, meeting nearly end on, where one was without a lookout, and failed to stop and reverse, and starboarded instead of porting.—The Comet, Case No. 3,051.

Between steam vessels on crossing courses, where one stopped and backed and the other failed to keep her course, as required by the rules.—The Corsica, Case No. 3,256.

Between steamers approaching guardship on parallel courses, where there was an absence of lookout and change of course.—The Cumbria, Case No. 3,472.

Steamer *held* in fault for collision with ferryboat coming out of slip, where she was running at full speed close to the piers.—The D. R. Martin, Case No. 4,091.

Between ferryboat crossing the North river and steamboat coming down the river, where both were *held* in fault for failure to slow and stop when danger of collision was apparent.—The D. S. Gregory and The George Washington, Case No. 4,100.

Between a tug with tow alongside, ascending the East river near piers, and canal boats towed at the end of a hawser stern foremost from pier.—The Edmund Levy, Case No. 4,288.

A steamer coming down the East river *held* in fault for a collision with a ship backed out by tugs from pier on the Brooklyn side for failure to slacken speed.—The Electra, Case No. 4,339.

Tug *held* in fault, when running free with the current in a fog at eight miles an hour, for collision with tug and tows coming up the stream.—Ellis v. The Katy Wise, Case No. 4,404.

Between tugs in the entrance of the Atlantic docks, where the signal of the incoming vessel was not heard by the outgoing vessel.—The E. W. Gorgus, Case No. 4,586.

Between steamer coming up the East river, near the Brooklyn side, and ferryboat, as the latter was leaving her slip, where the ferryboat erred in the moment of peril in not holding her course, and was *held* not in fault. Case No. 4,693 reversed.—The Favorita, Case No. 4,695.

Steamer having another on her starboard, and failing to give sufficient room to cross, considering the tide, *held* in fault.—The Franz Sigel, Case No. 5,062.

Between ferryboat crossing East river and steamboat coming up river on her starboard hand near piers, where former was *held* in fault for not keeping away.—The General Franz Sigel, Case No. 5,311.

Between tug and ferryboat, caused by an overtaking tug striking the former, and deflecting her course.—The General William McCandless, Case No. 5,321.

Between two steamers on crossing courses in the East river, where both were *held* in fault.—The George Law, Case No. 5,337.

Between steamer coming into New York harbor and steam elevator on her starboard hand, where the former's claim that the presence of vessels at anchor prevented her porting was not sustained.—The Hansa, Cases Nos. 6,036, 6,038.

Between two steamers on the Ohio river, involving mutual fault as to lights, lookouts, etc.—Hazlett v. Conrad, Case No. 6,288.

Between tug and tow coming down the East river, near the piers, and ferryboat just starting out, where the former was *held* in fault.—The John Cooker, Case No. 7,337.

Between ferryboat crossing from New York to Jersey City, on an ebb tide, under a port helm, and propeller coming up the river, where the latter was *held* in fault for not keeping away, and the former was not in fault for keeping on without slowing where her single whistle had been answered by a single whistle from the propeller.—The John Taylor, Case No. 7,429.

Between a steamer and tow of another steamer, where the former was *held* in fault for being out of her proper course.—McKibbin v. The C. Vanderbilt, Case No. 8,860.

Where steamers were meeting nearly end on, *held* that one was in fault for starboarding instead of porting, and for not reversing on perceiving a confusion of signals.—The Mary Sandford, Case No. 9,225.

A steamer ascending a channel at 8½ miles an hour, and one descending at 14½ miles an hour, both condemned for excessive speed.—The Milwaukee, Case No. 9,626.

Between steamer going up the East river on the New York side and steamer coming down, where the former was *held* in fault for failure to port her helm.—The Niagara, Case No. 10,220.

Between rival steamers making same dock from opposite courses, where one was *held* in fault for not sooner checking her headway.—Northern Shore Staten Island Ferry Co. v. The Huguenots, Case No. 10,323.

Between ferry and tow of tug on crossing courses, where the latter, having the right of way, was *held* in fault for stopping to ease up on a loose cleat.—The Northfield, Case No. 10,326.

Between two steamers approaching nearly end on, where both were *held* in fault, one for starboarding instead of stopping and backing, and the other for defective screens to her lights.—The North Star, Case No. 10,331.

Between a steamer backing across a ferry slip below the end of her pier and a ferryboat coming into the slip, where both were *held* in fault, the former for want of a lookout, and the latter for not stopping when danger was apparent.—The Paterson, Case No. 10,795.

Between two tugs racing to reach a vessel, to speak for employment.—The R. L. Maybey, Case No. 11,870.

Between tow and steamer on dark and rainy night, where the tug was deceived by her inability to see the colored lights, and took the steamer for a vessel at anchor, and was *held* at fault for keeping on at full speed.—The R. W. Burrowes, Case No. 12,180.

Between tow and steamboat on the Hudson river, caused by the attempt of the latter to pass to the starboard.—The St. John, Cases Nos. 12,223, 12,224.

Between two steamers at night on the Hudson river, where the fact that a single light was carried on one vessel was held to have misled the other. Case No. 12,326 reversed.—The Santa Claus, Case No. 12,327.

Between propeller with defective screens on her side lights, having the right of way, and steamship with negligent lookout, where both were *held* liable. Case No. 12,332 modified.—The Santiago de Cuba, Case No. 12,333.

Between tow going up the East river, along the Brooklyn shore, on an ebb tide, and a steamer coming down the river, and attempting to sheer across the bows of the tug, where the steamer was *held* solely in fault.—The Scranton, Case No. 12,558.

Between two steamers in the East river, where one was *held* in fault for failure to shape her course according to her signal, and in keeping on, instead of stopping, where danger of collision was apparent.—The Senator Mike Norton, Case No. 12,667.

Between ferryboat coming down East river at 12 miles an hour and tug crossing the river, where both were *held* in fault; the former for too great speed, and the latter for failure to have the statutory lights.—The Union, Case No. 14,344.

IV. STEAM VESSELS AND SAIL VESSELS.

§ 37. Steam vessels—In general.

A tug with a sail vessel or any other kind of craft in tow, either at the end of a hawser or lashed alongside, are to be treated as a single vessel under steam, and must keep out of the way of sail vessels.—The Herbert Manton, Case No. 6,399; The J. H. Gautier, Id. 7,319; The Nabob, Id. 10,002; The U. S. Grant, Id. 16,803; The R. B. Forbes, Id. 11,598.

Boats in tow, exclusively under the control of a steam tug, are to be considered vessels under steam.—The Pennsylvania, Case No. 10,946.

In a collision between a schooner and a ship in tow at the end of a hawser the ship must be regarded as a steam vessel.—The Civilta, Case No. 2,775.

It is the duty of a ship in tow to keep away from a schooner under sail, which is keeping on its course.—The Civilta, Case No. 2,775.

A tug, lying in the open lake, waiting for a tow, and exhibiting colored lights, is *held* to the responsibility of a steamer under way.—The Sunnyside, Case No. 13,620.

§ 38. —— Higher obligation imposed.

The law casts upon the steamer the obligation of using effectively and promptly the extraordinary means she possesses to prevent a collision.—The Washington Irving, Case No. 17,243.

As between a steamer and sail vessel, the former is held to greater caution and vigilance, and must adopt necessary precautions to avoid collision.—Baker v. The City of New York, Case No. 765.

The steamer will be held solely in fault for a collision with a sail vessel which she saw in good season, where the latter held her course.—The City of New Bedford. Case No. 2,757; The Kentucky, Id. 7,716; Lawrence v. The Roanoke, Id. 8,142; Lyle v. The Conestoga, Id. 8,622a; Lowry v. Portland, Id. 8,583.

It is immaterial whether the sail vessel was close hauled or running free.—The Carroll, Case No. 2,451.

A ferryboat, approaching her slip in a crowded harbor, must be *held* in fault, in the absence of vis major, for running upon a sloop, visible at a distance of 130 yards, which held her course.—Edwards v. The Manhasset, Case No. 4,295.

§ 39. —— Duty to take precautions called for by the situation.

The steamer must take all proper precaution for avoiding a sail vessel approaching from a direction involving risk of collision.—The Narragansett, Case No. 10,019.

A tug with a line of barges in tow, which is unable to change her course in favor of a sailing vessel, is nevertheless in fault in not making such inability known to the vessel, as required by rule 24.—The C. F. Ackerman, Case No. 2,563.

A steamer proceeding slowly to her dock *held* not liable for collision with sloop endeavoring to cross her bows into the same slip, where she stopped her engines as soon as the maneuver was discovered.—Tyler v. The South America, Case No. 14,311.

A steamship running under the stern of a vessel at anchor, standing high out of water, should proceed with great caution, and at such rate of speed as will enable her to keep clear of sail vessels passing on the other side.—Judd Linseed & Sperm Oil Co. v. The Java, Case No. 7,559.

A steamer carefully navigating a crowded harbor will not be *held* in fault for collision with a schooner just getting under way behind the hull of a large ship, which could not be seen in time to avoid her.—The Java, Case No. 7,234.

Where any doubt exists as to the ability of the steamer to pass ahead of the sail vessel, the former must delay to permit the latter to pass.—The Jamaica, Case No. 7,173.

A steamer approaching a sail vessel should take all precautions to guard against contingencies and accidents to which a sail vessel is liable.—The Delaware, Case No. 3,760.

It is the duty of a steamer to avoid getting into such close proximity to a tacking vessel that a change of her tack might cause a possibility of danger.—The Haugesund v. The Bowdoin, Case No. 6,220.

A steamer will be *held* in fault for approaching so near a sail vessel as to create a reasonable apprehension of danger of collision by the latter, and involve an erroneous maneuver in the moment of peril.—Haney v. The Louisiana, Case No. 6,021.

A propeller passing close to a sloop cannot recover for an injury by being struck by the sloop's boom, swinging out from a puff of wind.—The George Law, Case No. 5,336.

The fact that a steamer has vessels to her right and to her left will not excuse a collision with an approaching sail vessel, which kept her course, where she could have passed without danger by making a sufficient change of course.—The Dean Richmond, Case No. 3,713.

A steamer will be *held* liable for collision with a sail vessel in a crowded river where she plunges into the crowd of vessels, taking her chance of finding an opening through them.—The Vicksburg, Case No. 16,931.

Where a collision ensues in consequence of the delay to take precautionary measures, the vessel which has the burden of keeping out of the way is liable.—Wakefield v. The Governor, Case No. 17,049.

Steamer hove to, with steam up and sail set, must take precaution to avoid collision with sail vessel drifting while getting under way.—Butterfield v. Boyd, Case No. 2,250.

§ 40. —— Duty to reduce speed, stop, or reverse.

A steamer must slacken her speed when passing through a fleet of sail vessels anchored at the mouth of a river at night.—Ward v. The Fashion, Case No. 17,154.

A steamer should stop promptly upon discovering in her course an indistinct object, which may be a sail.—Fletcher v. The Cubana, Case No. 4,863.

The steamer will be *held* in fault for the collision, for not slacking speed, stopping, or reversing, on discovering the sail vessel, until she learns her course.—The Hermann, Case No. 6,408; The Adriatic, Id. 89, 91.

A steamer having knowledge of the approach of a sail vessel will be held in fault where she changes her helm in ignorance of the true course of the sail vessel, and does not slacken speed or stop and reverse to ascertain such position.—The Hammonia, Case No. 6,005; The Louisiana, Id. 8,537; The Northern Indiana, Id. 10,320; Reed v. The New Haven, Id. 11,649; The Western Metropolis, Id. 17,441.

A steamer is bound to check her speed as soon as she discovers that she is not shaking off the sail vessel's lights by changing her helm.—Dyer v. National Steam Nav. Co., Case No. 4,224.

A steamer which loses sight of an approaching sail vessel's light must check her speed or stop until she again discovers it.—The Illinois, Case No. 7,002.

Where there is plenty of sea room, the steamer need not slacken her speed so long as the sail vessel is apparently keeping her course, and no danger is apparent.—The Free State, Case No. 5,090.

A steamer, in entering the harbor of Chicago, which attempts to pass in a narrow place between a schooner ahead and a pier, without any considerable abatement of speed, will be *held* in fault for an ensuing collision.—Ward v. The Dousman, Case No. 17,153.

A speed of eight knots an hour on meeting a sailing vessel beating through a narrow channel 300 feet wide is excessive.—The Northern Warrior, Case No. 10,325.

Steamboat is in fault in undertaking to pass sailing vessel in a channel so narrow that she must come within 15 feet of the latter, when, by stopping a short time, she could have passed in a wider channel.—The Columbia, Case No. 3,035.

A steamer running 17 miles an hour colliding with a schooner closehauled which displayed the regulation lights is presumably at fault.—The Northern Indiana, Case No. 10,320.

In a collision in Hell Gate, between a steamer and a schooner, *held*, that the steamer was in fault in not waiting before turning into a narrow channel, until she knew whether the schooner was intending to turn into the channel or not.—The City of Hartford, Case No. 2,749.

In a collision between a steamer and a pilot boat at sea, *held* the steamer was at fault, in not stopping still before she reached the pilot boat.—The City of Washington, Case No. 2,770.

The burden is on the pilot boat to prove that the absence of the masthead light which she should have carried did not contribute to the collision.—The City of Washington, Case No. 2,770.

Steamer colliding with sloop in New York harbor in a fog *held* in fault for merely stopping, without reversing, on hearing fog horn.—The Matteawan, Case No. 9,283.

§ 41. Comparative obligations of vessels in general.

Where a steamer and sail vessel are approaching each other, it is the duty of the latter to keep her course, and of the former to keep clear.—The R. B. Forbes, Case No. 11,598; Hall v. The Buffalo, Id. 5,927.

The duty of steamers to keep out of the way of sail vessels does not absolve the latter from the exercise of the most vigilant caution.—Lonan v. The C. H. Northram, Case No. 8,473.

A sail vessel navigating near a steamer must take all reasonable precaution to protect herself and avoid injuring the steamer. She cannot impose on the steamer the duty of guarantying her against collision.—The New Champion, Case No. 10,146.

Steamers are bound to give way to sailing vessels when practicable, but are not required to insure the latter against their own negligence or misconduct.—The New Jersey, Case No. 10,161.

The sail vessel must avoid the steamer where the latter cannot give way without peril.—The Pilot, Case No. 11,168.

A sailing vessel in Hell Gate cannot be asked to check her headway to enable a steamboat to pass her at Hallett's Point.—Whitney v. The Empire State, Case No. 17,586.

§ 42. Sail vessel to hold her course.

It is a general rule that the sail vessel, whether running free or sailing closehauled, on meeting a steamer, must keep her course, and that the latter must adopt the precautions necessary to avoid a collision.—McKee v. The Pearl, Case No. 8,849; The Osprey, Id. 10,606; Pope v. The R. B. Forbes, Id. 11,275; Sanderson v. The Columbus, Id. 12,299; Wakefield v. The Governor, Id. 17,049.

A sailing vessel which collides with a steamer is not in fault where she keeps her course until collision is inevitable.—The Cella, Case No. 2,542.

Though in dangerous proximity, the sail vessel, in ordinary circumstances, must keep her course.—The Cornelius C. Vanderbilt, Case No. 3,235.

Where a schooner approaches a steamer having lights at her bow and stern, and luffs to avoid her, supposing her to be anchored, causing a collision, the schooner is in fault.—Chapin v. The E. Brainard, Case No. 2,597.

A sailing vessel coming down the Hudson river does not hold her course within the meaning of the law when, without cause, she changes from the west to the east side of the river in rounding West Point.—The J. L. Hasbrouck, Case No. 7,323.

A sail vessel will be *held* in fault for collision with a steamer where, when sailing on parallel courses, with ample space between them, she changes her course to cross the steamer's bows, so near that the latter could not, by reversing, avoid her.—The William Young, Case No. 17,760.

A steamer will be *held* in fault in presuming that a sail vessel will change her course so as to avoid the steamer, where she gives no indi-

cation of an intention to do so up to the last minute.—The Empire State, Case No. 4,475.

A sail vessel is not excused for changing her course, even with a view of preventing a collision, unless it appear that a collision could not otherwise be prevented, or that the danger of collision was imminent and pending.—Waldorf v. The New York, Case No. 17,057.

Mere apprehension of danger, not then imminent, is not sufficient to justify a change of course by a sailing vessel meeting a steamer under way.—Winter v. The Hercules, Case No. 17,889.

A sailing vessel, discovering the lights of a steamer nearly ahead, on a dark and cloudy night, has no right afterwards to change her course, on the supposition that she has not been seen by the steamer.—The Scotia, Case No. 12,512.

A sail vessel which fails to keep her course is presumptively at fault, and the steamer will be *held* responsible only for a fair exertion of the power of the vessel to avoid a collision.—Pope v. The R. B. Forbes, Case No. 11,275.

The steamer is not liable where the collision was caused by an improper change in the course of the sail vessel, where she used all means in her power to avoid the collision after such change of course.—The Postboy, Case No. 11,303; Baker v. The City of New York, Id. 765; Camden & A. R. Co. v. The Thomas Wallace, Id. 2,337.

The sail vessel will alone be *held* liable, where she changed her course without reason, and when not in danger, if the collision would not have happened, had she held her course.—Hurd v. Reeve, Case No. 6,917.

If the collision is occasioned by an alteration of the course of the sailing vessel, it devolves upon her to prove the propriety or necessity of such movement.—The William Young, Case No. 17,760.

Where a schooner coming up the Jersey coast, on seeing the light of a steamer, heaves her lead, and comes up into the wind, and, after the steamer changes her course to avoid the schooner, fills away again, directly across the steamer's course, she will be *held* in fault for the ensuing collision.—The Virgo, Case No. 16,975.

A steamer will be *held* in fault for a collision with a schooner at night, whose change of course was seen in ample time, though the schooner had no lights.—The Queen, Case No. 11,501.

The sail vessel must change her course if, by so doing, she can prevent a collision otherwise inevitable.—The Cornelius C. Vanderbilt, Case No. 3,235.

A change of course made by a sail vessel in response to a hail from an approaching steamer will not be considered a fault.—The Forest Queen, Case No. 4,938.

The sail vessel must change her course when hailed from the steamer where holding it would drive the steamer into danger to avoid her.—The Cornelius C. Vanderbilt, Case No. 3,235; Crockett v. Riley, Id. 3,402a.

§ 43. Sail vessel to run out her tack.

The law requires a sailing vessel in a narrow channel to beat out her tack, and to come about with all possible dispatch on the other, leaving to an approaching steam vessel the responsibility of being in a position to enable her to do so without danger.—Whitney v. The Empire State, Case No. 17,586.

A sail vessel will be *held* in fault for a collision with an overtaking steamer, where the latter took due precaution to avoid a collision, but the sail vessel failed to run out her tack, and came in stays just after crossing the steamer's bows.—The W. C. Redfield, Case No. 17,305.

The sail vessel is justified in changing her tack when the circumstances render it expedient and proper and the steamer must anticipate her movement.—Bartelson v. The Cynthia, Case No. 1,067.

In case of a sail vessel beating to windward, the steamer must anticipate her going in stays for another tack when proper to do so.—Messereau v. The Sophia, Case No. 9,493b.

The steamer is bound to anticipate the necessity of the sail vessel to come about on another tack; and, when the sail vessel is put on her new course, she is bound to keep it.—Wakefield v. The Governor, Case No. 17,049.

The steamboat cannot be excused for holding her way upon the hypothesis and belief that the sailing vessel cannot, with safety to herself, keep her tack, but must go about or come into the wind before they meet.—The Washington Irving, Case No. 17,243.

The assumption that a sail vessel will beat out her tack must yield to peculiar exigencies, such as arise in a crowded river.—The Vicksburg, Case No. 16,932.

A schooner which suddenly came around and made across a steamer's bow, though warned off, *held* in fault for the collision.—Lake Erie & B. Steamboat Co. v. The Son and Heir, Case No. 7,995.

§ 44. Contributive fault of sail vessel.

A schooner's change of course when four miles from a steamer, in dense fog, *held* not a contributive fault.—The Blackstone, Case No. 1,473.

A steamer with 12 barges lashed alongside ported, to avoid a shoal, and brought an outside barge in collision with a schooner which was outsailing and passing her. The schooner had time to change her course. *Held*, that she was solely liable.—The Iris, Case No. 7,062.

A change of course of the tug set up in defense in the answer to a libel by the tow against the colliding vessel, will not prevent a recovery, where it was justifiable.—The Iris, Case No. 7,062.

Where a collision is caused partly by the gross negligence of a sloop in the management of her helm while weighing anchor and partly by the failure of a tug to observe the regulations requiring steamers to keep to the middle of the stream, both will be held in fault.—Vandewater v. Westervelt, Case No. 16,846a.

§ 45. Burden of proof.

A steamer is presumptively liable for a collision with a sail vessel which has observed the prescribed rules of navigation.—Brainard v. The Worcester, Case No. 1,804a.

Where it is the duty of a steamer to avoid a sailing vessel, the onus is on the steamer to show, in case of collision, that the sailing vessel did not keep her course, or to show some other fault on the part of the sailing vessel that contributed to the collision.—The Western Metropolis, Case No. 17,440; The D. S. Stetson, Id. 4,104; Beardsley v. The Metamora, Id. 1,186; The Java, Id. 7,233.

On a libel by the owners of a steamer against a sail vessel, the libelants must not only show fault in the sail vessel, but that they took all precautionary measures to avoid the danger to which she was exposed.—Ward v. The Fashion, Case No. 17,154.

The mere proof that a steamer collided with a sail vessel, unaccompanied with circumstances exonerating her, raises a prima facie presumption of fault in the steamer.—The Washington Irving, Case No. 17,243; The Wenona, Id. 17,411.

The sail vessel will be presumed to have been in fault where the steamer was in her regular course, and adopted all the usual precautions to avoid the collision.—Dickenson v. The Gore, Case No. 3,893.

Where the circumstances of a collision between steamer and sail vessel indicate great negligence somewhere, the presumption is that it was the steamer's, it being her duty to keep out of the way.—The New Orleans, Case No. 10,179.

The burden of proof on the steamer to show that the sail vessel changed her course, where set up as a defense, is not sustained where no satisfactory conclusion as to the real state of the facts can be arrived at from the evidence.—The Lizzie Major, Case No. 8,422.

No reason being shown for the change of course of a steamer, thereby causing a collision, she was *held* in fault.—The City of Norwich, Case No. 2,763.

A libel against a schooner for collision with a steamer dismissed where it appeared that both were properly manned and carried proper lights, and there was no preponderance of evidence that the schooner changed her course.—Merchants' Transp. Co. v. The New York, Case No. 9,454.

§ 46. Particular instances of collision.

Between steamer and ship in Irish Channel at night where steamer's conduct was erratic, because of change of course by ship, and the ship was *held* solely liable.—The Adriatic, Cases Nos. 89, 91.

Between steamer bound to sea and drifting bark, where former was *held* in fault.—The Alexandria, Case No. 179.

Between steamer and schooner at sea at night where schooner changed her course, but steamer was *held* solely liable.—The Alhambra, Case No. 192.

Between steamer and schooner, caused by schooner's change of course to avoid another schooner.—The Amos C. Barstow, Case No. 337.

Between schooner and steam propeller in Long Island Sound.—Ayer v. The Glaucus, Case No. 683.

Between schooner and propeller in Chesapeake Bay, where both *held* in fault.—Boggs v. Parr, Case No. 1,602.

Between steamer and sail vessel off New Jersey coast in fair weather, where the latter failed to hold her course.—Brennan v. The Virgo, Case No. 1,831.

A steamer meeting a schooner closehauled *held* in fault for failing to keep a proper lookout, or to slacken speed.—Carleton v. The Roanoke, Case No. 2,409.

Evidence in collision between a steamer and schooner in the night considered, and *held* that those in charge of the steamer were negligent in not seeing her sooner.—The City of Norwich, Case No. 2,760.

Between schooner and propeller at night on Lake Erie, both being *held* in fault,—the former for not holding her course, and the latter for failure to keep away.—The Delaware, Case No. 3,760.

Between a schooner and a steam tug in a narrow channel, where the latter was *held* in fault for not keeping away.—The D. S. Stetson, Case No. 4,104.

Between ship and steamer on a starlight night, where both were sunk, and the steamer, having sighted the ship in due season, was *held* in fault for not keeping away, the latter not having changed her course.—Dyer v. National Steam Nav. Co., Case No. 4,224.

Between schooner beating through East river against the tide, and steamer whose pilot mistook the distance from the schooner, and ran her down when in stays.—The Elm City, Case No. 4,414.

Between schooner in charge of incompetent navigator, and without proper lookout, and tow in the East river, where the former might have avoided the disaster by running out her tack.—Fagan v. The Pluto, Case No. 4,605.

Between steamer and schooner in the East river, where the latter was hugging the New York shore to avoid the current, and the steamer attempted to pass too close, both being *held* in fault, the schooner having a negligent lookout. Case No. 4,635 reversed.—The Fanita, Case No. 4,636.

Between steamer and tow in Hell Gate near Pot Rock, where the former was *held* in fault in not keeping to the northerly edge of the tide.—The Galatea, Case No. 5,184.

Between lighter sailing free in North river and tow, where the former changed her course, apprehending danger, and was *held* solely in fault.—The General U. S. Grant, Case No. 5,320.

Collision between sloop and ferryboat *held* to have been caused solely by fault of the sloop, which luffed while the master was absent from the helm, helping to stow the anchor.—The Gerard Stuyvesant, Case No. 5,356.

Between steam and sail vessels on crossing course in Long Island Sound.—The Glaucus, Case No. 5,478.

Between steamer without lookout and schooner in the Kills, where the former was *held* liable for not keeping away.—The Gratitude, Case No. 5,704.

Between tow and schooner in Kills, where the latter was *held* in fault for not taking proper course.—The Gratitude, Case No. 5,705.

Between tug, with canal boat lashed alongside, and schooner, near Blackwell's Island, where the former crossed the latter's course.—The Herbert Manton and The J. H. Gautier, Case No. 6,399.

Between ship towed to sea on a hawser and schooner coming into the harbor, which came about, instead of keeping her course, and, missing stays, fell across the hawser.—The Hibernia and The Relief, Case No. 6,454.

Between yacht, after passing under the stern of the tow, and steamer in Chesapeake Bay without a lookout, and whose officers were strangers to the locality.—Hollyday v. The David Reeves, Case No. 6,625.

Between steamer and sail vessel, where the latter presented a confusion of lights, and the former failed to slacken her speed, and both were *held* in fault.—The Huntsville, Case No. 6,915.

Between steamer coming down the East river, and turning on the Brooklyn side so as to make her berth on the New York side, and schooner running free, close to the New York shore, where the latter was *held* in fault for not taking any measures to avoid the collision.—Hurley v. The Champion, Case No. 6,919a.

Between steamer off Sandy Hook, looking for towing employment, and brig sailing free, outward bound.—The Iola, Case No. 7,057.

Between steamer rounding into her berth and schooner under way in light breeze, where the latter was *held* in fault for not keeping away.—The Isaac Newton, Case No. 7,092.

Between steamer going through Hell Gate and schooner drifting with the tide in a light wind, where the former was *held* in fault for not stopping to let the schooner pass.—The Island City, Case No. 7,108.

Between steamer and schooner in Buttermilk channel, where the former was *held* in fault

for not giving the latter a wide berth.—The Jamaica, Case No. 7,173.

Between steamer and schooner at sea on a dark and hazy night, where the former was *held* liable for too great speed and the want of a vigilant lookout.—The James Adger, Case No. 7,188.

Between steamer and schooner in Hell Gate, where both were *held* in fault, one for too great speed, and the other for indefinite maneuvers.—Jarvies v. The State of Maine, Case No. 7,224.

Between steamer and bark at night, the latter being sunk, and all on board save one person lost, where the former was *held* in fault, on her own evidence, for too great speed or the want of vigilant lookout.—The Java, Cases Nos. 7,232, 7,233.

Between schooner and tow lashed alongside of tug near the Astoria dock in the East river, where the latter was *held* in fault for not keeping out of the way.—The J. H. Gautier, Case No. 7,319.

Between steamer and sloop rounding West Point in the Hudson river, where the former was *held* in fault for not keeping the usual course in such cases.—The J. L. Hasbrouck, Case No. 7,323.

Between steamer passing under the stern of a large vessel at anchor and schooner hidden from view, where the former was *held* liable.—Judd Linseed & Sperm Oil Co. v. The Java, Case No. 7,559.

Between steamer and schooner in New York harbor, steamer *held* in fault for porting her helm, the schooner having kept her course.—The Lady Ellen, Case No. 7,981.

Between steamer, running as a ferry boat, and schooner on the Kennebec river, where the former was *held* in fault for not keeping away.—The Leopard, Case No. 8,264.

Between steamer and schooner off the coast of New Jersey, where the latter was *held* in fault, having failed to prove a change of course by the schooner.—The Lizzie Major, Case No. 8,422.

Between steamer and brig in the Atlantic Ocean, where the latter was *held* solely in fault for failure to hold her course.—The Louisa, Case No. 8,529.

Between bark and steamer off the coast of Ireland, where the former was *held* in fault for not exhibiting a visible light, and the latter was also *held* in fault for too great speed.—The Louisiana, Case No. 8,537.

Between steamboat and schooner, where the steamboat was in fault for want of proper lookout, and because no proper measures were taken after the schooner was discovered.—Lyle v. The Conestoga, Cases Nos. 8,622, 8,622a.

Between steamer and sail vessel near Cape Ann, where the latter was *held* in fault for not keeping her course.—Lowry v. The Portland, Case No. 8,583.

Between steamer and schooner in Delaware river, where both were *held* in fault, the former for insufficient lookout, and the latter for failure to exhibit a torch.—The Margaret, Case No. 9,069.

Between steamer and schooner which had proper lights burning, and did not change her course, where the steamer was *held* solely in fault.—The Metis, Case No. 9,499.

Between steamer and skiff, where the steamer was *held* solely at fault, the skiff being becalmed.—Miller v. The W. G. Hewes, Case No. 9,594.

Between steamer and schooner, where both were *held* in fault, the former for improper maneuver, and the latter for failure to sound a fog horn.—The Monticello, Case No. 9,739.

Between bark becalmed without colored lights and steamer, where both were *held* in fault.—Naunton v. The Oregon, Case No. 10,057.

Between steamer in the East river and schooner, immediately after going about, which was *held* in fault for not beating out her tack.—The Nereus, Case No. 10,121.

Between steamer and schooner which changed her course only in extremis, where the former was *held* solely in fault, having no lookout but the quartermaster at the wheel, in the pilot house.—The New Orleans, Case No. 10,179.

Between steamer with a proper lookout and schooner having no proper green light, where the former was *held* not in fault for the results of maneuvers which seemed proper at the time.—The New Orleans, Case No. 10,180.

Between steamer and schooner in New York Bay, where the former was *held* in fault for attempting to cross the schooner's bows, and the luffing of the schooner was *held* to be a fault in extremis.—The Novelty, Case No. 10,369.

Between schooner sailing free and steamer, at night, where the latter was *held* solely in fault for not keeping out of the way.—The Ocean Queen, Case No. 10,408a.

Between steamer and schooner, where the former was *held* in fault for attempting to pass between the injured vessel and another vessel.—The Old Dominion, Case No. 10,483.

Between ferryboat and sloop, where both were *held* in fault,—the former for want of lookout, and the latter for absence of colored light.—The Pavonia, Case No. 10,850.

Between steamer and bark, approaching on nearly parallel courses, where the steamer ported in time, and the bark was *held* solely in fault for starboarding.—Peck v. Burns, Case No. 10,889.

Between steamer and schooner, where former was *held* in fault for not keeping away.—Pope v. The R. B. Forbes, Case No. 11,275.

Between steamer and schooner at night, which were in plain view for miles, where the steamer failed to sustain the burden of proof that she was not in fault.—The Prince Edward, Case No. 11,427.

Between steamer and schooner at night, where the latter was *held* in fault for a change of course when near the steamer, and after the steamer had changed her course to avoid collision. Case No. 11,501, reversed.—The Queen, Case No. 11,502.

Between steamer and sail vessel, where the former had no lookout, and mistook the course of the latter, and was *held* solely in fault for the collision.—Reed v. The New Haven, Case No. 11,649.

Between schooner and steamer going at the rate of nine knots an hour, where the latter was *held* in fault for reversing instead of changing her helm.—Sanderson v. The Columbus, Case No. 12,299.

Between steamer and schooner, where the latter's torch was mistaken for that of a pilot boat, and the steamer continued to bear down upon her, instead of changing her helm, or stopping until she found out the schooner's course, and was *held* solely in fault.—The Titian, Case No. 14,061.

Between steamer and schooner, where the latter's lantern was not seen through the negligence of the steamer's lookout, and the steamer was *held* solely in fault.—Todd v. The James Adger, Case No. 14,074a.

Between steamer and schooner at night, where the latter was *held* solely in fault, hav-

ing, by changing her course, thwarted prudent and proper measures which the steamer had taken to avoid her.—The Wenona, Case No. 17,411.

Between steamer and schooner, where the former changed her helm in ignorance of the latter's course, and was *held* solely liable.—The Western Metropolis, Cases Nos. 17,439, 17,441.

Between sail vessel just coming to anchor off the Battery at New York, and steamer descending the river, where both were *held* at fault; the sail vesel for want of a lookout, and the steamer for traveling too near the shore, in the night, at too great speed.—The Wings of the Morning, Case No. 17,872.

Between steamer and schooner at sea, where both were *held* in fault; the former for not taking prompt measures to avoid the collision, and the latter for not seeing the steamer before changing her course.—The Zodiac, Case No. 18,217.

V. OVERTAKING VESSELS.

§ 47. What are overtaking vessels.

A vessel which goes about at the same time as another vessel on a parallel course, and endeavors to pass such other vessel, is an overtaking vessel.—The Clytie, Case No. 2,913.

Where two steamers on the same route are rounding the same point, they cannot be considered crossing courses where the faster boat attempts to cross the bows of the other.—The Oceanus, Cases Nos. 10,414, 10,415.

§ 48. Duty of overtaking vessel.

The overtaking vessel must exercise the greater degree of care to avoid collision.—The Governor, Case No. 5,645.

An overtaking vessel beating in the same direction with the vessel ahead is bound to anticipate the coming about of the latter when she has run out her tack.—The Nellie D., Case No. 10,097.

An overtaking steamer in the East river, though her stem is ahead of that of the other steamer when they reach Hell Gate, must give way or be liable for a resulting collision.—The Narragansett, Cases Nos. 10,016, 10,018.

An overtaking steamer passing a tug and tow at the entrance of the East river is bound to guard against the known effects of the tide.—The Newport, Case No. 10,185.

Where a steamer coming from behind a tug and tow must necessarily cross their course, and chooses to do so in front instead of behind them, and a collision results, the burden is on her to excuse herself.—The Newport, Case No. 10,185.

The burden is upon the overtaking vessel to show that the collision was not caused by her fault.—The Governor, Case No. 5,645.

§ 49. Duty of vessel ahead.

The overtaking vessel must avoid the vessel ahead, but she has the right to assume that the vessel ahead will hold her course, and the latter must not unnecessarily change her course so as to involve risk of collision.—The Ellen Holgate v. The Illinois, Case No. 4,376; The Hortensia, Id. 6,706; The W. H. Clark, Id. 17,482.

A sail vessel beating in advance of a steamer must run out her tacks.—Twibell v. The Keystone, Case No. 14,285.

Where a wharf presents itself as a dangerous obstacle to a nearer approach to the shore by a vessel beating, she may come about, and throw the responsibility on an overtaking steamer to avoid her.—Twibell v. The Keystone, Case No. 14,285.

A vessel sailing closehauled, upon being overtaken by another sailing the same course slightly to windward, is at fault in luffing so as to cause collision.—The Hortensia, Case No. 6,706.

A vessel in advance is not bound to give facilities to enable a vessel in her rear to pass her, but only to refrain from any maneuvers calculated to embarrass the latter in an attempt to pass.—The Governor, Case No. 5,645.

A vessel approached from behind by another, intending to cross her bows from starboard to port, is under no obligations to promote such movement.—McNally v. Meyer, Case No. 8,909.

Where the vessel ahead is willfully thrown across the path of the overtaking vessel, she cannot recover for an ensuing collision, though the rear vessel be not without fault.—The St. Paul, Case No. 12,243.

§ 50. Attempting to pass.

The boat astern takes all the risk of an attempt to pass, and the vessel ahead is not obliged to give way or change her course.—McGrew v. The Melnotte, Case No. 8,812.

The leading vessel is entitled to hold her course, and the one behind must select such a course as she may safely take to pass, where the vessel ahead does nothing intentionally to thwart or prevent her passing.—The Rhode Island, Case No. 11,745; The Oceanus, Id. 10,415.

Running within 20 yards, in an attempt to pass, is negligence.—The Rhode Island, Case No. 11,745.

§ 51. Racing.

A ship *held* in fault for collision with a schooner in an attempt by crowding on sail to get into a harbor ahead of her.—Erlandsen v. The Ocean Spray, Case No. 4,518.

§ 52. Particular instances of collision.

Sail vessel *held* not in fault in running out her course, off Blackwell's Island, though overtaking steamer signaled to tack short.—The Bridgeport, Case No. 1,860.

Overtaking tow in Schuylkill river, *held* in fault in violating the rule of navigation requiring a vessel astern to look out for a vessel ahead.—Brunsgaard v. The America and The Magdalene, Case No. 2,056.

Between propeller and schooner overhauled in Hell Gate, where, the wind dying out, the schooner anchored, to avoid danger of drifting on Hallett's Point, where the propeller was *held* not liable.—The Electra, Case No. 4,338.

Between the tows of two tugs in the East river, caused by the effort to avoid an overtaking steamer navigating near the shore, where the latter was *held* solely in fault.—The Ivanhoe, Case No. 7,113.

A schooner will be *held* in fault for suddenly luffing up across the course of an overtaking ferry, for the purpose of taking in sail to make her landing.—The Jay Gould, Case No. 7,245.

Between steamers in Hell Gate, where the overtaking vessel was *held* in fault for not giving way when abreast of the other.—The Narragansett, Case No. 10,016.

Overtaking vessel *held* liable for a collision with a heavy barge towed alongside a steamer which broke her stem line on sheering on meeting a cross tide and grounding.—Nelson v. The Thomas Sparks, Case No. 10,115.

Between Long Island Sound steamers rounding the Battery, where the one which left her pier first was considered the overtaking steamer by reason of the longer course taken by her.—The Oceanus, Cases Nos. 10,414, 10,415.

Between steamers in Hell Gate, where the overtaking vessel was *held* in fault for not stopping in time to allow the other to get ahead of her.—The Providence, Case No. 11,449.

Between tow and overtaking steamer, where both tug and steamer were *held* in fault for crowding.—St. Paul Fire & Marine Ins. Co. v. The Lake Superior, Case No. 12,244.

VI. VESSELS IN TOW.

Liability of tug to tow, see "Towage," § 19.

§ 53. Duties and liabilities of tug.

In the case of a collision by a tow, where there is no proof as to the agreement for towage or the local usage, the tug will not be presumed to have been under the control of the tow.—The Swallow, Case No. 13,663.

It is no defense to a tug colliding with another vessel that she was acting under the orders of a steamer which she was towing.—Marshall v. Marshall, Case No. 9,128b.

The tug is not liable for a collision between a tow alongside and a vessel at a pier, where the tug's motions are directed by a pilot in the employ of, and on board and in charge of, the vessel in tow.—The Edgar Baxter, Case No. 4,278.

The rule is the same where the tug's motions are controlled by a licensed pilot employed by and on board of the ship.—Smith v. The Creole, Case No. 13,033. CONTRA, see The Rescue, Case No. 11,708.

The tow will be *held* liable for a collision where the tug is the agent of the boats and a collision is caused by her being overtasked.—The Palmetto, Case No. 10,699.

A tow of nine loaded canal boats *held* too heavy for a tug on the Chicago river.—The Palmetto, Case No. 10,699.

Suction of water from passing vessels is one of the natural incidents of navigation which a tug with a tow must guard against.—The Monitor, Case No. 9,710.

A tug is chargeable with fault in having a towing cleat so loose as to require her to stop and ease it on passing other steamers.—The Northfield, Case No. 10,326.

A tug, which stops on meeting a steamer, in consequence of which her tow spreads out with the effect of the tide, will be *held* in fault where the collision would not have happened if she had kept on.—The Pennsylvania, Case No. 10,946.

A tug which silently acquiesces in the slackening of a bow line by a tow alongside is responsible for resulting damages.—The Olive Baker, Case No. 10,489.

A tug acting under the direction of a naval officer *held* not liable for a collision of a floating derrick in tow drifting with the tide against a vessel moored.—Williams v. The Vanderbilt and The Collins, Case No. 17,743.

It is the duty of a propeller towing a barge past a vessel at anchor to take great care not to go so near the anchored vessel that a sheer of the barge might cause a collision.—The Cement Rock and The Venture, Case No. 2,544.

In the absence of instructions from the pilot in charge of a ship to the tug having it in tow, as to its course on approach of a schooner, it was the duty of the tug to navigate so as to avoid a collision.—The Civilta, Case No. 2,775.

A propeller which tows a barge past a vessel at anchor, passing so close as to cause a collision between the vessel and the barge, and without keeping a proper lookout astern, is in fault, and solely liable.—The Cement Rock and The Venture, Case No. 2,544.

Where a vessel in tow collides with another vessel which the tug saw and could have avoided, the tug is liable.—The Clover, Case No. 2,908.

Where a tug tows a ferry boat on fire from her slip, the burden of proof is on the tug to show that she was not in fault in towing the ferry boat against a schooner at anchor.—The Clara, Cases Nos. 2,788, 2,789.

The towing of a ferryboat on fire out of a slip by a hempen hawser, likely to take fire, is negligence, and, where the burning vessel drifts against another at anchor, on the hawser burning, the tug is liable.—The Clara, Cases Nos. 2,788, 2,789.

A tug towing a vessel by a hawser astern will be *held* liable for a collision between the tow and a vessel moored at a wharf, where, knowing the tow steered badly, and having ample sea room, she follows a course near the wharf.—The Favorite, Case No. 4,700.

A tug will be *held* liable for injury to third vessel by a sheer of a canal boat towed astern, where she had notice that the latter steered badly, and did not take proper measures to arrest the sheer and avoid the collision. Case No. 4,598, reversed.—The Express, Case No. 4,596.

A tug employed to tow in and land a vessel at a particular place is charged with the duty of directing the vessel towed, and managing the helm in making the landing.—The Southwest, Case No. 13,191.

The act of a sail vessel in detaching herself from a tug and fastening herself to a pier is to be considered her act, unless she show that she was left at the pier in opposition to her wishes.—Tyson v. The Jason, Case No. 14,317.

In the case of a raft towed by a steamer, the steamer, and not the raft, will be *held* liable for damages for a collision.—The W. H. Clark, Case No. 17,482.

The respective liabilities of tow and tug considered.—The Belknap, Case No. 1,244.

Tug *held* in fault for starting out with a tow in a tide so strong that she could not control her maneuver, and was forced against a vessel lying at a pier.—Williamsburg Ferry Co. v. The Chelsea, Case No. 17,747.

§ 54. Duties and liabilities of tow.

A tow which is itself without fault is not liable for damages resulting from a collision caused by the fault of the tug.—Westhoff v. The Oluf, Case No. 17,449.

The owners of a tow which is under the exclusive direction of the master of the tug are not liable for damages caused by collision occurring through negligence in the navigation of the tug.—The Hector, Case No. 6,317.

A schooner admitting that she broke adrift from her tug because of her own defective hawser is alone liable for collision with a vessel moored.—The A. R. Wetmore, Case No. 569.

A steamer without power of her own, and under the exclusive control of a tug, is not liable for collision with schooner at pier.—The Cambridge, Case No. 2,332.

§ 55. Joint liability.

Where the persons in charge of a tug and tow jointly participate in their control and management, the vessels are jointly liable for an injury to a third vessel.—The Coleman, Case No. 2,981.

Where a ship and tug lashed together are navigated under the direction of the master of the tug by the use of both helms, they are liable, as joint tort feasors, for a collision by the ship.—Boyer v. The Wisconsin and The Hector, Case No. 1,756.

Both tug and schooner *held* in fault for injuries caused by the tug attempting to haul the schooner from entanglement with mooring chain of powder boat, near which she negligently anchored.—The Burke, Case No. 2,159.

§ 56. Faulty management of tow.

A canal boat in the Chicago river is not subject to rule of navigation requiring a boat to be

carried astern with a line ready to be thrown ashore in emergency.—The B. S. Sheppard, Case No. 2,072.

Barque towed astern in narrow river should have her anchor ready to let go, to check her headway in emergency.—The B. S. Sheppard, Case No. 2,072.

§ 57. Contributive fault.

Where there was no darkness sufficient to prevent an approaching vessel from seeing a vessel in tow of a tug, failure of the tug to carry lights showing that she had a tow was not a fault causing the collision.—The City of Troy, Case No. 2,769.

§ 58. Burden of proof.

A boat towed astern, steered with her own helm, who sheers and comes into collision with a passing tow, has the burden of showing that the sheer was caused by some fault on the part of her tug.—The Herald, Case No. 6,392.

§ 59. Particular instances of collision.

Between canal boats in tow and steamer at anchor, where the tug was held at fault in not taking sufficient precautions in a squall of wind. —The Alida, Case No. 201.

Between steamer and tow in Milwaukee harbor.—The Alleghany, Cases Nos. 204, 205.

Between tows of steamboats meeting on Hudson river, where one tug was held in fault for not keeping her side of the channel.—The America, Case No. 280.

Between tow and tug of another tow, in the Kills.—The Atlas, Case No. 634.

Tug *held* prima facie liable for collision between ship in tow manned by landsmen only, and lighter at dock.—The Belknap, Case No. 1,244.

A steamer approaching her usual berth with due care *held* not liable for collision with a barge in tow.—Blukeman v. The Pacific, Case No. 1,571.

Both tug and barge in tow *held* in fault for collision with a steamer moored, caused by failure to stop her headway on approaching a berth.—Bowas v. Pioneer Tow Line, Case No. 1,713.

Between lighter propelled by oars and ship lashed to the side of a tug, making the same pier.—Boyer v. The Wisconsin and The Hector, Case No. 1,756.

Between steamer hove to and ship towed to sea, drifting in tide after hawser cast off.—Butterfield v. Boyd, Case No. 2,250.

In a collision between a steamboat and a schooner in tow, *held*, that the steamer was in fault.—The City of Hartford, Case No. 2,748.

Steamer *held* in fault for collision with boats holding seine towed astern of a fishing schooner caused by a change of course by the latter made in extremis.—The Columbia, Case No. 3,035.

Tug *held* prima facie liable for collision between tow and vessel at anchor at a place where the river was three-fourths of a mile wide.—Culberg v. The Continental, Case No. 3,460.

Between barge towed astern and cast loose from the tug, to permit the latter to come alongside to make a landing, and schooner at anchor near piers, in violation of local regulation, where both tug and barge were *held* solely at fault.—The E. A. Packer and The John Neilson, Case No. 4,241.

Between tug with tows on Delaware river, carrying but one vertical light, and steamship misled thereby, where both were *held* in fault, the latter for changing her course.—Elliott v. The Volunteer, Case No. 4,398.

Between tows in East river, where tug attempted to pass between a drilling scow and piers, and failed to keep her tow on a parallel course.—The Frederick M. Wilson, Case No. 5,078.

Tug *held* liable for collision between ferry boat and tow without light, which was being shifted while lying in the track of the ferry.—The Gorgas, Case No. 5,622.

Between the tow of a tug coming into and the tow of a tug going out of the Atlantic basin, where the former tug was *held* solely in fault for making a turn too short to enable her to see the approaching vessel in time to avoid a collision.—The J. C. Gibbes and The Capriccio, Case No. 7,248.

Between tows, resulting from failure of one to pay out the hawser in obedience to an order from the tug, *held* to have occurred from the sole fault of such tow.—Martinez v. The Anglo Norman, Case No. 9,174.

Between boat in tow astern and schooner drifting with tide in light wind, where tug was *held* in fault for not keeping out of the way.—The Mount Washington, Case No. 9,888.

Between a barge and ship in tow of steamers meeting in the East river, where the ship was *held* in fault for starboarding her helm.—Pennsylvania Coal Co. v. The Queen Victoria, Case No. 10,952a.

Between the rear boats in tow spread out by the stopping of the tug on a flood tide, and a steamer which passed to the port side after the tug had blown two whistles, where the latter was *held* solely in fault.—The Pennsylvania, Case No. 10,946.

Between the last of two barges, towed directly astern of a tug, and 1,000 feet therefrom, and a passenger steamer on Long Island Sound, on slightly crossing courses, where the steamer was *held* in fault for not discovering the tow, which carried the regulation light.—The Rhode Island, Case No. 11,741.

Tug *held* liable for collision by stern tow with schooner anchored in the St. Clair river for an attempt to pass the bend in the river with more than one vessel in tow.—The Swallow, Case No. 13,663.

Between steamer and brig in English channel in fog, where both were *held* in fault, the former for running 8 miles an hour, the latter for failure to continually blow her fog horn.—The Westphalia, Case No. 17,460.

VII. VESSELS AT REST, AT ANCHOR, OR AT PIERS.

§ 60. Local regulations generally.

A local ordinance in relation to anchoring is binding on all navigators.—The Bedford, Case No. 1,216.

A general regulation of the harbor masters forbidding vessels to anchor in a certain spot will be *held* to have been waived where no notice was given to remove.—The Russia, Case No. 12,168.

A vessel whose jib boom is standing, contrary to law, is liable for collision happening wholly or in part thereby.—The Clover, Case No. 2,908.

§ 61. Higher obligation on moving vessel.

The presumption is against a moving vessel which collides with another anchored or moored at a proper place, and she has the burden of showing that the latter was at fault or that the accident was inevitable.—American Dredging Co. v. The Bedowin, Case No. 299; Amoskeag Mfg. Co. v. The John Adams, Id. 338; The Baltic, Id. 823; The Beaver, Id. 1,199; The Bridgeport, Id. 1,861; The City of New York, Id. 2,759; Hall v. Little, Id. 5,939; The Helen R. Cooper, Id. 6,334; The Lady Frank-

lin, Id. 7,984; The Lincoln, Id. 8,354; McCloskey v. The Achilles, Id. 8,701; Mills v. The Nathaniel Holmes, Id. 9,613; Pierce v. Lang, Id. 11,144; The Scioto, Id. 12,508; Sterling v. The Jennie Cushman, Id. 13,375.

A sailing vessel entering a crowded harbor at night at a speed of six miles an hour, in addition to a current of four miles, and colliding with an anchored vessel, will be *held* in fault.—The Masten, Case No. 9,266.

Unskillfulness displayed by a vessel under way in the measures used to avoid a collision after discovering a vessel at anchor in the channel without a light will render the former liable.—Green v. The Adelaide, Case No. 5,752.

Damages for an injury to a vessel moored, by the rubbing by a vessel lying alongside, caused by a collision with a third vessel under way, may be recovered against the colliding vessel.—The Moxey, Case No. 9,894.

To recover of the vessel moored alongside, she must be shown to have been in fault.—The Moxey, Case No. 9,894.

A steamboat will be held liable for a collision between two vessels properly secured at a pier, caused by her swells, where she passed unnecessarily near at high speed.—The Morrisania, Case No. 9,838.

§ 62. Vessels at anchor—In general.

Dredging machines have rights of vessels at anchor.—American Dredging Co. v. The Bedowin, Case No. 299.

A vessel unlawfully obstructing the passage of another on tide waters is liable to the latter for any direct damage or prejudice resulting therefrom.—Smith v. The Alabama, Case No. 12,998a.

§ 63. —— Negligence in choosing anchorage in general.

An anchoring place designated by the harbor master of Boston is a proper anchorage, though in the channel.—The Lady Franklin, Case No. 7,984.

Anchorage in a narrow channel, where vessels are constantly passing, is not necessarily improper, if room be left for vessels and tows to pass in safety; but a vigilant anchor watch must be maintained.—The Masters, Case No. 9,267.

A schooner will not be held chargeable with a contributing fault in anchoring near piers in violation of local regulation, where it appears that vessels were in the habit of anchoring in such spot.—The E. A. Packer and The John Neilson, Case No. 4,241.

A vessel which anchors in the channel or entrance to a port, except in case of necessity, or remains there longer than the necessity continues, will be *held* in fault in case of collision with a moving vessel.—The Scioto, Case No. 12,508.

Negligence in lying in the track of a vessel gives rise to the same degree of liability for collision as any other fault.—Fish v. The Black Warrior, Case No. 4,813.

A vessel anchoring in the daytime in the track of a ferry, and having been requested to remove, will be held solely liable for injuries by collision with the ferryboat, which used due caution, at night in a fog.—The Exchange, Case No. 4,593.

A vessel lying at anchor in the main thoroughfare at the mouth of the Mississippi will be held in fault for a collision with a vessel which drifted against her in the current on the wind dying away.—The Louisville v. Strout, Case No. 8,542.

Vessels anchoring in Hampton Roads, within the area described in the United States coast survey charts as "the usual anchoring ground," cannot be held in fault because lying within the customary track of steamers.—The J. W. Everman, Case No. 7,591.

Anchoring in middle of Hudson river, opposite Ft. Lee, at night, *held* not culpable conduct.—The Indiana, Case No. 7,020.

§ 64. —— Anchoring near other vessels.

A brig which comes to anchor too near a schooner is liable for a collision with the schooner, where the brig drags her anchor on being fouled with another vessel at anchor, though she was not at fault for the first collision.—The Lincoln, Case No. 8,354.

Anchoring directly leeward of another vessel, a distance of 125 fathoms, is not of itself negligence.—The Julia M. Hallock, Case No. 7,579.

A vessel anchored in a proper place is entitled to room enough to swing in safety on as long scope of chain as is necessary to prevent her dragging.—The Queen of the East, Case No. 11,506.

§ 65. —— Care of vessel.

A vessel is not at fault in leaving her sails up while at anchor in broad daylight, at a place where she could be seen for a long distance, and was not obstructing the channel.—The John Sanderson, Case No. 7,364.

A vessel at anchor at a breakwater in a storm is in fault in not having a watch on deck, and cannot recover against a vessel for a collision.—The Clara, Case No. 2,787.

A custom of leaving fishing vessels at anchor in the harbor all night without any one on board can only extend to and be justified in ordinary weather, and not in time of storm.—The Echo, Case No. 4,264.

Where a vessel at anchor in a gale is run into by another vessel, having no person on board, the latter is liable, notwithstanding the custom in the harbor to leave vessels at anchor without any one on board.—Clapp v. Young, Case No. 2,786.

A vessel at anchor in a channel of a river is liable for all damages caused solely by her want of a light or lookout.—Cohen v. The Mary T. Wilder, Case No. 2,965.

A vessel injured while at anchor, at night, in the middle of the Hudson river, cannot recover where she failed to keep a good light and a sufficient watch on deck.—The Indiana, Case No. 7,020.

§ 66. —— Duty to avoid collision.

An anchor watch is not bound to take active measures to get his vessel out of the way of a vessel approaching in daylight under command, or to hail the latter unless he discovers that his vessel is not seen.—The Lady Franklin, Case No. 7,984.

A vessel anchored in a river in a rapid current cannot recover for injuries in a collision with a drifting sail vessel, which would have been avoided had she kept a watch.—Buzzard v. The Petrel, Case No. 2,261.

§ 67. —— Dragging anchors.

The burden is on a schooner which, having dragged her anchors at night, collided with a sloop at anchor, to show that the collision was caused by inevitable accident.—The Dutchess, Case No. 4,205.

Two anchors, together weighing 300 pounds, *held* insufficient for a fishing schooner of 54 tons, such insufficiency rendering her liable for a collision resulting from dragging her anchors in a storm.—The Echo, Case No. 4,264.

A vessel is liable for a collision caused by dragging her anchor in a storm, where the master had knowledge of the approaching

storm, and failed to put out a second anchor.—The Eloina, Case No. 4,420.

§ 68. Vessels at wharf—Care in mooring.

A canal boat moored at a dock by order of the harbor master is lawfully there, though it be at a narrow place in the river.—The Monitor, Case No. 9,710.

The mooring of a bark by a single ⅞-inch chain at a pier in the North river, in the winter season, *held* negligence.—The Lotty, Case No. 8,524.

Where a ship brought into a slip to avoid peril from running ice is warned that her position is dangerous to another vessel in the slip, injury caused by her, where her fastenings are carried away by the ice, is not a case of inevitable accident.—The John Tucker, Case No. 7,431.

It is no defense in such case that the vessel injured was lying in the slip head out, in violation of the rule of the harbor master.—The John Tucker, Case No. 7,431.

§ 69. —— Mooring against other vessels.

A vessel which moors alongside of another at a wharf or elsewhere becomes responsible to the other for all injuries resulting from her proximity which human skill or precaution could have guarded against.—Vantine v. The Lake, Case No. 16,878.

A vessel which moors alongside of another at a wharf is bound to know the depth of water, and is responsible for the directions of the consignees, who have such knowledge, and is liable for injury to the other vessel against which she careens on grounding during an ebb tide.—Vantine v. The Lake, Case No. 16,878.

It is no defense to a libel for injury to a sloop by the lurching of a scow moored alongside, during which she dumped her deck load of stone, that the lurching was caused by the swells from a passing steamer and the scow striking the ground, as, in such case, the owner was at fault in mooring the scow next the sloop.—Scow Without a Name, Case No. 12,554.

A large vessel which places herself outside a small one in a slip, and refuses to move to let the other out when the weather becomes such as to make her position dangerous, is liable for the injury inflicted.—Walters v. The Radius, Case No. 17,123.

The fact that it would be necessary to run a line across the slip temporarily, which is forbidden by ordinance, will not excuse the larger vessel, as the spirit of the ordinance would not be violated in such an emergency.—Walters v. The Radius, Case No. 17,123.

A vessel which is merely passive, as where the collision is caused by the swell of a passing steamer, is not to be *held* in fault, where she is not chargeable with negligence.—Kissam v. The Albert, Case No. 7,852.

A tug lying at a pier was injured by having a tug lying next her with flaring bows crowded against her bulwarks amidships, on being pressed from the other side by a tug and tow which merely sagged against her by the force of the tide. *Held*, that the injury was solely attributed to the positions of the vessels at the pier, and that the moving vessels were not liable.—The Charles R. Stone, Case No. 2,620.

§ 70. —— Care of vessel.

A vessel properly moored at a wharf is not ordinarily bound to keep watch on board.—Amoskeag Mfg. Co. v. The John Adams, Case No. 338.

A vessel which fastens to a pier in New York harbor in midwinter, while a strong tide is running, and the river is full of floating ice, is negligent in not having a competent pilot or master on board.—Tyson v. The Jason, Case No. 14,317.

A steamer will be *held* liable for injuries caused by the breaking of the fastenings of a canal boat by the current from her propeller, which she set in motion without notice to the canal boat while moored in a slip.—The Leo, Case No. 8,250.

A vessel lying in a slip in the port of New York must brace up her yards, or toplift them during the night.—The Phoenix, Case No. 11,111.

A vessel lying wholly inside a dock in Boston harbor need not have her yards braced up.—Pierce v. Lang, Case No. 11,144.

A vessel lying at a wharf in the Chicago river which allows her anchor to hang at the hawse pipe with its flukes below the surface, where it sinks a colliding boat, will be *held* at fault, irrespective of the city ordinances.—The Palmetto, Case No. 10,699.

§ 71. —— Making landings.

A vessel voluntarily approaching another moored at a dock, and striking her, is solely liable, although the other may somewhat block the passage.—Marshall v. Marshall, Case No. 9,128b.

A vessel is liable for collision, caused by the action of the tide, with a vessel lying at a dock at which she is attempting to land.—Brown v. The Gideon Lee, Case No. 2,006a.

Libelant landing his flat boat on Mississippi river, in accordance with local rule, *held* not guilty of negligence.—Culbertson v. The Southern Belle, Case No. 3,462.

Where steamers using the same pier have a customary mode of making landings, *held*, that the vessel which had begun to make her landing as customary was entitled to complete it without embarrassment from the other.—The State of New York, Case No. 13,327.

Steamer in backing out of slip in maneuvering for landing is negligent in not having a lookout on after deck.—The Baltic, Case No. 821.

A sail vessel approaching a wharf when another is making sail to leave a wharf near by has the right to presume, from the dropping of the sails of the latter, that she will wait until the former comes to anchor.—Rider v. The Pacific, Case No. 11,812.

A steamship will be held liable for so coming into her pier as to touch vessels lying at the second pier away.—The Nebraska, Case No. 10,075.

§ 72. —— Duty in relation to moving vessel.

A vessel lying near to, but not moored at, a wharf, without a signal light, and with her boom rigged out board, is responsible for a collision with another vessel moving prudently to her accustomed berth.—Stiles v. The John Stevens, Case No. 13,443.

A canal boat lying at a pier is not bound, at the request of the master of a tug taking another boat out of the slip, to get out extra fastenings to prevent the canal boat breaking loose by the pressure of the tug carried against her by the tide.—The Titan, Case No. 14,060.

The owners of rafts, barges, or other craft moored to the banks must foresee and provide against accidents liable to be caused by the swell of passing steamers.—Fawcett v. The Natchez, Case No. 4,703.

A usage for vessels to let go their warps on the approach of a steamer is not applicable in favor of a steamer having no right to use the waters of the harbor.—The Maverick, Case No. 9,316.

§ 73. —— Maneuvers in slips.

A vessel moving out of a slip, where other vessels are moored alongside, is charged with the duty of seeing that all lines are unfastened.—The Thornton, Case No. 13,995.

Steamship making a maneuver in a slip is liable for damages to her tug caused by the parting of a spring line used to check her sternway.—The Anglia, Case No. 389.

Where a vessel is moved in a dock in Boston harbor in which other vessels are lying, she must give notice to the wharfinger, so that proper precautions may be taken by the other vessels.—Pierce v. Lang, Case No. 11,144.

A large ocean steamer leaving a narrow slip crowded with other craft by using her own propeller must use the utmost care and maintain adequate lookouts and complete control over her movements. If this is impracticable she must employ a tug.—The Nevada, Case No. 10,131.

A tug in swinging an elevator in tow into a slip is charged with the duty of avoiding a barge rightfully moored to the end of the pier with stern projecting.—The Nellie, Case No. 10,093.

A bark which, having discharged her ballast at a wharf, immediately capsizes, on her lines being thrown off the wharf by direction of her master, and sinks a tug alongside employed by the master to tow her to another wharf, is liable for the loss sustained.—Hopkins v. The Zeba, Case No. 6,694.

§ 74. —— Drifting from moorings.

A vessel which breaks from her moorings, and comes into collision with another at anchor, has the burden of showing vis major, or inevitable accident.—The Fremont, Case No. 5,094.

The breaking of fastenings in a tempest is not a case of vis major where the master had warning and sufficient opportunity to protect the vessel.—The Lotty, Case No. 8,524.

Failure to increase fastenings after necessity was apparent will prevent defense of vis major to vessel causing damage by breaking away in wind storm.—Camden & A. R. Transp. Co. v. The Lotty, Case No. 2,337a.

A collision in a slip, caused by a bark pulling out a pile to which her bow chain was fastened, in a storm lasting two or three days, *held* not due to inevitable accident.—The Johannes, Case No. 7,332.

Steamers laid up for the winter alongside a pier broke from their moorings from the force of ice driven by the wind and tide against barges which made fast to them for the night. *Held* not a case of inevitable accident, and that the barges were liable.—The Energy, Case No. 4,485.

Where a schooner moored for the winter at a pier broke adrift, and ran into a canal boat and beached her, she is liable for the damages.—The Christopher Columbus, Case No. 2,705.

The fact that a vessel causing damages by breaking her moorings was moored by the licensed pilot who brought her into port is no defense.—Camden & A. R. Transp. Co. v. The Lotty, Case No. 2,337a.

§ 75. Vessels aground.

A vessel aground in a narrow channel, in a situation to permit of other vessels passing her in safety, should, on the approach of another, cease her efforts to get off, until such other vessel has passed.—The Thomas A. Scott, Case No. 13,921.

A tug working at a vessel aground in the channel of the St. Clair flats must give way to passing vessels, though it requires a temporary suspension of her efforts; and the master of an approaching vessel may rely upon her observance of such duty.—The Napoleon, Case No. 10,014.

A vessel which attempts to haul by another grounded in the entrance to a dock, after being warned that there is not room enough, is liable for all injuries caused by her jamming.—The Stromless, Case No. 13,540.

§ 76. Effect of unseaworthiness.

Vessels moored at piers must be of sufficient strength to bear ordinary pressure from vessels landing or moored alongside.—The Cambridge, Case No. 2,332.

A ship, having come in from sea in a seaworthy condition, the fact that she was sunk at her anchorage, by the blow of a steamship carried against her by the tide, does not establish that she was not tight and strong.—The Russia, Case No. 12,168.

§ 77. Particular instances of collision.

Between steamer with a tow and sloop at anchor, near shore, caused by steamer's taking inshore course, too great speed, and want of lookout.—Acker v. The Rainbow, Case No. 26.

Between dredge anchored at mouth of river and tug and bark.—Albany Dredging Co. v. The Gladiolus and The Concordia, Case No. 132.

Between brig anchored in track of navigation and vessel in tow.—Allegro v. The Niagara, Case No. 207a.

With vessel at anchor where colliding vessel not clearly proven.—The Anna, Case No. 399.

Between towboat and wrecking vessels anchored over wreck, and exhibiting wrong light.—The Austin, Case No. 663.

Between longboat hanging under bark's counter and barge breaking loose from pier by force of ice floe.—The Avid, Case No. 678.

Between steamer backing out of slip, swinging with tide, and ferryboat making adjoining slip.—The Baltic, Case No. 821.

Between ferryboat on foggy morning and brig anchored near track, in violation of ordinance.—The Baltic, Case No. 822.

Between vessel lying at end of pier, with stern projecting into ferry slip, and ferryboat making landing, carried by tide against it.—The Baltic, Case No. 823.

Between vessels at anchor in a storm.—Beane v. The Mayurka, Case No. 1,175.

Vessel *held* negligent in anchoring 400 feet to windward of another, and not taking due precaution to avoid collision from increasing wind and sea.—The Beaver, Case No. 1,199.

Schooner anchoring in dense fog within 60 yards of track of ferry, in violation of local ordinance, *held* at fault.—The Bedford, Case No. 1,216.

Ferryboat knowing of anchorage of schooner in violation of ordinance, and refusal to change, *held* equally liable for collision in fog.—The Bedford, Case No. 1,216.

Vessel lying at anchor in roadstead without anchor lights, and lookout asleep, *held* solely in fault.—Beyer v. The Nurnberg, Case No. 1,380.

Tug *held* in fault in attempting to land steamer at pier alongside schooner just getting ready to go to sea.—The Cambridge, Case No. 2,332.

Schooner in such case *held* not in fault in not having fenders out to save injury from collision.—The Cambridge, Case No. 2,332.

Steamship *held* in fault for setting her screw in motion while in a slip, and in not keeping a watch, and liable for damages to canal boat drawn by suction and sunk.—The Colon, Case No. 3,022.

Steamer *held* liable for collision with vessel at anchor in a proper place, caused by ground-

ing in an attempt to pass on the wrong side.—Commercial Steamboat Co. v. Dutton, Case No. 3,064.

Between propeller at pier and schooner entering the basin, where the latter would have hit the face of the pier had the propeller not been there.—Cornell v. The Margaretta, Case No. 3,239.

A bark with stern extending beyond the end of the pier *held* solely in fault for collision with large steamer cautiously working into her berth at an adjoining pier.—In re Cornwall, Case No. 3,248.

Steamboat *held* liable for collision with flat boat at Mississippi river landing.—Culbertson v. The Southern Belle, Case No. 3,462.

Tug *held* liable for collision between schooner being towed out of slip and bark lying at adjoining pier, caused by the casting off of a line by the schooner, which held her against flood tide.—The Don Juan, Case No. 3,986.

Between sloop in Norfolk harbor and tug backing from wharf, the latter being *held* liable for want of a lookout.—Dunstan v. The R. R. Kirkland, Case No. 4,181.

Between vessel at pier and vessel making adjoining berth, alleged to have been hindered by another vessel assigned to the same berth by the harbor master.—The E. C. Scranton, Case No. 4,270.

Between schooner aground across a Hatteras Inlet channel and steamer attempting to pass after making soundings, which failed to obey her helm because of scraping the bottom, the steamer being *held* solely in fault, though the schooner did not put out fenders, and might by lightening have got into shallower water.—The Ellen S. Terry, Case No. 4,378.

Between pilot boat at anchor off quarantine, with sails up to dry, and bark towed in from sea, carried against the former by the tide on being brought too close.—The Emilie, Case No. 4,450.

Between schooner entering the mouth of Buffalo creek, from the lake, in a gale, with wet rigging, and canal boat projecting too far into the channel, where the former was *held* free from fault.—Evans v. The John F. Warner, Case No. 4,563.

Between a propeller aground on St. Clair flats, not exhibiting a proper light, and a tow whose tug failed to stop, where the tow only was *held* blameless.—The Frank Moffat, Case No. 5,060.

Vessel at anchor *held* not at fault for omitting to set an anchor watch.—The Fremont, Case No. 5,094.

Between canal boats at pier forced together by steamer backing in coming into her berth at the pier, and duly warned.—The General McCullum, Case No. 5,317.

Between steamer, at anchor in the track of a ferry, and the ferryboat, in a fog, where the former failed to ring a bell, and was *held* solely in fault.—The Hudson, Case No. 6,829.

Between steamer under way and schooner at anchor in middle of Hudson river at night, without sufficient light or watch.—The Indiana, Case No. 7,020.

Between brig at anchor on the flats in the Penobscot river and schooner in tow, where the latter was *held* solely liable.—The Jeannie Cushman, Case No. 7,250.

Between schooner at anchor in the East river, between Blackwell's and Manhattan Islands, with her sails up, and schooner under way, where the latter was *held* in fault.—The John Sanderson, Case No. 7,364.

Between vessel shorthanded, hove short, before making sail, and vessel anchoring 125 fathoms to leeward, where former was *held* solely liable for adopting improper method of getting under way.—The Julia M. Hallock, Case No. 7,579.

Where a canal boat was injured by striking the anchor of a schooner suspended under water at a pier, *held* that both were in fault.—The Kolon, Case No. 7,923.

A vessel struck by a schooner while anchored in or near the edge of the channel, without displaying lights, *held* in fault.—Larco v. The Martha and Elizabeth, Case No. 8,087.

Between ferryboat coming out of Fulton Ferry slip and tow of tug coming down East river and rounding to pick up a boat just above the slip, where the former was *held* in fault.—The Manhasset, Case No. 9,019.

There is almost a conclusive presumption of fault in a steamer which runs into a vessel at anchor in a harbor, in a proper place, and with proper lights.—Mercer v. The Florida, Case No. 9,433.

Between pilot boat and schooner, where the former was *held* in fault for failure to exhibit a light while lying to, and for want of a competent person on deck.—Messena v. The Neilson, Case No. 9,493a.

A bark drifting from her anchorage against another anchored vessel *held* liable, in the absence of sufficient evidence that the drifting was by inevitable accident.—The Midas, Case No. 9,532.

Between steamer and vessel in anchor in fog, where both were *held* in fault, the former for too great speed, and the latter, for absence of bell or fog horn.—Morrison v. The Petaluma, Case No. 9,848.

A bark *held* not in fault where a canal boat moored beside her was sunk by coming in contact with her fender.—The New York, Case No. 10,195.

Between schooner anchored in North river about 100 yards from the dock at Thirteenth street, New York, without lookout, and tow landing at dock, where former was *held* in fault for anchoring in such place.—Olmstead v. The Sandusky, Case No. 10,504.

Between vessel at anchor and vessel getting under way, where both were *held* liable, the former for failure to have a watch, and the latter for not notifying the former of her intention.—O'Neil v. Sears, Case No. 10,530.

Between vessels at anchor, when one attempted to move which had previously dragged her anchor, and was *held* solely in fault for not sooner discovering the dragging, and for attempting to move under the circumstances.—The Petunia, Case No. 11,052.

Between steamboat backing into berth, and ship with yards squared, where both were *held* in fault,—the former for not having out a line to steady her, and the latter for leaving her yards squared at night.—The Phœnix, Case No. 11,111.

Between schooner at anchor with sails up in puffy wind, in channel 1,500 feet wide, and steamer running 12 miles an hour, where the latter was *held* solely in fault for not giving schooner a wider berth.—The Planet, Case No. 11,203.

Between vessel moored at bank of river and one of two passing steamers, where the outer steamer, having plenty of room, was *held* solely in fault for crowding.—Portevant v. The Bella Donna, Case No. 11,292.

Between brig at anchor in a proper place, and ship subsequently anchored near, which dragged her anchor and went astern, where the brig subsequently drifted nearer the ship, and they came together on the turn of the tide.—The Queen of the East, Case No. 11,506.

Between bark at anchor in New York harbor, and tug coming down the river, where it was *held* that the former's lights were sufficient, and the tug was solely at fault.—Rae v. The New York, Case No. 11,524.

Between vessel at anchor without a light, and vessel coming into harbor and entering the anchorage ground under full sail where both were *held* in fault.—Ruckman v. The Five Boys, Case No. 12,107.

Between bark and tug lying at rest in Lake Huron, where the latter exhibiting colored lights, was *held* solely at fault in not getting out of the way.—The Sunnyside, Case No. 13,620.

A vessel anchored within 300 yards of the Battery, at night, without a light or a watch on deck, *held* solely liable where injured in a collision with a steamboat rounding the Battery in the usual manner to make her pier at Cortlandt street.—Thain v. The North America, Case No. 13,853.

In the case of a bark at anchor in the Swash Channel, run into by an Atlantic liner, at night, *held*, that both vessels were liable; the former for not having a light, and the latter for failure of her officers to use the night glasses to examine the channel ahead.—The Ville Du Havre, Case No. 16,943

A floating derrick without motive power, moving in tow of a tug, *held* free from fault where she drifted against a vessel moored at a dock.—Williams v. The Vanderbilt and The Collins, Case No. 17,742.

Between scow cast off from tug in tideway with a sheer and vessel at anchor, where former was held solely at fault.—Wilson v. The Envoy, Case No. 17,802.

VIII. LIGHTS AND SIGNALS.

§ 78. Duty to carry lights in general.

Construction of Act July 25, 1866, as to proper lights for ocean going steamers, coasting steamers, and those carrying sail.—The Glaucus, Case No. 5,478.

Act July 7, 1838, requiring steamboats to carry lights at night, does not apply to coal barges.—Elliott v. The James Nelson, Case No. 4,393.

But a coal barge which does not display within a reasonable time such a signal light as may be seen will be *held* in fault where the absence of the light contributed to the collision.—Elliott v. The James Nelson, Case No. 4,393.

It is neglect of proper precaution for a steamboat not to have a signal light at night.—Bulloch v. The Lamar, Case No. 2,129.

Where a collision on the high seas between a foreign vessel and a vessel of the United States was caused by the neglect of the latter to carry the lights required by the acts of congress, her owner cannot recover against the foreign vessel.—The Scotia, Case No. 12,513.

§ 79. Side lights.

A whale ship which had been twice refitted at San Francisco after Act April 29, 1864, was passed, *held* in fault for not carrying colored lights, though her master never heard of the act.—The Ontario, Case No. 10,543.

The local inspectors cannot release a vessel from the obligation to carry colored lights.—The Metropolis, Case No. 9,501.

A vessel, having lost her colored lights in a storm at night on Lake Michigan, *held* in fault in running through Mackinaw Straits on following night with the prohibited white light.—The Gray Eagle, Cases Nos. 5,734, 5,735.

A light, without reflectors, on a sail vessel navigating the lakes at night, is insufficient, under Act March 3, 1849, § 5.—Foster v. The Miranda, Case No. 4,977.

A green and red light placed in the center of a schooner forward, and separated only by a board, is not a compliance with the statute.—The Empire State, Case No. 4,474.

A ship is in fault in having her colored lights placed abaft her mizzen rigging, so as to be obscured from a vessel approaching ahead.—The Shakspeare, Case No. 12,700.

Signal lights hung on either side of the boat, on nails driven into the nosing of the hurricane roof, are not proper lights.—Hazlett v. Conrad, Case No. 6,288.

When a steamer sees the green light of another vessel directly ahead, it is nearly certain that, if both keep on their courses, there can be no collision, and, in such case, starboarding by the steamer, out of abundant caution, though unnecessary, is not reprehensible. Case No. 17,410, reversed.—The Wenona, Case No. 17,411.

§ 80. Sail vessels in general.

The maritime law does not oblige sailing vessels to carry lights at sea at night.—Bedell v. The Potomac, Case No. 1,215; The Blossom, Id. 1,564; The Neptune, Id. 10,120.

A vessel under way, with wind abaft the beam, must show a white light, under the act of 1849, as a vessel "going off large."—Hall v. The Buffalo, Case No. 5,927.

A sailing vessel discovering a steamer approaching at night will be *held* in fault for a collision if she does not exhibit a light.—The Parkersburgh, Case No. 10,753.

In the case of a steamer and sail vessel, where the lights are red to red or green to green, the sail vessel is not required to show a lighted torch, as the vessels are not then approaching, within the meaning of Rev. St. § 4234.—The Tonawanda, Case No. 14,092.

A steamer must exhibit proper lights to a sailing vessel in order to charge the latter with fault for not showing a lighted torch.—The New Orleans, Case No. 10,180.

A sail vessel, seeing a steamship approaching in a direction from which her regulation lights are not visible, will be *held* in fault in not indicating her presence to the steamship by showing a visible light.—The Louisiana, Case No. 8,537.

A schooner sailing at night in a fog in a common thoroughfare, and hearing fog signals, will be *held* in fault for not exhibiting a lighted torch.—The Eleanora, Case No. 4,335.

§ 81. Steam vessels when towing.

A tug which has no mast must carry the vertical mast headlights required by Rev. St. § 4233, of vessels towing, in such manner as to be equivalent in effectiveness to that prescribed by the rules.—The Jesse Williamson, Jr., Case No. 7,296.

§ 82. Pilot vessels.

A schooner pilot boat, when off pilot ground, is subject to the provision of Rev. St. § 4234, requiring sailing vessels to show a torch to an approaching steamer.—The New Orleans, Case No. 10,180.

A pilot boat at anchor is not required to show a white light at her masthead, and a flare-up light every 15 minutes (article 8), but must show the white light in a globular lantern provided for by article 7.—The Wanata, Case No. 17,138.

§ 83. Anchor lights.

A vessel at anchor in a thoroughfare on a dark night, under the maritime law, is bound to exhibit a light.—Lenox v. Winisimmet Co., Case No. 8,248.

A vessel lying in the channel of a port from necessity is bound in the nighttime to show a light.—The Scioto, Case No. 12,508.

Wrecking vessels anchored over a wreck, and fastened together, are substantially but one vessel, and should exhibit but one light.—The Austin, Case No. 663.

§ 84. Effect of failure to exhibit light.

It is an act of blamable misconduct for a vessel to run through a harbor at nighttime without exhibiting the lights prescribed by law.—Hotaling v. The Titan, Case No. 6,714a.

A vessel having the right of way in the nighttime, and not having the statute lights, is presumed to be in fault in respect to a collision with a vessel that should have seen her and given way.—The Ontario, Case No. 10,543; The Delaware v. The Osprey, Id. 3,763; Chapin v. The Hattie Ross, Id. 2,598; Taylor v. Harwood, Id. 13,794; The American Eagle, Id. 301.

A tug anchored at night without a light inside a boom used in a channel for the protection of dredging vessels will be *held* in fault where she is injured by collision with a schooner navigated with due care, and having no notice of the boom.—The Willard Saulsbury, Case No. 17,681.

The omission to carry side lights required by statute will not necessarily prevent a recovery of damages for collision.—The D. P., Case No. 4,056.

The want of proper lights is immaterial where their absence did not occasion or contribute to the disaster.—The Northern Warrior, Case No. 10,325.

Nothing short of an absolute certainty that a torch at night in a fog on board a sail vessel could do no good, to be established by proof, will justify its omission.—The Eleanora, Case No. 4,335.

Failure to carry a light does not put a vessel at fault unless the discovery of her position to the colliding vessel was thereby delayed.—Fletcher v. The Cubana, Case No. 4,863.

The failure of the schooner to show a torch is not a contributive fault, where the steamer's lookout saw the schooner at least as early as the torch ought to have been shown.—The Leopard, Case No. 8,263.

Neglect by a vessel, having the right of way, to show the regulation lights, does not relieve another vessel from observing the rules of navigation, and using all practicable precautions to avoid a collision.—Swift v. Brownell, Case No. 13,695.

The absence of lights on a canal boat just after sundown, when they would not have afforded any aid in discovering her, is not a fault.—The Tillie, Case No. 14,049.

Failure of sail vessel to carry lights does not excuse steamer from duty to avoid her if seen in time.—Bedell v. The Potomac, Case No. 1,215.

A vessel which is in fault in not complying with the statute regulation as to lights takes the hazard of mistakes made by other vessels as to her true character.—The Continental, Case No. 3,141.

In such case the burden is on the vessel which failed to carry the proper lights to show the other might nevertheless, by ordinary care and skill, have avoided the collision.—The Continental, Case No. 3,141.

It cannot be said that a loss resulted entirely from the neglect of a vessel to carry a proper light, where the other vessel had not a competent lookout, and should have kept away.—Foster v. The Miranda, Case No. 4,977.

The want of a light on board of a vessel colliding with another, anchored at night in a channel of a river without a light or lookout, cannot affect the case.—Cohen v. The Mary T. Wilder, Case No. 2,965.

§ 85. Effect of carrying wrong light.

A vessel carrying the wrong light at the time of the collision has the burden of showing that it did not contribute to the loss.—Foster v. The Miranda, Case No. 4,977.

The failure to display the exact statutory light by a vessel at anchor is not sufficient contributory negligence to prevent recovery of damages for a collision occasioned by the reckless navigation of another vessel.—The Scottish Bride v. The Anthony Kelly, Case No. 12,551.

Notwithstanding improper lights carried by a sail vessel mislead a steamer, the latter will be held at fault if, after discovering the sail vessel, she could have avoided the collision by the exercise of great care and diligence.—The Empire State, Case No. 4,474.

Vessels approaching each other, and seeing the lights of each other, not only have a right, but are bound, to assume that the lights seen are properly set and screened.—The Wenona, Case No. 17,411.

The sail vessel will be *held* solely in fault for a collision with a steamer where she carried only a white light, which induced the steamer to believe that she was another steamer, whose side lights had not yet come into view.—The Scotia, Case No. 12,513.

A tug with tows carrying but one vertical light will be *held* in fault without speculating whether the absence of the proper light increased the danger of collision.—Elliott v. The Volunteer, Case No. 4,398.

That a steam propeller did not carry her mast light at proper elevation, and had no colored lights, will not prevent recovery, where the colliding steamer was traveling at great speed, and had no lookout, and her pilot would not have seen colored lights, and did see the mast light.—The Metropolis, Case No. 9,501.

Tug's negligence in not carrying proper lights cannot be imputed to tow in libel against colliding steamer.—The Alabama, Case No. 122.

§ 86. Confused or obscured lights.

A schooner at anchor is in fault where her light is in such position that it is hidden from view by her sails.—The City of New York, Case No. 2,759.

A steamer will not be held in fault for a collision on foggy night, with sail vessel whose anchor light was obscured by her sails.—Brainard v. The Worcester, Case No. 1,804a.

A sail vessel will be *held* in fault in presenting a confusion of lights to a steamer, where due to want of proper screens or faulty positions.—The Huntsville, Case No. 6,915.

§ 87. Penalties for violations of law.

A vessel is not liable under Rev. St. § 4233, rule 10, for failure to exhibit a light while at anchor at night, where its light was accidentally extinguished only for a short time, and without negligence of the owners.—The Eclipse, Case No. 4,269.

It must appear that the vessel was seized before filing the libel, to sustain a conviction for such failure.—The Eclipse, Case No. 4,269.

§ 88. Signals—Duty to follow.

Steamers must keep courses agreed upon by signal.—The Alleghany, Cases Nos. 204, 205.

A steamer has the right to rely to the last moment upon the power of an approaching steamer to pass in accordance with a single blast given by her.—The Frederick M. Wilson, Case No. 5,078.

A tug rounding the Battery in New York harbor *held* not in fault for holding her course, though she failed to receive a response to her

first signal of one whistle.—The E. H. Coffin, Cases Nos. 4,309, 4,310.

Where a tug signaled another to cross, and, being unable to check her progress, a collision ensued, the signaling tug was in fault.—Chase v. Crary, Case No. 2,626.

A steamer will be *held* in fault for not taking the course indicated on her exchange of signals with another steamer, and the latter will not be *held* in default for keeping up her speed.—The Minnie R. Childs, Case No. 9,639.

§ 89. —— Departure from rule.

A steamboat has no absolute right to direct another's course by her whistle.—The America, Case No. 281.

A vessel assenting by signal to a faulty maneuver is equally liable in case of loss resulting therefrom.—The Albemarle, Case No. 135.

A steamboat which signals another for a departure from the ordinary rule of navigation must take the hazard of the maneuver, whether she hears a response to the signal or not.—The St. John, Case No. 12,224.

A steamboat which answers two whistles of another by the same signal cannot be *held* in fault for starboarding her helm to pass to port.—The St. John, Cases Nos. 12,223, 12,224.

A steamer, in the absence of an imperative necessity, has no right to attempt to pass to the left until she has obtained, by signal from the other, consent to such a movement.—The E. H. Coffin, Cases Nos. 4,309, 4,310.

A steamer which starboards her helm to make a pier, after blowing two whistles, and without waiting for a reply, is guilty of negligence.—The Edmund Levy, Case No. 4,287.

Supervising inspectors' rule 1 does not authorize one steamer to dictate to another a departure from rule 13, requiring them to pass port to port. But it authorizes and makes binding a signaled agreement to depart from the rule.—The Milwaukee, Case No. 9,626.

A steamer claiming protection, under an alleged agreement to depart from the rule, must show a proposition to that effect by proper signals in time to be acted on with safety, and that it was understood and accepted.—The Milwaukee, Case No. 9,626.

§ 90. —— Failure to hear.

A vessel will not be *held* in fault for failure to observe a weak signal given by an approaching steamer, which was not seen because of the interposition of another steamer.—United States v. The Mineola, Case No. 15,779a.

§ 91. —— Confusion of signals.

If there is confusion of signals between approaching steamers, each is bound to stop, under article 16 of the rules.—The Mary Sandford, Case No. 9,225.

A failure to answer a second signal, where the approaching vessel indicated by her answer to the first signal that she would not give way, will not justify the signaling vessel in proceeding as if the other had yielded her course, though the latter is in the wrong place and on the wrong course, and she must proceed cautiously.—The Louis Dole, Case No. 8,534.

Both vessels will be *held* in fault in holding their courses after each has been notified that the other is taking a course which will make a collision inevitable.—The Queens County, Case No. 11,507.

Where the ascending steamer on the Ohio river, after signaling her course, changes her signal, and the descending steamer answers that she will keep her course, the ascending steamer is bound to follow the course first signaled.—The Quickstep, Case No. 11,509.

§ 92. Particular instances of collision.

Between bark in tow of tug without the required lights for a tow, and steamer at night without lookout, where both tug and steamer were *held* in fault.—The Alabama, Cases No. 122, 123.

Between steamer and brig not carrying adequate lights.—The Ariadne, Cases Nos. 524, 525.

Evidence examined, and *held*, that a collision between a steamer and a pilot boat was not due to the want of the masthead light on the pilot boat.—The City of Washington, Case No. 2,771.

Between steamers on Long Island sound, one of which was misled by the lights of the other, which did not comply with the statute.—The Continental, Case No. 3,141.

Schooner sailing in James river on a clear night *held* not in fault in not exhibiting a signal light.—Hotchkiss v. New York & V. S. S. Co., Case No. 6,718a.

Between steamer and tows of a tug, where the latter was *held* in fault for not carrying lights, and in not signaling the steamer sooner.—The Pleasant Valley, Case No. 11,226.

Between brigantine in tow and a brig under sail near the Narrows, at night, where the tug was *held* in fault for not carrying the two vertical lights.—The U. S. Grant, Case No. 16,803.

Between steamer and schooner in daytime, where former was *held* in fault for absence of lookout.—Weeks v. The New Orleans, Case No. 17,353a.

IX. OFFICERS, LOOKOUTS, AND CREW.

§ 93. Officers.

Inability of the officer in charge of a steamer to give instant orders to the engineer when a collision is impending is negligence.—The Forest Queen, Case No. 4,938.

The chief officer, in a fog, should be so placed that he can have instant access to and command of the signals to the engineer.—The Colorado, Case No. 3,028.

The officer of the deck may take the helm and act upon the direction of the lookout.—The Blossom, Case No. 1,564.

The master, who went below after hearing the whistle of an approaching steamer, *held* in fault.—Hazlett v. Conrad, Case No. 6,288.

The officer in charge of a sail vessel, whose lookout has reported a light in such a position that there is no apparent danger of a collision, is not at fault in leaving the future watching of such light to the lookout.—The Sunnyside, Case No. 13,620.

The fact that the engineer and master left their posts of duty after the lights of an approaching vessel were seen may be considered on the question of negligence in giving and executing orders.—The Manitoba, Case No. 9,029.

§ 94. Sufficiency of crew.

A schooner having only two men on deck, one attending to going about, and acting as a lookout, and the other steering and blowing the fog horn, *held* in fault for sailing short handed in a fog.—The Eleanora, Case No. 4,335.

A tug whose chief officer also acts as wheelsman is insufficiently manned, regardless of the custom of the waters, and every doubt as to her being in fault will be resolved against her.—The Coleman, Case No. 2,981; The Victor, Id. 16,933.

A ship which neglects to have a lookout stationed exclusively for that duty, and leaves the helm unattended, is in fault.—The Catharine and Martha, Case No. 2,512.

Where there is a doubt on the evidence, the doubt will be construed against the vessel which was not properly officered and manned.—The Washington, Case No. 17,223.

The fact that a bark has but one man at her wheel in a fog is no proof of negligence or want of seamanship.—The Hansa, Case No. 6,037.

§ 95. Pilots and engineers.

A steamboat running on a ferry line between New York and Port Richmond is a ferryboat, within Act Aug. 30, 1852, § 42, and is not obliged to have on board a licensed pilot and a licensed engineer.—The Sylph, Case No. 13,711.

Absence of a pilot from a steamer navigating a narrow channel is prima facie a fault.—The Milwaukee, Case No. 9,626.

It is gross fault for a sailing vessel to attempt to run into New York harbor on a dark night, in a northwestern gale, without a pilot.—Laing v. The G. L. Buckman, Case No. 7,988.

The presumption is against the proper management of a vessel whose pilot was not a licensed pilot, and had never before acted in that capacity.—The Washington, Case No. 17,220.

Where a collision is caused by the misconduct of a pilot employed by the owner not under compulsion by the statute, the vessel is liable.—The Carolus, Case No. 2,424.

The owners of the vessel at fault are not exonerated from liability by having a licensed pilot on board.—The Julia M. Hallock, Case No. 7,579.

§ 96. Lookouts—When required in general.

A pilot boat, equally with other vessels, is guilty of gross negligence in running at night without a competent lookout forward.—The Blossom, Case No. 1,564.

A vigilant lookout is required on ferry boats crossing the East River.—The America, Case No. 284.

A lookout forward is necessary for all vessels sailing in harbors in daytime.—The A. G. Brooks, Case No. 98.

A schooner running in a harbor under shortened sail to anchor in a wind so violent that she was unable to keep her side lights burning is in fault in not keeping a vigilant lookout.—The Wanata, Case No. 17,138.

A custom not to keep a lookout will not be given any weight.—Morgan v. The Philip De Peyster, Case No. 9,805.

A usage with coasting vessels to run, under certain circumstances, without a lookout, will be disregarded.—The Rebecca, Case No. 11,618.

A propeller towing alongside a float loaded with railroad cars, extending 40 feet in front of her pilot house, must have a lookout on the front part of the float.—The Pennsylvania, Case No. 10,949.

A tug having only a mate and wheelsman on deck is insufficiently manned. A lookout is absolutely necessary.—The Nabob, Case No. 10,002.

§ 97. —— Competency.

The steward, who was standing by the companion way, and was no mariner, and had not been stationed as a lookout, is not a proper lookout.—The Gratitude, Case No. 5,704.

Passengers cannot be regarded as lookouts unless specially designated by master as such.—Amoskeag Mfg. Co. v. The John Adams, Case No. 338.

The lookout must be a person competent to give the requisite orders to the helmsmen in case of meeting a ship.—Allen v. Mackay, Case No. 228.

A steamer is responsible for a collision which a better lookout might have prevented.—The Magnolia, Case No. 8,958.

The master is not a proper lookout.—Hazlett v. Conrad, Case No. 6,288.

The officer in charge of the navigation of a vessel is not a competent lookout.—The Northern Indiana, Case No. 10,320; The Parkersburgh, Id. 10,753.

§ 98. —— Number.

A propeller of 1,400 tons burden on Lake Huron, in a dense fog, should have two wheelmen and two experienced lookouts.—The Colorado, Case No. 3,028.

A vessel entering a harbor at night should have her crew on deck on the lookout.—The Scioto, Case No. 12,508.

Vessels sailing during a dense fog are bound to have on deck all the disposable part of their crew, to aid in keeping a lookout.—Jones v. The Hanover, Case No. 7,466.

§ 99. —— Persons acting also in other capacities.

The lookout of a steamer must be a person who makes the lookout his exclusive business, and he should be stationed at the forward part of the vessel, and not in the wheelhouse.—Ward v. The Ogdensburgh, Case No. 17,158.

A steamboat, in the nighttime, navigating the waters of a bay or river, must always have a lookout who, for the time, has no other duty or occupation.—Haney v. The Louisiana, Case No. 6,020.

The mate who has command of the deck is not a sufficient lookout.—Ward v. The Ogdensburgh, Case No. 17,158. CONTRA, see The Shakspeare, Case No. 12,700.

The man at the wheel is not a sufficient lookout.—The Blossom, Case No. 1,564.

A master, acting as pilot and wheelman in the wheelhouse of a tug, is not a competent lookout.—The Sea Breeze, Case No. 12,572a.

The master of a tug, where performing other duties, is not a competent lookout.—The John Gilpin, Case No. 7,343.

A tug with her captain on deck and a man at her wheel, and no other lookout, has not a proper lookout.—The Tillie, Case No. 14,049.

The man blowing the fog horn on a sail vessel is a proper lookout.—The Hansa, Case No. 6,037.

A usage of coasting schooners to consider all hands on deck at night as lookouts will not be sanctioned.—Poole v. The Washington, Case No. 11,271.

It is inexcusable negligence for a large passenger steamer on Long Island Sound, at night, to have no lookout save the pilot in the pilot house.—The Metropolis, Case No. 9,501.

The fact that the master of a vessel was acting as wheelsman and lookout will render the vessel liable where the proofs leave it doubtful whether such fact contributed to the collision.—The Young America, Case No. 18,179.

§ 100. —— Position of lookout.

No fixed position is established by law as the place where the lookout must be in the forward part of a vessel under way, but he must have a free vision over each bow and ahead of the vessel.—The Kallisto, Case No. 7,600.

Steamboats navigating the western rivers must have a competent and vigilant lookout

stationed on the forward part of the hurricane deck.—Rusk v. The Freestone, Case No. 12,143.

The fact that the hurricane deck was crowded with passengers is no excuse for the failure to keep a lookout stationed there.—Rusk v. The Freestone, Case No. 12,143.

The pilot house of a steamer, in the nighttime, is not a proper place for a lookout.—Hazlett v. Conrad, Case No. 6,288; The Northern Indiana, Id. 10,320; The Parkersburgh, Id. 10,753.

A steamer will be held in fault where a collision was caused by her failure to keep her lookout stationed in the bow.—The Magenta, Case No. 8,946.

A lookout must be constantly at his post, and must not be interrupted in the performance of his duty.—The Douglass, Case No. 4,031.

A mate near the wheelsman at the time of collision cannot be considered a proper lookout.—The Empire State, Case No. 4,474.

Lights should not be placed in the bows of a ship in such a position as to prevent the lookout from seeing ahead.—The R. B. Forbes, Case No. 11,598.

§ 101. —— Negligence of lookout.

The failure of the lookout of a steamer to report a vessel, when discovered, *held* negligence, though the master and pilot were on the bridge.—The Hansa, Case No. 6,036.

The lookout of a vessel will be *held* in fault in leaving his post after reporting the light of another vessel.—The Havre, Case No. 6,232.

The failure of the lookout of a sail vessel to reannounce the colored lights of another vessel, which was not under way, *held* not a fault.—The Sunnyside, Case No. 13,620.

The pilot of a sailing vessel held in fault for going aft, after watching for a time the light of a vessel which would pass very near, although his own vessel had a right, under the rules, to keep her course.—Lane v. The A. Denike, Case No. 8,045.

The vessel bound to give way is likewise in fault if by diligence and attention her lookout might have discovered the vessel that had not proper lights.—The Ontario, Case No. 10,543.

The failure of a lookout to report a vessel which he sees is evidence of negligence in the performance of his other duties.—Wright v. Norwich & N. Y. Transp. Co., Case No. 18,087.

§ 102. —— Effect of failure to have lookout.

The absence of a competent lookout casts the burden upon the vessel of showing that it did not contribute to the collision.—The Northern Indiana, Case No. 10,320; Poole v. The Washington, Id. 11,271; Reed v. The New Haven, Id. 11,649; McGrew v. The Melnotte, Id. 8,812; The Ancon, Id. 348; Beavers v. The North America, Id. 1,201; The Emily, Id. 4,453; The M. M. Hamilton, Id. 9,685; Western Ins. Co. v. The Goody Friends, Id. 17,436.

Where the accident would not have happened but for the absence of a lookout, the vessel thus in fault will be held solely liable where the other vessel had the right of way.—Kelsey v. The William Kallahan, Case No. 7,680.

Want of a lookout will not be excused unless it is clear that it did not contribute to the collision.—The Atlas, Case No. 634.

Every doubt relating to the consequences is to be resolved against the vessel which is without a lookout.—The John Fretter, Case No. 7,342.

Where a hail from the vessel on the privileged tack was not heard on board the other, *held*, that the collision was caused by the absence of a lookout.—Morgan v. The Philip De Peyster, Case No. 9,805.

The absence of a lookout, where it did not contribute to the collision, is not a fault.—The Victor, Case No. 16,933; Shirley v. The Richmond, Id. 12,795.

Absence of a lookout, unless shown to have contributed to the collision, does not render liable a vessel which is otherwise faultless.—Randall v. The Zebra, Case No. 11,557.

Absence of a lookout is immaterial if the officer of the deck has all the information a lookout could give him.—The Milwaukee, Case No. 9,626.

The want of a lookout will not be considered a fault where the other vessel was seen in good season by the master and mate in charge.—The Maria Martin, Case No. 9,079.

Where a steamer is seasonably seen, and the schooner kept on her course, the steamer is liable for the collision, though the schooner had no lookout except her master, who was on the quarter deck.—The City of New Bedford, Case No. 2,757.

In case of a collision between a steamer and schooner, whose light was seen in ample time to avoid her, the steamer was condemned for all the damages, though the schooner had no lookout.—The Tonawanda, Case No. 14,092.

The want of a proper lookout on a sail vessel cannot be considered a contributing fault where she kept her course, as was her duty, on meeting a steamer.—The Empire State, Case No. 4,474.

A steamer will be *held* liable for a collision with a schooner on a dark and cloudy night if it might have been avoided had the steamer a lookout forward.—The George M. Dallas v. The New Haven, Case No. 5,338.

Where the pilot of each vessel saw the other in time to execute all maneuvers incumbent to avoid a collision, the absence of a lookout is immaterial.—The General Franz Sigel, Case No. 5,311.

Vessels are in mutual fault where collision is caused by failure of both to maintain a proper lookout.—Causey v. The Shark, Case No. 2,526.

X. FOG OR THICK WEATHER.

§ 103. Application of rules of navigation in general.

The rule as to crossing courses, requiring the vessel to starboard to keep her course, is inapplicable to navigation in a dense fog.—The D. S. Gregory, Cases Nos. 4,101, 4,103.

§ 104. Local usage.

It being the usage in New York harbor to run steamboats in a dense fog, where two steamboats collided when running at the same speed the court will not hold either vessel at fault, and a division of damages will not be decreed.—The Sylph, Case No. 13,711.

§ 105. Running in fog.

It is not proper for a ship to leave her wharf, in tow of a steamer, on a night so dark that a sail vessel cannot be seen in time to avoid a collision.—The R. B. Forbes, Case No. 11,598.

Where fog is so dense that vessel cannot avoid another at anchor, it should not proceed.—The Baltic, Case No. 822.

Where a steamship knows that another vessel is ahead enveloped in a fog, she is guilty of negligence if she goes forward without properly heeding her fog signals.—The Anna v. The Golden Horn, Case No. 403.

Thick fog in the morning will not excuse a steam ferryboat for colliding with a schooner anchored near her track, and which she had seen and passed repeatedly during the night.—Lane v. The Bedford, Case No. 8,046.

Steamer navigating the East river, rounding Corlear's Hook, when a thick fog shut down upon her, and she was unable to anchor, *held* in fault for running near the piers, instead of keeping into the middle of the stream.—Shaw v. The Bridgeport, Case No. 12,717.

§ 106. Speed.

The speed of a vessel in a fog should be moderate.—The Chancellor, Case No. 2,589.

A steamship is liable to a sailing vessel for injuries caused by too great speed in a fog.—The City of Guatemala, Case No. 2,747.

A steamer in a fog must keep her headway under a command sufficient to stop within such distance as other vessels can be seen or their position ascertained, on the assumption that the latter will do their duty in apprising her of their proximity.—The Colorado, Case No. 3,028; The Hammonia, Id. 6,007; The Leo, Id. 8,254; The Eleanora, Id. 4,335.

If the night was either so dark or so foggy that the steamer, by slowing, stopping, and backing as soon as she discovered the sail vessel, could not avoid the collision, then the steamer was moving at too great a speed. (Affirming 770.)—The Western Metropolis, Case No. 17,441.

The presumption of fault is conclusive against vessels sailing with too much canvas in a fog in fishing waters, and colliding with vessels at anchor, where there is no vis major.—Guibert v. The George Bell, Case No. 5,856.

A steamer will not be *held* in fault for excessive speed in fog, where it was not an element in the collision.—Brainard v. The Worcester, Case No. 1,804a.

A steamer will be *held* in fault for running 7½ knots an hour, in a crowded thoroughfare, in weather so thick and hazy that a light which came suddenly into view was supposed to be half a mile off, but was, in fact, so near that though the engines were immediately reversed the collision occurred.—The Louisiana, Case No. 8,537.

Seven miles an hour for a steamer in a fog, surrounded by sail vessels, *held* too great speed.—The Manistee, Case No. 9,028.

Seven knots an hour in a dense fog, off the east end of Long Island, *held* an immoderate speed.—Leonard v. Whitwill, Case No. 8,261.

A speed of from seven to eight knots an hour in dense fog off Point Judith *held* excessive.—The Franconia, Case No. 5,049.

A speed of eight knots in a dense fog, in South Vineyard channel, *held* immoderate.—The Blackstone, Case No. 1,473.

A steamer moving eight miles an hour in a dense fog is not going at a moderate speed.—The City of Panama, Case No. 2,764.

A speed of 16 miles an hour in a fog *held* excessive, and not necessary to prevent steamer from being deflected from her course.—The Bristol, Cases Nos. 1,890, 1,892.

A speed of 16 or 17 knots during dense fog upon a frequented track is grossly improper.—The Bay State, Case No. 1,150.

A speed of 17 miles an hour in a track frequented by sail vessels, in a fog so thick that a vessel cannot be seen in time to be avoided, is conclusive evidence of fault.—The Northern Indiana, Case No. 10,320.

§ 107. Duty to slacken speed, stop, or reverse.

Where, in a thick fog, dangerous proximity is first discovered by the noise of each other's paddles, a vessel will be *held* at fault for not immediately reversing, where the collision might thereby have been avoided.—Hovey v. The Francis Skiddy, Case No. 6,741.

A steamer traveling seven knots an hour in a dense fog off the east end of Long Island, *held* in fault in not stopping immediately upon hearing the fog horn of a schooner whose position she did not clearly locate.—Leonard v. Whitwill, Case No. 8,261.

A steamer *held* in fault in starboarding blindly, in ignorance of course of sail vessel in a fog.—The Franconia, Case No. 5,049.

§ 108. Fog signals.

There is a fog, within the meaning of Act April 29, 1864, requiring sailing vessels to sound a fog horn, whenever the weather is so thick that the horn would be heard further than the ordinary signal lights could be clearly distinguished.—The Monticello, Case No. 9,739.

A sail vessel under way must sound a fog horn when there is fog enough by day to shut out the view of the sails or hull, or at night the lights, of a vessel within the range of the sound of the horn. (Act 1864, c. 69, art. 10.)—Dolner v. The Monticello, Case No. 3,971.

A boat which has missed its landing in a fog, and is turning around to return to it in the fair way of other boats navigating the river, should blow three whistles, as provided in rule 10 of pilot rules.—Wallamet R. T. Co. v. Oregon S. N. Co., Case No. 17,106.

Article 10 of the regulations for preventing collisions, requiring that a bell shall be sounded at least every five minutes during the fog, means that the bell must be sounded as often as once in five minutes, and as much oftener as the case shall require.—The Chancellor, Case No. 2,589.

A steam tug moving in a slip in a fog is not required to sound her steam whistles as a signal to a steamer moving outside.—The Shady Side, Case No. 12,692.

A vessel moored in a channel near a landing will be *held* in fault for failure to give the usual fog signals during a heavy fog and snowstorm.—The Porter, Case No. 11,285.

A bark under shortened sail with helm lashed three-quarters to port, drifting about a mile an hour in a thick fog, is a vessel under way, and bound to use a fog horn instead of a bell.—The Pennsylvania, Cases Nos. 10,947, 10,950.

A steam tug is not required by the supervising inspectors' rules to sound her fog whistle while running in a fog; but it may be her duty under general principles of admiralty law.—The Morning Star, Case No. 9,817.

Steamboats on the Mississippi are in fault for running in a fog without sounding the whistle at intervals not exceeding two minutes.—The Milwaukee, Case No. 9,625.

Steamer lying to or at anchor at night or in fog must take precautions to warn approaching vessels.—The Bay State, Case No. 1,148.

Bells must be rung at shorter intervals than two minutes by vessels at anchor in crowded harbor in dense fog.—Brush v. The Plainfield, Case No. 2,058.

A schooner at anchor in a fog is in fault for not sounding a bell and blowing a horn on hearing the horn of an approaching ship.—The Chancellor, Case No. 2,589.

§ 109. Effect of failure to give fog signals.

The neglect of a sail vessel under way in a fog to sound a fog horn being established, she must show affirmatively that the horn, if blown, could have produced no effect.—The Leo, Case No. 8,254.

A sail vessel becalmed in fog is not culpable for omitting to use foghorns or other warnings, which would not have been of any avail. Case No. 1,148 reversed.—The Bay State, Case No. 1,150.

§ 110. Anchoring in fog.

A steamer entering crowded harbor in a dense fog *held* not negligent in anchoring over night near a ferryslip, where she took all precautions, by signals, to make her position known.—The D. S. Gregory, Cases Nos. 4,099, 4,102.

§ 111. Particular instances of collision.

Between steam and sail vessels in fog.—The Aleppo. Case No. 157; The Ancon, Id. 348; The Anna v. The Golden Horn, Id. 403.

Schooner *held* not in fault for not changing her course on meeting steamer in dense fog.—The Blackstone, Case No. 1,473.

Steamer *held* to be negligent in shaping her course and in running at too great speed in fog.—The Bridgeport, Case No. 1,861.

Between steamer running at excessive speed in fog and bark lying at anchor near Newport breakwater, which failed to give adequate signal. *Held* both in fault.—The Bristol, Case No. 1,891.

Between steamer running 16 miles an hour in fog and barque whose fog horn was properly blown.—The Bristol, Cases Nos. 1,890, 1,892.

Between schooner at anchor without lights or lookout on foggy night, and steamer at speed of eight miles an hour, with compass out of order, and insufficient lookout. Damages divided.—The Cambridge v. The Omega, Case No. 2,336.

Between steamer and schooner at night in a fog, where both were *held* in fault.—one for immoderate speed and a wrong maneuver, and the other for not sounding a fog horn.—Dolner v. The Monticello, Case No. 3,971.

Between steamer coming into harbor in fog, and anchoring near ferryslip, and ferryboat which had full notice of her position, where the latter was *held* in fault.—The D. S. Gregory, Cases Nos. 4,099, 4,102.

Between two ferryboats on crossing courses in a dense fog, where one backed before the lights of the other were seen, and the other kept on at full speed.—The D. S. Gregory, Cases Nos. 4,101, 4,103.

Between bark closehauled and steamer at sea in a fog, where the bark's horn was not heard, and the steamer was *held* liable for excessive speed.—The Hansa, Case No. 6,037.

Between steamer and schooner in thick weather off Sandy Hook, where the former was *held* in fault for too great speed and want of a careful lookout, and the latter was *held* equally in fault for failure to sound a fog horn. Case No. 8,251 reversed.—The Leo, Case No. 8,254.

Between a ferryboat and a sloop anchored in the Hudson river, near the piers, in a fog, where both were *held* in fault, the ferryboat for being far out of her course, and the sloop for failure to maintain a watch.—The Lydia, Cases Nos. 8,614, 8,615.

Between bark drifting under shortened sail in a thick fog, and steamer running seven miles an hour, where the former was *held* not in fault for sounding the bell rather than the fog horn, and the latter was *held* liable for all damages.—The Pennsylvania, Cases Nos. 10,947, 10,950.

Between steamer on the East river in a fog and tug maneuvering inside of the end of the piers, where the former was *held* in fault for being out of her place, and for too great speed.—The Shady Side, Cases Nos. 12,691, 12,692.

XI. SPECIAL CIRCUMSTANCES AND ERRORS IN EXTREMIS.

§ 112. Measures to avoid collision.

Fault cannot be imputed in deciding on one of two doubtful measures for avoiding a collision which carries the vessel so nearly clear as six feet.—The Clytie, Case No. 2,913.

Special emergencies or positions of vessels may allow and even require a deviation from the general rule or usage.—Lowry v. The Portland, Case No. 8,583.

Ignorance of language by persons in charge of vessel at anchor in track of navigation will not excuse failure to observe hails and directions by approaching vessels.—Allegro v. The Niagara, Case No. 207a.

A schooner at anchor slipped her cable to avoid collision with a steamer drifting in an ice field with a disabled engine, and both anchor and cable were lost. *Held*, that the vessels were each liable for a moiety.—Hotchkiss v. Adriance, Case No. 6,715a.

§ 113. Deserted vessels.

Where a vessel, deserted by her officers and crew to save their lives, drifts into collision with another, each vessel must bear its own loss.—The John Perkins, Case No. 7,360.

Where collision between a steamer and sloop is caused by the act of the master of the sloop in jumping overboard on seeing the peril, he cannot recover.—Arnold v. Peck, Case No. 561a.

§ 114. Vessels in distress.

A steamboat unavoidably injuring another in the confusion incident to an attempt to extricate her from a threatened conflagration, will not be *held* responsible for the damage.—Stevens v. The S. W. Downs and The Storm, Case No. 13,411.

The tug is not responsible for a collision with the tow, which has gone adrift and is in great peril, while attempting to save her crew, where not guilty of gross negligence.—The Merrimac, Case No. 9,478.

Tug colliding with and sinking steamer in distress in attempting to succor passengers and crew, where she acted with reasonable judgment and skill, *held* not liable.—Gilman v. The Tyler, Case No. 5,446.

§ 115. Pilot boats.

It being shown to be the custom, it was not a fault of a pilot boat to put herself in the path of a steamer, and lower her yawl to put a pilot on board of the steamer.—The City of Washington, Case No. 2,771.

§ 116. Errors in extremis—What are.

Where vessels are in such position, when within 150 feet of each other, that if no change is made by either they would pass in safety, the vessel having the right of way will be *held* in fault for a change of course.—Rogers v. The S. B. Wheeler, Case No. 12,021.

A steamer, meeting a schooner closehauled on the high seas, so shaped her course that the vessels would have passed 40 feet apart. *Held*, that luffing when near was a change in extremis.—The Benefactor, Cases Nos. 1,297, 1,298.

A steamer is liable for a collision with a scow, caused by the steamer suddenly changing her course to avoid being run into by a sailing vessel, unless it is proved that the steamer was without fault in getting into a position which made the change of course necessary. Case No. 18,243 reversed.—Bouker v. The Delaware, Case No. 18,244.

§ 117. —— Effect of.

Where vessels come suddenly and without warning into imminent peril, the necessary uncertainty and confusion must be considered in determining whether the management is blameworthy.—The Columbus, Case No. 3,043.

An error committed under an impending danger or in extremis, to avoid a collision brought about by the fault of another vessel, will not be considered a fault.—The Belle, Case No. 1,-

269; Chapin v. The Hattie Ross, Id. 2,598; The Colorado, Id. 3,028; The Falcon, Id. 4,619; The Favorita, Id. 4,695; The F. W. Gifford, Id. 5,166; The Magnolia, Id. 8,958; Reed v. The New Haven, Id. 11,649.

A vessel which is entitled to keep her course has a right to expect the other vessel to be steered clear of her, and a faulty maneuver in a moment of peril, brought about by the fault of the latter vessel in not giving way under the rules, will not render the former liable for damages caused by the collision.—The Catharine and Martha, Case No. 2,512; The City of Paris, Id. 2,765; Hinckley v. The Northumberland, Id. 6,511; The Jupiter, Id. 7,585; The Western Metropolis, Id. 17,440.

A steamer departing from the statutory regulations assumes all risks of misunderstandings. —The Atlas, Case No. 633.

A large and swift steamer attempting to pass dangerously near a sailing vessel takes the risk of the helmsman losing his presence of mind.—The Columbia, Case No. 3,035.

Vessel sailing free must not come so near vessel close hauled as to create apprehension of danger of collision.—The Argus, Case No. 521.

The owners of a vessel whose master gave the order, obedience to which by the mate of the other vessel caused a collision, cannot sustain a claim for damages.—The Huntress, Case No. 6,913.

XII. SUITS FOR DAMAGES.

Limitation of action, see "Admiralty," § 44.

(A) PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

§ 118. Jurisdiction.

In a case of collision with the foundation of a pier for a lighthouse, it must be presumed that jurisdiction over the site has been ceded to the United States, as the law provides that no lighthouse shall be built until such cession.—The Maud Webster, Case No. 9,302.

The court has no jurisdiction of a cross libel in rem in a collision case, without a seizure of the vessel within the district.—The Bristol, Case No. 1,889.

Jurisdiction in admiralty as dependent on locality, see "Admiralty," §§ 4, 30–33.
—— of action for personal injuries caused by collision, see "Admiralty," § 32.

§ 119. Right of action in general.

In determining the question of fault, with a view of fixing the liability, the proximate cause of the injury must be regarded.—Mills v. The Nathaniel Holmes, Case No. 9,613.

The loss of a ferryboat, which, while in a sinking condition from a collision, collides with another vessel and sinks, is not increased by the second collision, and it is immaterial whether or not the second colliding vessel was in fault.—The C. F. Starin, Case No. 2,565.

A wrongdoer, who takes the injured vessel in his possession to repair her, must show that the boat, when returned, was in substantially as good condition as before the accident, and he is liable for the additional work necessary to put the boat in such condition.—The Uncle Abe, Case No. 14,334.

The insurer of a cargo lost by a collision may sue the colliding vessel, after notice and proof of the loss and demand of payment, though before actual payment.—The Manistee, Case No. 9,027.

See, also, "Insurance," § 166.
Right to maintain suit for collision, see "Admiralty," § 51.

§ 120. Defenses in general.

Misconduct causing a collision precludes recovery by the party in fault for injuries sustained.—Dodge v. The John Stuart, Case No. 3,952a.

A deck hand on board a vessel cannot recover from another vessel damages for personal injuries received in a collision between the two vessels caused by the fault of his vessel.—The Northern Warrior, Case No. 10,325.

The fact that a pilot boat is cruising off her station is no defense to a libel against another pilot vessel for a collision.—Messena v. The Neilson, Case No. 9,493a.

It is no defense that the vessel injured was engaged in the coasting business without a license. —The Metropolis, Case No. 9,501.

A boat licensed as a towboat, and having no license to carry passengers, does not violate the navigation laws by carrying a single passenger, so as to lose her redress for an injury done her in a collision.—The Morning Star, Case No. 9,817.

It is no defense to a libel for injuries to a passenger on a ferryboat on her way to attend divine service, caused by a collision with such boat, that libelant was traveling on Sunday.—The D. S. Gregory and The George Washington, Case No. 4,100.

Query, whether a vessel engaged in an illegal employment can maintain an action for an injury received from another vessel by collision. —The Leopard, Case No. 8,264.

§ 121. Who may sue.

A charterer may maintain a libel against another vessel for collision.—Lake Erie & B. Steamboat Co. v. The Son & Heir, Case No. 7,995.

The master has authority as such to sue in his own name for damages to his vessel by collision.—The Una, Case No. 14,331; The Uncle Abe, Id. 14,334.

The master's right of action, as such, for a collision, is not affected by the fact that underwriters upon the vessel have paid the cost of repairs, which constitutes a part of the claim for damages.—The Uncle Abe, Case No. 14,334.

Though the cargo belonged to third parties, the owner of the injured vessel, as bailee, is entitled to recover for its loss.—Burton v. The Commander in Chief, Case No. 2,216.

The owner of a vessel whose cargo is damaged by collision cannot sue for the damage in his own name, unless he has paid the same or become liable to pay it.—The New Jersey, Case No. 10,162.

The fact that the owners of a vessel in possession have placed the title temporarily in another, to secure moneys borrowed to pay her purchase price, will not prevent their maintaining a libel for collision.—Messena v. The Neilson, Case No. 9,493a.

Consignees of a cargo may maintain a libel in personam against the owners of a vessel for a loss sustained by collision.—Dollner v. Garcia, Case No. 3,970.

The pendency of a suit by the consignees in another district against the vessel is no bar to such proceeding.—Dollner v. Garcia, Case No. 3,970.

§ 122. Joinder of libelants.

The owners of the vessel may recover for cargo lost without joining the shippers as libelants.—The Metis, Case No. 9,500.

The owners of a cargo of a vessel sunk in a collision need not be made parties to the suit by the owners of a vessel against the other vessel for damages by the collision, to enable the court to render a decree adjusting the losses.—Leonard v. Whitwill, Case No. 8,261.

All the owners of the injured vessel should be joined as libelants.—The Richard Doane, Case No. 11,765.

A forfeiture incurred by a transfer of an interest in the injured vessel to an alien, but not judicially declared, does not prevent him from joining in the libel.—The Nabob, Case No. 10,002.

The insurer of a cargo may be admitted as a party to settle its rights to a share of the recovery.—The City of Paris, Case No. 2,767.

After a decree for libelants, and while a reference as to damages is pending, insurers who have paid the loss of the cargo may be made co-libelants.—The City of Paris, Case No. 2,766.

See, also, "Admiralty," § 53.

§ 123. Who may be sued.

Persons injured in a collision with a vessel in charge of a licensed pilot are entitled to have their remedy against the vessel.—Camp v. The Marcellus, Case No. 2,347.

A contractor, building a lighthouse for the United States on a mud shoal out of the fairway, and forbidden by the lighthouse department to keep lights on the structure, *held* not liable for damage to a schooner colliding therewith at night.—The Maud Webster, Case No. 9,302.

An agreement by the tow to assume all risk will not relieve the tug from liability to a third party for injury caused by a collision with the tow caused by inability of the tug alone to control the tow.—The Helen R. Cooper and The R. L. Mabey, Case No. 6,333.

Both tug and tow are liable where the injury would not have occurred had a second tug been employed.—The Helen R. Cooper and The R. L. Mabey, Cases Nos. 6,333, 6,334.

Liability of insurer for loss by collision, see "Insurance," § 101.

§ 124. Joinder of defendants.

Where a collision is the joint act of two vessels, they may be joined as defendants; but otherwise where distinct acts of collision are charged, without privity.—Atkinson v. The Hamilton, Case No. 611.

A libel for an injury caused by the joint negligence of two vessels may be maintained jointly against them.—Chase v. Crary, Case No. 2,626.

The owner of a tow may libel both the tug and the vessel with which she collided, and thus compel them to interplead and settle their respective liabilities.—The Enterprise, Case No. 4,500.

A libel may be maintained jointly against a tug and tow for an injury inflicted by a collision of the tow with another vessel; and the fact that one of these vessels may be found on the evidence to be free from blame does not vitiate the libel as against her co-defendant.—Williams v. The Vanderbilt and The Collins, Case No. 17,744.

A libel for collision cannot be brought against a vessel in rem and her owner in personam, unless her owner is also master.—The Richard Doane, Case No. 11,765.

See, also, "Admiralty," § 53.

§ 125. Libel—Requisites and sufficiency.

The libel must narrate the particular facts and circumstances which caused the disaster.—The M. M. Hamilton, Case No. 9,685; Quinn v. The Transport, Id. 11,516.

The libel must state the courses of the vessels, their speed, and specific acts of negligence by respondents.—Potts v. The William A. Burden, Case No. 11,349.

Omission of the libel to state facts in relation to the course and position of the vessels, made cardinal points at the hearing, is faulty pleading.—Wells v. The Anne Caroline, Case No. 17,389a.

A libel must set out the facts relied on to charge the vessel with fault.—Chapin v. The Hattie Ross, Case No. 2,598; Dodge v. The John Stuart, Id. 3,952a.

A libel for injuries sustained by collision must allege facts showing the proper conduct of libelant's vessel.—Dodge v. The John Stuart, Case No. 3,952a.

The libel must state the facts constituting the fault in navigation. A mere general allegation that the vessel "was so carelessly, negligently, unskillfully, and recklessly navigated," etc., is not sufficient.—The H. P. Baldwin, Case No. 6,811.

As against a vessel colliding with another moored at a pier, and unable to move, it is sufficient to aver that the former ran into the latter.—The A. R. Wetmore, Case No. 569.

A libel to recover damages to a vessel struck, while moored at a dock, by a moving vessel, need not set out in detail the movements of the colliding vessel; nor, being incapable of movement herself, need she allege any matter in excuse of her own connection with the accident.—Williams v. The Vanderbilt and The Collins, Case No. 17,744.

An omission to state in the libel material facts peculiarly within the knowledge of the opposite party, if without design, is not prejudicial.—The Coleman, Case No. 2,981.

§ 126. —— Amendment.

The failure to allege a ground of negligence is amendable where there is no surprise.—The Alabama, Case No. 122.

A libel by the owners of a tow, alleging that it was run upon a sunken pier known to the tug, where the answer denies negligence, may be amended by averring negligence.—The Deer, Case No. 3,737.

An amendment of the libel, as to the amount of damages claimed in a collision case, allowed, to remove a formal difficulty to the way of a just award.—The St. John, Case No. 12,224.

§ 127. Answer or plea.

A general allegation of negligence on the part of libelant's vessel is insufficient to constitute a defense.—Killam v. The Eri, Case No. 7,765.

An answer in a collision case, which sets up facts constituting negligence, is sufficient though no fault be formally charged.—The Pilot, Case No. 11,168.

On a libel against two tugs by the tow of one which came into collision with the tow of the other, the answers of the tugs charging negligence of each other are not evidence against each other, and libelant must offer evidence of negligence to be entitled to recover.—The James Bowen, Case No. 7,192.

An averment in the libel of the particular courses of the vessels is to be taken as true, where the answer, in general terms, avers that the vessel libeled was not in such a position as required her to avoid the other.—The Starlight, Case No. 13,310.

A tender or offer of payment relied on to bar costs should be set up in the pleading, and should be a continuing offer.—The Walter W. Pharo, Case No. 17,124.

§ 128. Cross libel.

Where defendants are not in fault, they may, by cross libel, set up the damages they have sustained, and have a decree in their favor.—Ward v. The Ogdensburgh, Case No. 17,158.

§ 129. Issues and proof.

Evidence which does not pertain to the express allegations in the pleadings is inadmissible.—The Starlight, Case No. 13,310.

A vessel negligently running into another, which is lying disabled, may be *held* liable, although the precise manner of the collision is not proved as alleged.—The Martin Wyncoop, Case No. 9,177.

No damages can be recovered for the delay of barges in tow of the injured vessel where the libel does not state to whom they and their cargo belonged.—The Morning Star, Case No. 9,817.

There is no rigid rule which prevents libelant, alleging one fault, recovering on proof of a different fault.—The Cambridge, Case No. 2,334.

Libelant may rely upon improper speed in fog, shown by defendant's evidence, although he alleged only improper steering.—The Cambridge, Case No. 2,334.

Where the tow injured in a collision libels both the colliding vessel and her tug, the former may take advantage of the negligence of the tug in not carrying lights, though not set up in her answer.—The Pleasant Valley, Case No. 11,226.

Where the answer admits that the vessel and cargo "were sunk and lost," libelant may prove value without showing that she could not be raised.—The Metis, Case No. 9,500.

In the case of a collision between a steamer and sail vessel, fault of the latter in an attempt to come about abruptly, and falling off and drifting against the steamer, is not admissible under an answer alleging fault in holding her course when she should have come about.—The Washington Irving, Case No. 17,243.

The question whether the sale of the vessel to libelant was fraudulent as to the seller's creditors cannot be raised by respondents in a collision case who have no interest in such vessel.—Clapp v. Young, Case No. 2,786.

A steamer was navigating a channel with barges lashed to each side of her, and a schooner was outsailing and passing her. The steamer ported her helm to avoid a shoal, and thus brought one of the barges across the schooner's track. The libel on behalf of the barge did not mention the steamer's change of course, but only the schooner's fault in keeping hers. The answer on behalf of the schooner averred the steamer's porting her helm. *Held*, that the state of the pleadings did not preclude a recovery by the barge.—The Iris, Case No. 7,062.

(B) EVIDENCE.

§ 130. Burden of proof.

Where the injured vessel was in stays, the burden of proof is on the colliding vessel to show she was not in fault.—The Charlotte Raab, Case No. 2,622.

Libelant must show, by preponderating evidence, that the other vessel was guilty of negligence or of some misconduct causing the collision.—Saunders v. The Hanover, Case No. 12,374; The Breeze, Id. 1,829.

Libelant must show absence of fault on the part of his boat, as well as fault on the part of the other.—McGrew v. The Melnotte, Case No. 8,812; Lucas v. The Thomas Swann, Id. 8,588; Elliott v. The James Nelson, Id. 4,393; The Columbus, Id. 3,043; Corks v. The Belle, Id. 3,231a; Messena v. The Neilson, Id. 9,493a; The Neptune, Id. 10,120.

In an action for damages to a sailing vessel by collision with a steamer, the burden of proof lies in the first instance on the libelant.—The William Young, Case No. 17,760.

A sailing vessel suing a steamer must show that the collision was not produced by her own fault,—particularly that she did not change her course without clear necessity.—The New Jersey, Case No. 10,161.

A vessel in fault for failure to comply with a rule of navigation or violation of law has the burden of showing that the fault did not contribute to the collision.—Leonard v. Whitwill, Case No. 8,261; The Chancellor, Id. 2,589.

A vessel shown to be negligent must be *held* to clear proof of contributing fault in the other vessel.—The Comet, Case No. 3,051.

An owner of goods lost in collision, in order to recover against the other vessel, must show that the vessel on which they were shipped was free from fault.—Knight v. Stone, Case No. 7,888.

Where all the persons on board of a bark sunk in a collision with a steamer who could have given evidence for her were lost, and the steamer is found to have been in fault, she must make out a clear case of fault on the part of the bark to render her equally liable.—The Java, Cases Nos. 7,232, 7,233.

The burden is upon the owners to show that the pilot was alone in fault, where injury is committed by negligence in the management of a vessel while in charge of a licensed pilot.—Camp v. The Marcellus, Case No. 2,347.

Proof of the situation of the injured vessel alone may be such as to throw the burden upon the other to show due care, caution, and skill.—The Bridgeport, Case No. 1,861.

Inevitable accident will not be presumed, but must be clearly proved by party setting it up.—Amoskeag Mfg. Co. v. The John Adams, Case No. 338.

Where the injury complained of is admitted by the answer, claimant has the burden of showing affirmatively the matters of justification or defense set up.—The Rhode Island, Case No. 11,745.

§ 131. Competency.

A protest of the captain and crew, made the morning after the collision, is admissible as corroborative testimony when it corresponds with the testimony of the witnesses.—Ward v. The Fashion, Case No. 17,154.

The deposition of a witness on an investigation before the board of inspectors, who is called for libelant in a suit for the collision, can only be used by respondent for the purpose of contradicting him.—The Marietta Tilton v. The Harrisburg, Case No. 9,084.

The admission of the superintendent of defendant's towing line that it would cost more to raise the vessel sunk by one of its towboats than she was worth, and that he regarded her as a total loss, is competent on a libel for such loss.—Dowdall v. Pennsylvania R. Co., Case No. 4,038.

Testimony of experts as to the bearing of a steamer's speed upon her navigation, but not as to its propriety, is admissible.—The Blackstone, Case No. 1,473.

Testimony of practical seamen, as experts, is admissible to show whether circumstances required a departure from the rules of navigation.—The Clytie, Case No. 2,913.

Evidence of a careful lookout that no light could be seen on an approaching vessel is affirmative evidence that no light was burning on her.—The Sam Weller, Case No. 12,290.

Desertion without cause of vessel injured in collision may be considered as tending to show consciousness of fault.—The Atlas, Case No. 633.

Opinion evidence as to the value of a vessel is admissible where she has no market price.—The Cayuga, Case No. 2,535.

The ownership of a boat, in making out a prima facie case, may be proved in the same man-

ner as any other chattel.—Munch v. The Sucker State, Case No. 9,921.

§ 132. Weight and sufficiency—In general.

On a libel for injuries to a sail vessel in collision with a steamer, the defense that the former changed her course must be established by a preponderance of evidence; it is not sufficient that the evidence creates a doubt.—Leavitt v. Jewett, Case No. 8,172.

Where evidence leaves it open to reasonable doubt as to which party was in fault, the loss must be sustained by the one upon whom it has fallen.—The Bayard v. The Coal Valley, Case No. 1,128; The Kallisto, Id. 7,600.

The case will be held to be one of inscrutable fault where, upon the evidence, the cause of the collision cannot be determined.—The Breeze, Case No. 1,829.

Where there is an irreconcilable conflict of evidence as to whether there was any collision, libels for the loss will be dismissed.—The C. Vanderbilt, Case No. 3,524.

In the case of a collision between a steamboat and a heavily laden flatboat, the presumption of fault is against the steamer where there is a doubt by reason of a conflict in the evidence.—Seaman v. The Crescent City, Case No. 12,581.

Damages will be denied for want of preponderating proof in a great conflict of evidence.—The Summit, Case No. 13,606.

Evidence of conversations with the crew of the injured vessel, where inconsistent with their cotemporary act, and denied upon the stand, are entitled to but little weight.—Whitney v. The Empire State, Case No. 17,586.

The fact that the answer in a collision case, when put in, did not deny the averment of the libel that the tack was properly beat out, is to be considered on a conflict of testimony on that point, even though the answer was allowed to be amended on the hearing by inserting such a denial.—Whitney v. The Empire State, Case No. 17,586.

Loose declarations or admissions by members of the crew immediately after collision are entitled to but little weight as against their deliberate testimony.—The New Jersey, Case No. 10,161.

The testimony of a witness should not be rejected because, in a hurried conversation immediately after the collision, he gave a different statement as to a particular fact from that positively sworn to in court.—Ward v. The Fashion, Case No. 17,154.

Declarations of witnesses as to distance in the nighttime are not of much weight.—Sinnott v. The Dresden, Case No. 12,908.

Evidence of verbal statements made in time of excitement and peril should be received with great caution.—The Masten, Case No. 9,266.

But little credence can be given to the testimony of a sailor who contradicts statements deliberately made by him, in writing, immediately after the collision.—The Douglass, Case No. 4,031.

A proved fabrication of evidence, unexplained, will compel an adverse decree.—The Tillie, Case No. 14,048.

Where the testimony shows that the fault of one is flagrant, and leaves the question of fault of the other in doubt, the former only will be *held* in fault.—The Manistee, Case No. 9,028.

Libelant's case cannot be sustained by the evidence alone of his pilot, who was the only lookout.—The Globe, Case No. 5,485.

The identity of a colliding vessel *held* established by the testimony of her master that he passed the place in question about the time of collision, and struck an unknown vessel.—Larrabee v. The Piedmont, Case No. 8,095.

The admission of a master that his vessel was in fault, coupled with a promise to pay the damages, though he was not on deck at the time of the collision, is entitled to great weight.—The Douglass, Case No. 4,031.

On a libel for collision of a steamer with a small boat, where it was alleged that the steamer was 200 or 300 feet away when seen, *held* that, as the small boat had time to get out of the way, there could be no recovery.—The Mississquoi, Case No. 9,649.

Steamer *held* not in fault, on the testimony of four witnesses that they were keeping a sharp lookout, and, because of the excessive darkness, did not see the sloop until too late to avoid the collision.—Hersey v. The North America, Case No. 6,429.

Evidence of the witnesses on board of one vessel that the lights of the other were not seen, though a careful lookout was kept, *held* to outweigh the testimony of witnesses for the other vessel that her lights were brightly burning, coupled with a suspicious circumstance that her lights were saved, though her crew had no time to save their clothing.—The Sam Weller, Case No. 12,290.

Witnesses to a collision should not be impeached because of different statements of attendant incidents.—Corks v. The Belle, Case No. 3,231a.

Libel dismissed where libelant omitted to call a material witness and the witness testifying in his behalf made statements manifestly incorrect.—The New York, Case No. 10,194.

§ 133. —— Character of witness.

Evidence of disinterested witnesses in favor of libelant is not overcome by testimony of an equal number of interested witnesses for respondent.—Laing v. The G. L. Buckman, Case No. 7,988.

Testimony of passengers, who have no practical knowledge of seamanship, should be received with caution.—Klots v. The Red Jacket, Case No. 7,871.

§ 134. —— Means of knowledge.

The testimony as to the course and deflections of a vessel of those who hold her helm is entitled to more weight than those on board another moving vessel.—McNally v. Meyer, Case No. 8,909.

The testimony of the master of the vessel at her wheel as to the relative positions of the vessels is entitled to greater weight than that of seamen on the bow of the other vessel.—The Jeremiah, Case No. 7,289.

The testimony of persons on board a vessel as to her movements and the facts occurring on board is entitled to greater weight than that of persons on board of another moving vessel.—The Herbert Manton and The J. H. Gautier, Case No. 6,399; The Governor, Id. 5,645; The Narragansett, Id. 10,019; Hall v. The Buffalo, Id. 5,927; The Falcon, Id. 4,619.

The testimony of the witnesses on board a sail vessel, as to the direction of the wind, *held* more reliable than that of witnesses on board the steamer with which she came in collision.—The Hammonia, Case No. 6,005; The Hansa, Id. 6,037.

The testimony of those on board as to the relative positions of the vessels is entitled to greater weight than that of mere onlookers.—The Postboy, Case No. 11,303.

The positive testimony of witnesses to their own acts, at the time of a collision, is entitled to outweigh the opinions and belief of out-numbering witnesses who judged of such acts from the opposite vessel.—The Neptune, Case No.

10,120; Whitney v. The Empire State, Id. 17,586.

The testimony of persons on board a vessel as to whether she was well managed is entitled to more weight than that of witnesses on board another vessel who had no particular opportunities to judge of the matter.—The Northern Warrior, Case No. 10,325.

The opinions of experts as to the vessel's course, when founded upon very nice calculations, will not obtain as against the clear testimony of eyewitnesses.—The D. P., Case No. 4,056.

Testimony of officers and crew as to the number of whistles blown by their own vessel is to be believed as against an equal number of witnesses on the other vessel.—The Milwaukee, Case No. 9,626.

The rule that the testimony of those on a vessel should prevail, as to what takes place on board her, does not obtain in all cases.—The Hortensia, Case No. 6,706.

The rule giving greater weight to the testimony of persons on board a vessel, as to her movements, does not apply to the exhibition of a light.—The Frank Moffat, Case No. 5,060.

The testimony of one who saw the collision from the land is entitled to greater weight than that of those on the moving vessels.—The M. M. Chase, Case No. 9,684.

(C) DAMAGES.

Limitation of liability, see "Shipping," §§ 244–255.

§ 135. Measure of damages in general.

The owner of the injured vessel is entitled to receive a remuneration which will place him in the situation in which he would have been but for the collision.—The Rhode Island, Case No. 11,740a; The Narragansett, Id. 10,020.

The measure of damages is compensation for the entire loss. If the injury is reparable the measure is the sum necessary to restore the vessel to her previous condition. In case of total loss market price is the criterion.—The New Jersey, Case No. 10,162.

The party in fault should bear any inconvenience or hardship in proving the exact damages.—The Mayflower, Case No. 9,345.

The expenses of raising the injured boat, of repairs, and for loss of time will be allowed.—Barrett v. Williamson, Case No. 1,051.

Where the owner has repaired the vessel, the recovery may, in some cases, exceed its value, where excess is made up by unexpected amount of demurrage.—The Glaucus, Case No. 5,478.

The burden is on claimant to show that the making of repairs to the injured vessel was to be in full satisfaction of damages.—The Baltic, Case No. 825.

Hypothetical or consequential damages will not be considered.—The Blossom, Case No. 1,564.

Libelant cannot have a decree for full damages unless he show both fault on the other vessel and the absence of fault on his part, which contributed to the collision.—Schenck v. The Fremont, Case No. 12,448.

It is no defense that the damage would have been less had the vessel been strongly built.—Amoskeag Mfg. Co. v. The John Adams, Case No. 338.

The damages in the case of a rotten and unseaworthy vessel brought in collision with a wharf, where the condition of the vessel was not the sole cause of the injury, are the natural and necessary consequences of the collision to the vessel in her actual state of repair.—The Workman, Case No. 18,045.

Where a skiff was sunk in a collision, and libelant personally injured, the court allowed, as damages, the value of repairs to the skiff, and compensation for loss of its use, the cost of libelant's cure, compensation for his sufferings and for loss of time, and compensation for permanent injuries.—Miller v. The W. G. Hewes, Case No. 9,594.

§ 135a. Limited to value of offending vessel and freight pending.

The personal liability of the owners of the vessel in fault is measured by the value of the vessel immediately before collision and freight pending, and they are not exempted by its loss.—Barnes v. Steamship Co., Case No. 1,021.

The recovery is limited to the amount of the interest of the owner in the vessel and her freight pending at the time of the collision, under Act 1851.—Cook v. Mallory, Case No. 3,163.

The recovery by the owner of a vessel injured by collision is limited to the value of the offending vessel and her freight immediately subsequent to the collision. He has no claim upon the insurance received by the owner.—The Peshtigo, Case No. 11,018.

The liability in the case of a collision on the high seas between vessels of different foreign nations is determined by the law maritime according to the law of nations, and is limited to the value of the ship and freight, which must be abandoned to the injured party.—Thomassen v. Whitwell, Case No. 13,929.

A tender in the answer and upon the trial, by a written surrender of defendant's interest in the vessel, *held* sufficient.—Thomassen v. Whitwell, Case No. 13,929.

Where the vessel at fault was subsequently wrecked on her voyage, sold by direction of her owners, and delivered to the purchasers after the libel for collision was filed, *held*, that the owner waived his exemption from personal liability.—Thomassen v. Whitwell. Case No. 13.929.

§ 136. Punitive damages.

Damages may be given, above the amount of actual injury, in case of a willful and malicious collision.—Ralston v. The State Rights, Case No. 11,540.

Inhuman conduct of the master of a vessel in collision, in not giving proper assistance to the damaged vessel and her passengers and crew, cannot be considered in estimating damages.—Saunders v. The Hanover. Case No. 12,374.

§ 137. When full value of vessel recoverable.

Where a vessel sunk in a collision is sold as a wreck, the whole amount will not be allowed as a total loss where she is raised and repaired, but only the expenses and repairs and demurrage for loss of time.—The M. M. Caleb, Case No. 9,683.

The owner, after collision, who allows his boat to lie until she becomes worthless, is only entitled to the expense of raising her, and putting her in repair, with a reasonable allowance for loss of time and freight and damage to the cargo.—The Sam Gaty, Case No. 12,276.

Reasonable apprehension that all efforts to save the vessel injured will be unavailing and perilous will excuse abandonment.—The Colorado, Case No. 3,028.

The crew are justified in leaving the injured vessel, where her condition at the time appeared to be desperate, although she might have been saved; and the measure of damages is the full value of vessel and freight.—The Rebecca, Case No. 11,618.

The loss of a vessel abandoned under a reasonable apprehension that the lives of the crew would be endangered by trying to save her will

be assessed as a total loss, though the other vessel similarly damaged was saved.—The Ontario, Case No. 10,543; Swift v. Brownell, Id. 13,695.

A party claiming a total loss must prove either an actual total loss, or that it would cost more to raise and repair the vessel than she would be worth when repaired.—Dowdall v. Pennsylvania R. Co., Case No. 4,038.

The owner cannot abandon vessel as being a total loss where she has been sunk, but could be raised for a small sum, compared with her value. —Clarke v. The Fashion, Case No. 2,851.

Libelants cannot recover for a total loss where vessel, sold without examination and without notice to defendants, could have been raised and repaired with little outlay.—The Cambridge, Case No. 2,334.

Full value at time of loss will be allowed where the expenses of raising and repairing the vessel, undertaken by another, amounted to more than she was worth after she was repaired.—The Bristol, Case No. 1,892.

Full value was allowed where the amount for which a sunken vessel was sold after she was raised did not exceed the expenses of raising her.—The Shady Side, Case No. 12,692.

A ferryboat injured by a collision while coming out of her slip at Fulton street, Brooklyn, *held* not in fault for attempting to reach Jersey City, where her officers examined her injuries, and were of opinion that she could be kept afloat.—The John Cooker, Case No. 7,337.

The circumstances stated, under which the value of a sunken canal boat was allowed as upon a total loss.—Deems v. Albany & Canal Line, Case No. 3,736.

§ 138. Value of vessel, how ascertained.

The vessel is to be paid for at her value when lost.—Allen v. Mackay, Case No. 228.

Mode of arriving at value of vessel sunk by a collision.—The North Star, Case No. 10,332.

The value of a vessel is not necessarily her purchase price with repairs added.—The North Star, Case No. 10,332.

The market value just before the collision, in the ordinary course of sales, is the measure of damages in case of total loss.—The Colorado, Case No. 3,029.

The measure of damages for a vessel sunk is the price a prudent owner, wishing, but not compelled, to sell, would reasonably expect to get at public or private sale, using proper measures to avoid undue sacrifices.—McCloskey v. The Achilles, Case No. 8,701.

Market value as proved cannot be reduced by showing that the actual value is less because of age or imperfect build.—The New Jersey, Case No. 10,162.

The rule that the market value of the vessel is the criterion of her value does not apply where she has no market value.—The Cayuga, Case No. 2,535.

In the absence of a market value, the value of the vessel to the owner, in the business she was engaged in at the time of collision, is a proper basis of damages.—The Mayflower, Case No. 9,345.

The damages where the value of the injured vessel is reported at a certain sum, "in gold, or Canadian currency," are to be estimated at the value of such sum in United States notes. —Councer v. The A. L. Griffin, Case No. 3,279.

Where a vessel is lost at sea, proof of her value at the time and place of her loss may, in ordinary cases, be made by evidence of her value at her last port of departure, or at the place of her destination.—The Pennsylvania, Case No. 10,948.

Where the cost of repairs is claimed as damages, it is not competent to show what the vessel cost her owner four years before, as evidence tending to prove that at the time of the collision she was not worth as much as such sum. —The Vicksburg, Case No. 16,932.

On the question of the actual market value of the boat at the time of loss, plaintiff may testify as to what he had paid for her, and what he had expended upon her.—Dowdall v. Pennsylvania R. Co., Case No. 4,038.

§ 139. Expenses of raising and repairs.

The services of other vessels of an association, of which the injured vessel was a member, furnished a person under a contract for raising the vessel at a specific sum, are proper items of expense.—The Sunnyside, Case No. 13,621.

The injured vessel is entitled to be put into as good condition as before the injury, and no allowance is to be made for new materials instead of old.—The Jeannie Cushman, Case No. 7,250.

A recovery is allowed of an amount sufficient to restore the injured vessel to the condition she was in at the time of the collision.—The Blossom, Case No. 1,564.

The party repairing should show positively that he has only reinstated the vessel in the condition she was before the collision.—The W. H. Clark, Case No. 17,482.

Full charges for repairs should not be allowed when the boat was old and somewhat decayed.—The W. H. Clark, Case No. 17,482.

Damages may include further repairs where the first repairs are found insufficient after a voyage.—Larrabee v. The Piedmont, Case No. 8,095.

The injured vessel is not bound to employ, to make repairs, the persons recommended by the owners of the vessel in fault, and offers to make repairs made after others are employed are not conclusive as to the amount of recovery.—Weeks v. The New Orleans, Case No. 17,353a.

Where competent persons offered to raise a sunken vessel for a certain sum, damages for expenses of raising must be reduced to such sum.—The Russia, Case No. 12,169.

Owners of injured vessel, who make repairs, may recover as part of damages the usual additional charge for use of tools, etc., and also for the services of superintendent. — The Cayuga, Case No. 2,535.

Damages to the injured vessel, which was sold at auction, and afterwards repaired by the buyers, are ascertained by a reference to the cost of repairs instead of the result of the sale.—The Empire State, Case No. 4,473.

The sum necessary to repair the injured vessel may be recovered, though libelant has sold her without making such repairs.—The Rhode Island, Case No. 11,741.

Where the repairs exceeded the value of the vessel, *held*, that libelant should recover only her value at the time of the accident and the necessary expenses to ascertain the extent of her injuries.—Scow Without A Name, Case No. 12,555.

Estimates of the cost of repairs are not competent when the repairs have been actually made. —The Mayflower, Case No. 9,345.

The expense of putting in a new mast cannot be allowed where the injured mast as repaired stood the remainder of the season, and it did not appear but that it would have continued serviceable.—The Monitor and The Hill, Case No. 9,711.

The expenses of repairs were reduced to the lowest estimate where the bills were exaggerated, with the connivance of the master.—The Sampson, Case No. 12,279.

§ 140. Depreciation in value because of injury.

The alleged depreciation in the market value resulting from the mere fact that the vessel has been injured, is too variable and uncertain to be allowed as damages, where the intrinsic value of the vessel is made good.—The Favorita, Case No. 4,695; Petty v. Merrill, Id. 11,050.

An item of $800 for the difference between the value of the injured vessel before and after repairs disallowed.—The Isaac Newton, Case No. 7,091.

§ 141. Demurrage—When allowed.

Compensation will be made for the loss of the use of the injured vessel while undergoing repairs.—The Morning Star, Case No. 9,817; The Narragansett, Id. 10,017, 10,020; Cannon v. The Potomac, Id. 2,386.

The probable earnings of a boat for the time she was delayed in repairing the injury sustained by collision with a bridge are recoverable as damages.—Jolly v. Terre Haute Draw-Bridge Co., Case No. 7,441.

To recover demurrage, loss of service and damages by such loss must be shown.—The Baltic, Case No. 824.

Damages are recoverable for the necessary detention of the vessel while undergoing repairs, where it appears that the vessel could have been profitably chartered or employed.—North Shore Staten Island Ferry Co. v. The Huguenots, Case No. 10,330; The Stromless, Id. 13,540.

A carrier, during the busy season, may be presumed to have lost employment.—Strong v. Certain Quantity of Wheat, Case No. 13,541.

In estimating the damages to a ship on a whaling voyage, demurrage is to be allowed for the time she is in port undergoing repairs.—Swift v. Brownell, Case No. 13,695.

There can be no recovery for delays caused by storms, or by ice or obstructions in the harbor or river where a vessel may be, after necessary repairs are made.—Harris v. The Prometheus, Case No. 6,127; The Thomas Kiley, Case No. 13,924.

Demurrage is not allowable for a delay in discharging the cargo, after the vessel was raised with the owner's knowledge.—Brady v. The New Philadelphia, Case No. 1,797.

The loss of the use of a ferryboat while undergoing repairs is allowable, though the owners supplied her place by a spare boat, without any decrease in the receipts of the ferry.—The Favorita, Cases Nos. 4,694, 4,695; The Cayuga, Id. 2,537.

Demurrage will be allowed where the vessel, while undergoing repairs by the owners of the colliding vessel, was offered a charter which the master in good faith refused to accept, because having no knowledge of when she would be ready, though he did not inform the claimants.—The Baltic, Case No. 825.

Demurrage for delay in making repairs is recoverable, though such repairs made the vessel worth more than she was worth before the collision.—The Santee, Case No. 12,329.

Where competent persons offered to raise the vessel for a certain sum, and a more expensive method is adopted, demurrage for the delay beyond the time it would have taken such persons to raise the vessel cannot be allowed.—The Russia, Case No. 12,169.

§ 142. —— How ascertained.

The compensation for injuries to a vessel caused by collision is to be determined by the market price or value of the services of the vessel for the time during which she is detained from her business for repairs.—Warner v. The South America, Case No. 17,190.

The damages for detention of a vessel while undergoing repairs are determined by the market value of her hire, and not by what she was earning per day at the time of the injury, not being under hire or charter.—The South America v. Warran, Case No. 13,180a.

The rule of damages for delay while undergoing repairs is the amount the vessel would have produced for chartering in the business in which she has usually been employed.—Harris v. The Prometheus, Case No. 6,127.

The owner of a yacht, for his own use, may recover, as damages for the loss of her use while repairing, the price at which he could readily have let her for pleasure parties.—The Walter W. Pharo, Case No. 17,124.

The full amount which the injured vessel might have earned should not be allowed as compensation for time lost.—The W. H. Clark, Case No. 17,482.

Damages for the detention of a pilot boat, injured by a collision, should include only her value as a vessel to be used as a pilot boat, and not an allowance for the loss of time of the pilots on board.—The Emilie, Case No. 4,451.

In the absence of evidence as to the market value of such a vessel, resort may be had to the judgment, as to such value, of persons acquainted with the business and with her earnings.—The Emilie, Case No. 4,451.

The value of the time of a pilot boat while undergoing repairs must include only the value of the use of the boat as a vessel without pilots or crew or stores.—The Transit, Case No. 14,138.

Pilots whose boat is injured in a collision *held* not bound to hire a fruiter or fishing smack for the purpose of carrying on their business while their vessel was being repaired.—The Transit, Case No. 14,138.

A fishing boat making weekly trips to market, and losing one trip by a collision, which injures her seine, may be allowed the probable profits of such trip.—The Mary Steele, Case No. 9,226.

Damages for detention may be estimated at the market value, though the vessel was under charter.—Larrabee v. The Piedmont, Case No. 8,095.

A charge for lay days in a charter party furnishes no test to determine the damages for detention during the repair of a vessel.—The Hermann, Case No. 6,408.

The demurrage clause in the charter is sufficient evidence of the measure of damages for detention while the vessel is undergoing repairs.—The Rebecca v. The America, Case No. 11,619a.

An allowance for loss by delay while undergoing repairs cannot be based upon speculative and conjectural opinions as to the probability of the employment of the vessel, and the amount of her earnings.—The R. L. Maybey, Case No. 11,871.

In the case of a tug, the proper inquiry is as to what she could have been chartered for, per day, in the business of towing, regard being had to the market price.—The R. L. Maybey, Case No. 11,871.

Where ferryboat injured by collision was withdrawn for repairs, and its place supplied by another boat, evidence of the value of her use, based on the receipts, is admissible on the question of her value, though there is no evidence that she could have been chartered for any sum during the time she was laid up.—The Cayuga, Case No. 2,535.

The pro rata share of the net earnings of an association of vessels, based upon the valuation on each vessel, *held* a proper basis for demurrage, where one of the vessels was injured in a collision.—The Sunnyside, Case No. 13,621.

The books of the owner showing previous and subsequent earnings are competent to show probable earnings during the detention.—The Mayflower, Case No. 9,345.

An item of $465 for loss of earnings during detention for repairs founded upon the mere opinion of the master and mate, not rejected on exceptions, where the cost of sending the report back would probably equal any abatement in the amount.—The Isaac Newton, Case No. 7,091.

Demurrage allowed at the rate of eight cents a ton of the vessel's carrying capacity for every day's delay.—The Cambridge, Case No. 2,334.

The amount paid for the hire of a vessel to take the place of the injured one is better evidence of the proper amount of demurrage than the opinion of witnesses.—The St. John, Case No. 12,224.

In the absence of direct evidence of the amount of loss from delay while making repairs, interest upon the value of the vessel during such time may be awarded.—The Rhode Island, Case No. 11,740a.

The highest rate of interest allowed in the state during the time of the detention of the vessel undergoing repairs upon her value allowed as damages for her detention.—Munch v. The Sucker State, Case No. 9,921.

Where, in the case of a vessel running on a line, no vessel was hired to supply her place while undergoing repairs, an allowance of interest upon her value, at the rate of 6 per cent. per annum, while undergoing repairs, was upheld against an appeal by both parties.—The Rhode Island, Case No. 11,744.

§ 143. Loss of cargo.

The direct effect of a collision with a lighter being to cast its cargo overboard, the colliding vessel is liable for the loss thereby sustained.—Boyer v. The Wisconsin and The Hector, Case No. 1,756.

Libelant is not obliged to attempt to save cargo, where the conditions are such as to preclude reasonable expectations of success.—Burton v. The Commander in Chief, Case No. 2,216.

The owner of a vessel sunk in the middle of Long Island sound is not bound to attempt to save property from the wreck.—Banks v. The Metropolis, Case No. 962.

The use of such nautical skill as owners of vessels usually employ in such emergencies sufficiently shows reasonable exertions to save a sunken cargo.—The Galatea, Case No. 5,185.

The measure of damages for cargo lost in a collision is its value at the port of shipment, with expenses of lading and transportation to the place of collision, and insurance with interest from the time of collision.—The Ocean Queen, Cases Nos. 10,409, 10,410; Gordon v. The Mary Vaughan, Id. 5,618; The Harriet Newhall, Id. 6,102; The Aleppo, Id. 158; Allen v. Mackay, Id. 228.

No allowance will be made for expected profits.—The Harriet Newhall, Case No. 6,102.

The value must be taken as at the time and place of shipment.—The Mary J. Vaughan, Case No. 9,217.

In the case of a vessel sunk at her anchorage in the port of her destination, the value of the cargo must be taken at such port, less freight and duties.—The Russia, Case No. 12,169.

The measure of damages for a loss by a collision at sea of a cargo of guano, belonging to the republic of Peru, *held* to be its market value in Peru for purposes of export. Dyer v. National S. S. Co., Case No. 4,226, modified.—Dyer v. National Steam Nav. Co., Case No. 4,225.

Such value is determined by deducting from its value, at the port of destination, shipping expenses, freight, duties, insurance, port charges, and commission for selling, and from the net proceeds 10 to 12 per cent., for mercantile profit.—Dyer v. National Steam Nav. Co., Case No. 4,225.

The proper rate of interest to be allowed on the value of the property lost *held* 6 per cent., and not 7 per cent.—Dyer v. National Steam Nav. Co., Case No. 4,225.

The measure of damages for the loss of a cargo procured abroad is what the master paid for it, with freight, and not what it cost the owner by his adventure in sending his ship to procure it.—The Glaucus, Case No. 5,478.

The value of a cargo of bone and oil lost in the Arctic Ocean is to be estimated at its market value in the home port of the vessel at the time when it would ordinarily have arrived there, if shipped at the time and from the place of the collision.—Swift v. Brownell, Case No. 13,695.

In the case of a cargo of coal sold at private sale without notice to the parties chargeable for the damages, *held*, that the loss shown thereby was recoverable, but the practice was disapproved.—The Thomas Kiley, Case No. 13,924.

§ 144. Injury to cargo.

For an injury to cargo carried to its destination after the vessel is raised and repaired, the vessel at fault is only liable for the loss that would have been sustained on its immediate sale at the nearest port.—Seaman v. The Crescent City, Case No. 12,581.

Failure to discover a leak will not charge owners with damage to cargo, where examinations made immediately after the collision revealed no injury.—Amoskeag Mfg. Co. v. The John Adams, Case No. 338.

The taking possession of damaged cargo by original purchasers at the contract price, less the sum paid by insurers, *held* a private sale, and sufficient, with evidence of experts, to support finding as to amount of damage.—The General McCullum, Case No. 5,318.

Claimants are entitled to a deduction for the value of cargo raised by libelant's agent from the sunken vessel, and appropriated by him.—The Galatea, Case No. 5,185.

§ 145. Loss of freight or other profits.

The freight, only, which the vessel was in the act of earning, is recoverable.—Egbert v. Baltimore & O. R. Co., Case No. 4,305.

The net freight which the injured vessel was earning, and has lost, is allowable as an item of damage.—The Heroine, Case No. 6,416; Egbert v. Baltimore & O. R. Co., Id. 4,305.

The expenses which the vessel would have incurred in successfully performing the voyage must be deducted from the gross freight.—The Heroine, Case No. 6,416; The Colorado, Id. 3,029.

Pending "freight" recoverable (Act 1851, c. 43, § 3) includes earnings in transporting goods for owners of vessel.—Allen v. Mackay, Case No. 228.

The net freight recoverable cannot exceed the amount claimed in the libel.—Egbert v. Baltimore & O. R. Co., Case No. 4,305.

Vessel detained five days for repairs *held* entitled only to one third of net freight on contract about to be performed which would have occupied fifteen days.—The Gorgas, Case No. 5,623.

Where it appears that the cargo of a sunken vessel was saved, freight money will not be allowed as damages, without actual proof of loss.—The M. M. Caleb, Case No. 9,683.

§ 146. Incidental injuries.

Damages caused by beaching the injured vessel are chargeable to the vessel in fault, where the master acted with reasonable skill and diligence after the collision.—The Nellie, Case No. 10,096.

Damages suffered by the injured vessel in the course of reasonable and proper efforts to save her are properly chargeable in the action for collision.—The Narragansett, Case No. 10,017.

Where the injured vessel is left helpless in the track of navigation and is injured by a passing vessel, the vessel in fault for the first collision is liable for damages for the second collision.—The Oler, Case No. 10,485.

A vessel by whose fault a collision occurs is liable for damages consequent on the stranding of the disabled vessel, resulting from its disabled condition.—The Cella, Case No. 2,542.

The injury or loss of a portion of the cargo after the wreck, by the efforts of a third vessel to save it, does not exonerate the faulty vessel from liability for full damages.—The Narragansett, Case No. 10,019.

Where a steamer is liable for collision with a schooner, and two of the schooner's men jumped on board the steamer, the loss of the men, if crippling her, is chargeable to the steamer.—The City of Guatemala, Case No. 2,747.

Where a schooner breaks away from the pier, and runs into a canal boat and beaches her, and she is injured by a storm, the schooner is liable for the damages from the collision and from the subsequent storm.—The Christopher Columbus, Case No. 2,706.

Freight money lost by the master when hurrying from his sinking vessel, and sails used for covering the deck load, are proper items of damage.—The Mary C., Case No. 9,201.

The value of a boat stolen from the master of the injured vessel was disallowed, there being no necessary or probable connection proved between the collision and the theft.—The Nellie, Case No. 10,096.

A vessel cast off from a tug in a tideway at fault for collision with a vessel moored cannot recover for increased damage from the fact that the latter's anchor was atrip.—Wilson v. The Envoy, Case No. 17,802.

§ 147. Incidental expenses.

Salvage expenses and charges necessarily paid in rescuing the vessel and cargo from perils arising out of the collision will be allowed as damages.—The Narragansett, Case No. 10,020; Crowel v. The Radama, Id. 3,442.

A bona fide adjustment by the parties will be accepted by the court as the proper mode of fixing the value of such services.—The Narragansett, Case No. 10,020.

In assessing the partial loss to sunken vessel, an allowance may be made for the salvage which would have been paid if the owners had procured her to be brought in and repaired.—The Cambridge, Case No. 2,334.

Charges for wharfage while repairing, for the time of the owner and crew in raising and clearout the vessel, for the loss of profits while sunk and while being repaired, are properly added to the cost of repairs.—Vantine v. The Lake. Case No. 16,878.

The salary and board of the master of a vessel while superintending her repairs *held* a proper charge.—The Sunnyside, Case No. 13,621.

Services of an agent in settling and paying bills are not chargeable as damages.—The Mayflower, Case No. 9,345.

In a case of collision by mutual fault between a steamer and sail vessel, the steamer may be allowed, as part of the damages, a sum for towing the sail vessel into port after the collision.—The Mary Patten, Case No. 9,223.

The costs and expenses in defending a suit brought for services rendered in pumping and keeping the vessel afloat after the collision *held* not recoverable in a case of mutual fault.—The Favorita, Case No. 4,694.

After a vessel has been repaired, additional work necessary to make the vessel good will not be allowed for.—Chase v. Crary, Case No. 2,626.

A reasonable sum will be allowed for care of cargo.—The Alexandria, Case No. 178.

The cost of raising a boat and putting her on the ways to be examined is recoverable as an item of damage, where there is a total loss.—The Nebraska, Case No. 10,076; The America, Id. 285; The Mary Eveline, Id. 9,212.

§ 148. Interest.

Interest may be allowed on all items of damages.—The America, Case No. 285; The Empire State, Id. 4,473; Burton v. The Commander in Chief, Id. 2,215.

Interest on items of damages will be allowed at 6 and not at 7 per cent.—The Baltic, Case No. 824; Allen v. Mackay, Id. 228; The Mary Eveline, Id. 9,212.

Interest will be allowed on the value of the cargo and freight and the amount of repairs.—The Empire State, Case No. 4,473; The Baltic, Id. 824.

Interest is allowed on a recovery for demurrage.—The Alexandria, Case No. 178.

Interest is allowable on the cost of repairs only from the time when payment therefor was actually made.—North Shore Staten Island Ferry Co. v. The Huguenots, Case No. 10,330; The Mary Doane, Id. 9,205.

Interest should be allowed on the damages from the day on which the injury happened until the day when judgment is rendered.—The Morning Star, Case No. 9,817.

Interest on the value of the vessel, and on the net freight, from the time of the loss, may be allowed, though it was not claimed as such in the libel.—Egbert v. Baltimore & O. R. Co., Case No. 4,305.

A fraudulent attempt to charge for repairs not made necessary by the collision will not prevent recovery of true amount of damages, but the court may deny interest.—Crane v. The Samson, Case No. 3,357.

Interest may be allowed on the cost of cargo and all expenses and insurance actually paid.—Allen v. Mackay, Case No. 228.

The jury are not bound to give interest to the owner of the injured vessel.—Barrett v. Williamson, Case No. 1,051.

§ 149. Apportionment of damages—In general.

The rule as to the division of damages in cases of mutual fault only applies where both vessels are in fault at the time, and in the acts which produced the collision, and where the faults are not egregiously unequal.—Ralston v. The State Rights, Case No. 11,540.

Where one vessel is clearly at fault, and the evidence leaves it doubtful whether the other was at fault, the damages will not be divided.—Ward v. The Dousman, Case No. 17,153; The Sunnyside, Id. 13,620.

Where two vessels collide, without blame on the part of either, the loss must be borne by that on which it falls. If both are to blame, it must be apportioned between them. If it is by the fault of one, that must make full compensation.—Reeves v. The Constitution, Case No. 11,659.

Where a collision happens without fault of either party, or the fault cannot be ascertained, or if both were in fault, the damage and loss are equally divided.—The Scioto, Case No. 12,508.

In case of a loss of a schooner and her cargo by collision with a steamer, where both vessels were *held* in fault, the damages for the loss of the schooner were apportioned between the two vessels, and a decree was given the owners of the cargo for the full amount of their loss, and the steamer credited on the decree in favor of the schooner against her for a sum equal to one-half of the decree in favor of the owners of the cargo.—The Eleanora, Case No. 4,335.

The rules and authorities governing the apportionment of damages for collision in cases of mutual fault, inscrutable fault, and inevitable accident, elaborately reviewed.—The Comet, Case No. 3,050.

Division and apportionment of damages where a vessel and cargo were totally lost, and the other vessel injured, in a case of mutual fault.—The Santiago De Cuba, Case No. 12,333.

§ 149a. —— Joint liability.

Where a vessel is injured by the joint negligence of two vessels, the damages must be apportioned between them.—The Monitor and The Hill, Case No. 9,711.

Where two steam vessels are *held* liable to the owners of a schooner, and the damages are apportioned between them, and one vessel is of less value than the amount of damages, the difference cannot be recovered against the other vessel.—The City of Hartford, Case No. 2,753.

Where collision between two tows resulted from negligence of both tugs, and, on libel against one, opportunity given to make the other a party is not embraced, only half damages will be decreed.—The Atlas, Cases Nos. 633, 634.

Where steamer and tug held liable for injury to tow, steamer bound for only half damages though value of tug will not make up the other half.—The Alabama, Case No. 123.

A schooner and ferryboat collided, in consequence of which the ferryboat injured a third vessel. On a libel by the schooner, both were held in fault. *Held*, that a cross libel for damages paid by the ferryboat to the third vessel should be dismissed.—Brush v. The Plainfield, Case No. 2,058.

Where it is doubtful whether the tug or the vessel with which the tow collided was in fault, on a libel by the owner of the tow against the tug, a decree will be given the tow, leaving the tug to recover the whole or a portion of the damages from the other vessel.—The Enterprise, Case No. 4,500.

Where a decree against two vessels does not apportion the damages, and it appears that one stands in the relation of surety to the other, libelant will be required to first issue execution against the latter.—The Helen R. Cooper and The R. L. Mabey, Case No. 6,335.

§ 150. —— Mutual fault.

Where both vessels were in fault for the collision, the damages and costs will be equally divided between them, without regard to the difference of their values.—Allen v. Mackay, Case No. 228; The Bay State, Id. 1,148, 1,150; The Brothers, Id. 1,969; Cannon v. The Potomac, Id. 2,386; The City of Hartford, Id. 2,749; Foster v. The Miranda, Id. 4,977; Haney v. The Louisiana, Id. 6,020; The John Henry, Id. 7,350; The Kolon, Id. 7,923; Lenox v. Winisimmet Co., Id. 8,248; The Magenta, Id. 8,946; The Marcia Tribou, Id. 9,062; The Mary Patten, Id. 9,223; The Nautilus, Id. 10,058; O'Neil v. Sears, Id. 10,530; Schenck v. The Fremont, Id. 12,448.

Where both vessels are in fault, and only one injured, she may recover half damages and full costs.—The Baltic, Case No. 824; The Mary Patten, Id. 9,223.

Where, in a case of mutual fault, one vessel is sunk, the damages will be apportioned, and the owners of the sunken vessel must bear half the loss of the cargo and of the seamen's effects.—Leonard v. Whitwill, Case No. 8,261.

In a case of mutual fault, the owner of the cargo of one of the vessels lost in the collision may recover his entire damages from the other vessel.—The Kolon, Case No. 7,923.

Where damages were adjudged to be divided, insurance money received by one of the steamers is not to be deducted from the share which the other is adjudged to pay.—Cannon v. The Potomac, Case No. 2,386.

A fault of one vessel will not excuse want of care, diligence, and skill in the other, so as to exempt her from sharing the loss and damage.—The Scioto, Case No. 12,508.

Where a collision occurs by the willful fault or intentional wrong of both parties, the damages will not be apportioned, but the libel will be dismissed.—The R. L. Maybey, Case No. 11,870.

§ 151. —— Inscrutable fault.

Damages will be equally divided where, owing to conflicting and uncertain evidence, the fault cannot be fixed.—The Comet, Case No. 3,050.

Where it is impossible to tell on the pleadings and proofs which vessel had the right of way, the case will be considered as one of mutual fault or of inscrutable fault, and the damages will be divided.—The Tracy J. Bronson, Case No. 14,131.

Where the court is satisfied that both vessels were in fault, but is unable on the evidence to find the specific faults of each, the case is one of inscrutable fault, and the damages may be equally divided.—Lucas v. The Thomas Swann, Case No. 8,588.

§ 152. —— Inevitable accident.

Where a collision occurs from inevitable accident, without the negligence or fault of either party, each should bear his own loss.—The Eliza and Abby, Case No. 4,349; Jerome v. Floating-Dock, Id. 7,291; The John Perkins, Id. 7,360; The Moxey, Id. 9,894; The Nautilus, Id. 10,058; Ward v. The Fashion, Id. 17,154.

§ 153. Effect of insurance.

Libelant is entitled to the full amount of damages, though he has received partial indemnity from underwriters.—The Avon, Case No. 680.

That a part owner has received insurance as for a total loss is no reason why the entire value of the vessel should not be awarded, on a libel by the owners.—The Metis, Case No. 9,500.

Payment to a carrier, by an insurance company, of damages to a cargo by a collision, will not prevent the carrier from maintaining a suit against the wrongdoer for the full amount of the damage.—Hovey v. The Sarah E. Brown, Case No. 6,744.

(D) TRIAL OR HEARING, JUDGMENT, AND REVIEW.

§ 154. Reference.

The subject may be referred to persons skilled in navigation, and their report acted upon, where the rights depend upon questions of nautical skill in the management of a vessel.—The Emily, Case No. 4,453.

The appointment of nautical assessors, in collision cases, approved.—Barnes v. Steamship Co., Case No. 1,021.

The proceedings on a reference to a commissioner to compute damages in a collision case

are to be conducted in the manner usual on a reference in chancery.—The E. C. Scranton, Case No. 4,271.

Where respondent declines to produce any evidence on the reference to ascertain damages, libelant need only establish a prima facie case.—The Rebecca v. The America, Case No. 11,619a.

§ 155. Commissioner's report and exceptions thereto.

An award in a case of collision which decides the liability, but not the damages, is void because not final.—The Nineveh, Case No. 10,276.

The report of a commissioner in a case of mutual fault of a certain sum as "due to the libelant" will be amended so as to read "as the damages sustained by libelant."—The Baltic, Case No. 824.

The commissioner's report of the amount of damages will be adopted in the absence of palpable errors or inadvertencies or preponderating evidence.—The Narragansett, Case No. 10,020; The Mayflower, Id. 9,345; Egbert v. Baltimore & O. R. Co., Id. 4,305.

Where it does not appear how the commissioner arrived at the sum allowed for freight pending, an exception to the report, as not showing the principal on which it is calculated, is the only way to bring up the question of the amount.—The Galatea, Case No. 5,185.

The justness of a decree on libel for collision, in which a reference to a commissioner to ascertain the damage has been directed, cannot be tested on exceptions to the commissioner's report.—Burton v. The Commander in Chief, Case No. 2,215.

Nor can the credibility and reliability of the witnesses on the reference be investigated on such exceptions, unless the objections rest wholly on questions of law.—Burton v. The Commander in Chief, Case No. 2,215.

The propriety of the action of a commissioner, to whom it has been referred to ascertain the damages in a collision case, in refusing to allow a person to be sworn to contradict testimony previously given, cannot be raised by an exception to the report, but must be raised by an application to the court before the report is made.—The E. C. Scranton, Case No. 4,272.

In a libel in rem for collision, though the owner of the injured vesesl is not entitled to recover the value of the cargo belonging to others where he has not paid for the loss of the same, yet this objection cannot be raised on exception to the report of a commissioner to whom the cause was referred. The remedy of the claimants would be by motion to reject the report as not within the provision of the order of reference, or to allow a rehearing on the merits.—The New Jersey, Case No. 10,162.

§ 156. Hearing or trial by court.

A hearing will be given without proof where the pleadings admit liability.—American Dredging Co. v. The Bedowin, Case No. 299.

First question in a suit in rem for collision is whether the vessel sued was in fault, and until that fact is established the question whether libelant was in fault does not arise.—The Chancellor, Case No. 2,589.

Where the witnesses as to value for opposite parties are so far apart that they cannot be approximately correct, it is error to average the amount by their testimony.—Gilooley v. Pennsylvania R. Co., Case No. 5,448b.

Where the only evidence introduced was as to the total value of the vessel, the court may either allow nominal damages or estimate them from the court's knowledge of such cases and the general facts proven.—The Sam Gaty, Case No. 12,276.

Proof of title to the injured vessel may be given after trial.—The Havre, Case No. 6,232.

§ 157. Rehearing.

A rehearing not allowed in the district court on the ground that since the trial libelant's witnesses testified differently in another suit, growing out of the same collision, as such evidence is admissible on appeal.—The John Cooker, Case No. 7,337.

§ 158. Decree.

Under a libel charging a collision to have been caused by the joint negligence of two vessels, a decree may be rendered against one found to have been solely in fault.—The E. C. Scranton, Case No. 4,270.

Where the negligence of one of two vessels jointly liable is proven the decree may be against her alone.—Chase v. Crary, Case No. 2,626.

On a libel by a tow against her tug and the colliding vessel, the libelant may recover against the latter alone, where there was independent fault on her part.—The Manhasset, Case No. 9,019.

A decree for damages for collision in favor of several libelants should be for the gross sum, so as to bring it within the jurisdictional amount for appeal.—Avery v. The Wanata, Case No. 677.

Owners of cargo must be made parties to the suit before they can avail themselves of the operation of the decree.—Jones v. The Hanover, Case No. 7,466.

The title will pass to the defendant, in a suit for collision, who pays the full value on a decree against him, as against underwriters to whom the owner has previously abandoned the vessel.—Fox v. The Lucy A. Blossom, Case No. 5,013.

In the case of a single stipulation for value, where both tug and tow are libeled for a collision, it is not necessary to decide which of them is in fault, if only one.—The John Cooker, Case No. 7,337.

In a libel for collision, the issue formed by the pleadings was whether the collision was caused by the negligence and want of skill of the respondents. The court was of opinion that the proof showed the collision to have been the result of inevitable accident, and the decree was "that, the libelants having failed to establish fault in the respondents, the libel must be dismissed." It was *held* that this opinion with regard to the collision being inevitable accident could not be incorporated into the decree in order to enable the libelant to plead res adjudicata to a libel pending against him in another court.—Ward v. The Fashion, Case No. 17,155.

§ 159. Review.

The rejection of evidence on the subject of damages by the commissioner, when not raised in the district court, is not available on appeal.—The Vicksburg, Case No. 16,932.

On appeal by one party alone from a decree finding mutual fault, the circuit court cannot inquire as to the fault of the party not appealing.—The Quickstep, Case No. 11,509.

The circuit court, on appeal, will not reverse the decree of the district court, except on a preponderance of evidence.—The Heroine, Case No. 6,417.

On an appeal in a collision case, where the question, on the proofs, is a close one as to which vessel was in fault, the decree will not be reversed.—The Florida, Case No. 4,889.

The decree will be reversed where there is a direct conflict between the testimony of the crews on the colliding vessels, and the testimony of witnesses on other vessels is opposed

to the finding of the lower court.—Wells v. The Ann Caroline, Case No. 17,389.

In a case of irreconcilable conflict in the evidence, where an equal number of witnesses have been examined on both sides upon whose credibility the case depended, the decree below will not be disturbed.—The Sampson, Case No. 12,279.

The amount of the allowance, unless strikingly out of proportion to the damage, will not be interfered with where the principle adopted was the correct one.—The Narragansett, Case No. 10,017.

On affirmance of a decree for libelant in a collision case, the decree will be entered for the amount of the loss at the time of the loss, with interest from such time, and for costs in the district court, without interest thereon.—Deems v. Albany & Canal Line, Case No. 3,736; The Alexandria, Id. 179.

Where a decree for libelant was reversed by the supreme court, which held both vessels to be in fault, claimant, who had failed to allege in his answer that he had sustained any damages by the collision, was allowed to amend his answer in that respect.—The Pennsylvania, Case No. 10,951.

§ 160. Costs.

Where a libel which fails to convey any idea of the manner in which the collision occurred is not excepted to, and is dismissed at the hearing, no costs will be given.—The Warren, Case No. 17,192.

Where each party had made an offer of settlement, libelant is entitled to costs where he recovered more than he was offered, though much less than he had demanded.—The Walter W. Pharo, Case No. 17,124.

Cross libels for a collision were filed in admiralty; one in personam, the other in rem. Libelant obtained a decree in one suit, and the other was dismissed. The losing party appealed in both, and the damages were apportioned. *Held*, that the aggregate costs in both courts should be divided between the parties.—Vanderbilt v. Reynolds, Case No. 16,839; The North Star, Id.

In a libel for collision, where there is strong probable cause of action, but the libel is dismissed, costs will not necessarily be imposed on the libelant.—The Eliza and Abby, Case No. 4,349.

Where a libel is dismissed for failure to prove fault, no costs will be awarded against libelant where there was strong probable cause for the action, and the libeling vessel sustained the greater injury.—Corks v. The Belle, Case No. 3,231a.

Where the blame for a collision is found to lie with the libelant alone, the costs will be taxed against him.—Winne v. The Carroll, Case No. 17,876a.

The ordinary practice where both vessels are found in fault and the damages are equally divided is to refuse costs to either.—The Favorita, Case No. 4,694; The Nautilus, Id. 10,058.

But in such case the court may order the vessel most to blame to pay all the costs.—The Rival, Case No. 11,867.

Where, in a case of mutual fault, only one vessel is injured, she is entitled to full costs on the recovery of half damages.—The Baltic, Case No. 824; The Mary Patten, Id. 9,223; The Austin, Id. 663.

Where both vessels were in fault, and an apportionment of damages was decreed, and no cross libel was filed, the costs will be allowed to the party who recovers.—The City of Hartford, Case No. 2,750.

In a collision case, where both vessels are held in fault, and the damages are apportioned, and the decree is affirmed on the appeal of both parties, the costs in the appellate court will be equally divided.—The Eleanora, Case No. 4,335.

Where, on an appeal by both parties from a decree finding them mutually in fault in a collision case, the decree below was affirmed, no costs were given to either party.—The Wings of the Morning, Case No. 17,872.

Party appealing in collision case, and securing division of damages, is entitled to costs of appeal.—The Bedford, Case No. 1,216.

See, also, "Admiralty," §§ 127–153.

COLONIAL GRANTS.

See "Public Lands," §§ 77–80.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMBINATIONS.

See "Conspiracy."

COMITY.

Between courts, see "Courts," §§ 109–119; "Patents," §§ 246, 261.

COMMERCE.

§ 1, Power to regulate in general. § 2, Subjects of regulation. § 3, Means and methods of regulation.

Carriage of goods and passengers, see "Carriers"; "Shipping."
Power to control and regulate navigable waters, see "Navigable Waters," § 2.
With Indians, see "Indians," § 11.

§ 1. Power to regulate in general.

The constitutional power of congress to regulate commercial intercourse, qualified by the limitations and restrictions expressed in the constitution, and by the treaty-making power of the president and senate, is sovereign, and may be used, not only for the advancement of commerce, but for the promotion of other objects of national concern.—United States v. The William, Case No. 16,700.

The power to regulate commerce among the several states is paramount in the federal government, and cannot be restricted by a state.—Palmer v. Cuyahoga County, Case No. 10,688.

A state has no power to regulate commerce extending beyond its jurisdiction; otherwise as to commerce beginning and ending within the state.—Halderman v. Beckwith, Case No. 5,907.

The power of congress to regulate commerce among the several states is not per se, without any exercise thereof by congress, an absolute inhibition of state legislation, which may affect such commerce.—Silliman v. Hudson River Bridge Co., Case No. 12,852; United States v. Railroad Bridge Co., Id. 16,114.

A state statute exempting vessels owned wholly in the state from payment of any pilotage unless a pilot is actually employed does not violate Rev. St. § 4237, but is in violation of Const. art. 1, § 9, cl. 6, providing that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of an-

other state."—Williams v. The Lizzie Henderson, Case No. 17,726a.

Logs purchased for exportation, while awaiting shipment, though still on land, are "exports," within Const. art. 1, § 10, prohibiting states from levying imposts or duties on exports.—Clarke v. Clarke, Case No. 2,846.

The power to prohibit the foreign slave trade is part of the power of congress to regulate foreign commerce.—United States v. Gould, Case No. 15,239.

Congress has power to prohibit citizens and residents of the United States from engaging in the slave trade with or between foreign countries, both under the power to regulate commerce (Const. art 1, § 8, subd. 3), and because such traffic concerns the relations between citizens of the United States and those of foreign countries.—Charge to Grand Jury, Case No. 18,269a.

§ 2. Subjects of regulation.

Power of congress to regulate commerce with foreign nations and among the several states includes the power to regulate navigation.—The Chusan, Case No. 2,717; The Wilson v. United States, Id. 17,846.

And the power of congress over the vessel is co-extensive with that over the cargo.—The Wilson v. United States, Case No. 17,846.

The United States has jurisdiction over navigable streams so far as may be necessary for commercial purposes.—Jolly v. Terre Haute Drawbridge Co., Case No. 7,441.

The navigation between different ports on a public river within the same state is within the power to regulate commerce among the states.—Silliman v. Hudson River Bridge Co., Case No. 12,851.

Where there is an obstruction to commerce which operates to the irreparable injury of an individual, or of the United States, the federal circuit court may act to prevent the injury.—United States v. Railroad Bridge Co., Case No. 16,114.

A state statute regulating oyster fisheries is not repugnant to the power granted to congress to regulate commerce.—Corfield v. Coryell, Case No. 3,230.

Congress has power to authorize, as a regulation of commerce, the building of a bridge across a navigable stream.—Miller v. New York, Case No. 9,585; In re Clinton Bridge, Id. 2,900.

The power of congress to regulate commerce is paramount to the power of a state to authorize the building of a bridge across a public river navigable from the sea.—Silliman v. Hudson River Bridge Co., Case No. 12,851.

A state statute, authorizing the bridging of a navigable stream within the state, is not in conflict with the constitutional power of congress to regulate foreign and interstate commerce, unless in conflict with a special enactment.—Pennsylvania R. Co. v. New York & L. B. R. Co., Case No. 10,953.

A state tax upon locomotives, passenger and freight cars, etc., being an expedient for raising revenue, is unconstitutional, as interfering with commerce between the states.—Minot v. Philadelphia, W. & B. R. Co., Case No. 9,645.

A state tax upon receipts for transportation through the state of goods carried from and to points outside the state is unconstitutional.—Indiana v. American Exp. Co., Case No. 7,021.

The right of the states to make inspection laws is subject to the paramount right of congress to regulate foreign and interstate commerce, and an impost on imports or exports is void, if in excess of what is absolutely necessary for executing such inspection laws.—Neilson v. Garza, Case No. 10,091.

Congress is the proper authority to decide whether a charge or duty is or is not excessive.—Neilson v. Garza, Case No. 10,091.

Transportation of freight and passengers from one state to another, or through more than one state, either by land or water, is interstate commerce.—Sweatt v. Boston, H. & E. R. Co., Case No. 13,684.

Quære, whether a carriage of freight out of a state into another, not being a mere transit through the state, is interstate commerce, so that the carriage within the state is beyond its power of regulation.—Bondholders v. Railroad Com'rs, Case No. 1,625.

The issuing of a policy of life insurance is not "commerce," within the constitutional provision giving congress power to regulate commerce among the states.—Berry v. Mobile Life Ins. Co., Case No. 1,358.

§ 3. Means and methods of regulation.

A government license to a vessel to carry on a coasting trade does not exempt the owners from liability to pay a license, under the municipal regulations of a town within the limits of which the vessel is moored for the purpose of giving theatrical exhibitions on board.—Spalding v. Baton Rouge, Case No. 13,200.

The assessment of a vessel owned in a city, by the city assessor, for city taxes, is not a "duty of tonnage" within the meaning of Const. U. S. art. 1, § 10, cl. 1.—The North Cape, Case No. 10,316.

The imposition of a tonnage tax on foreign vessels exporting goods is constitutional.—Aguirre v. Maxwell, Case No. 101.

The method of determining the amount of tonnage tax is discretionary with congress.—Aguirre v. Maxwell, Case No. 101.

Under the power to regulate commerce and to make all laws necessary and proper for carrying that power into effect, congress has authority to give full protection to commerce by its criminal jurisprudence.—Charge to Grand Jury, Case No. 18,256.

Statutes passed by congress in pursuance of this power are of paramount authority, and cannot be invalidated or impaired by the action of any state or states. Any law, ordinance, or constitution made by them for that purpose is wholly nugatory, and can afford no legal protection to those who may act under it.—Charge to Grand Jury, Case No. 18,256.

The power of congress to punish offenses committed on the high seas below the grade of piracy or felony may be sustained under the provision conferring power to regulate foreign commerce.—The Ulysses, Case No. 14,330.

Act March 3, 1825, § 23, which punishes a conspiracy to destroy a vessel or cargo with intent to defraud the underwriters, is within the power of congress to protect commerce, and applies to internal commerce.—United States v. Cole, Case No. 14,832.

COMMISSION.

Inquisition of lunacy, see "Insane Persons," § 2.
To take testimony, see "Depositions."

COMMISSIONERS.

See "United States Commissioners."
County commissioners, see "Counties," § 2.
In admiralty, see "Admiralty," §§ 101–105.
In equity, see "Equity," §§ 109–118.
In prize proceedings, see "War," § 64.
Shipping commissioners, see "Seamen," § 4.

COMMISSION MERCHANTS.

See "Factors."

COMMISSIONS.

Of executor or administrator, see "Executors and Administrators," § 64.
Of factors, see "Factors," § 16.
Of marshals, see "United States Marshals," § 9.
Of trustee, see "Trusts," § 40.

COMMITMENT.

For contempt, see "Contempt," § 8.
On charge of crime, see "Criminal Law," §§ 38–43.
—— for trial in another state, see "Extradition," § 19.
On conviction of crime, see "Criminal Law," § 111.
Review of, see "Habeas Corpus."

COMMITTEE.

Guardianship of insane person, see "Insane Persons," § 3.

COMMON CARRIERS.

See "Carriers."

COMMON COUNTS.

See "Assumpsit, Action of."

COMMON LAW.

§ 1, Common law of states and United States. § 2, Effect of English decisions and statutes. § 3, Proof of common law.

See, also, "International Law."

§ 1. Common law of states and United States.

There is no principle of the common law which pervades the Union, and exists independently of the laws of the states. This rule is found as adopted and modified by the laws and judicial decisions of the respective states.—Lorman v. Clarke, Case No. 8,516.

§ 2. Effect of English decisions and statutes.

The decisions of the English courts prior to the Revolutionary War are of binding force on the Virginia courts.—Murdock v. Hunter, Case No. 9,941.

The common law of England, except so far as modified by statute, was the law of property in the territory of Michigan.—Johnston v. Vandyke, Case No. 7,426.

The statute of bigamy (1 Jac. I. c. 11) is in force in the county of Washington, D. C. (Act Feb. 27, 1801; 2 Stat. 103.)—United States v. Jennegen, Case No. 15,474.

§ 3. Proof of common law.

Unwritten laws of a foreign country may be proved by parol.—Robinson v. Clifford, Case No. 11,948; United States v. Ortega, Id. 15,971.

COMMON SCOLD.

§ 1, Indictment. § 2, Evidence. § 3, Punishment.

§ 1. Indictment.

An indictment charging defendant with being a common slanderer or common brawler is not sufficient. It should charge defendant as a common scold or common barrator, in technical language.—United States v. Royall, Case No. 16,201.

§ 2. Evidence.

Upon the trial on an indictment for being a common scold, particular instances of scolding may be given in evidence.—United States v. Royall, Case No. 16,202.

§ 3. Punishment.

The offense of being a common scold is punishable as a nuisance at common law, by fine and imprisonment, the punishment by ducking being obsolete.—United States v. Royall, Case No. 16,202.

COMMUNITY PROPERTY.

See "Husband and Wife," § 11.

COMPENSATION.

For performance of contract, see "Contracts," § 25.
For property taken for public use, see "Eminent Domain," §§ 2–4.
For salvage services, see "Salvage."
For towage, see "Towage," §§ 6–8.
Of officers or persons in particular relations.
See "Clerks of Court," § 2; "Detectives"; "District and Prosecuting Attorneys," § 3; "Executors and Administrators," § 64; "Factors," § 16; "Jury," § 13; "Officers," § 1; "Pilots," §§ 7–11; "Receivers," § 7; "Sheriffs and Constables," § 1; "United States Commissioners"; "United States Marshals," §§ 8–14; "Witnesses," §§ 10–17.
Agent, see "Principal and Agent." § 16.
Assignee in bankruptcy, see "Bankruptcy," § 463.
Attorney, see "Attorney and Client," § 5.
Customs officers, see "Customs Duties," § 24.
Deputy marshals, see "United States Marshals," § 7.
Master in chancery, see "Equity," § 118.
—— of vessel, see "Shipping," §§ 85–92.
Partner, see "Partnership," § 52.
Referee, see "Reference," § 3.
Revenue officers, see "Internal Revenue," § 4.
Servant, see "Master and Servant," § 2.
Trustee. see "Trusts," § 40.
United States officers, see "United States," § 10.

COMPETENCY.

Of evidence in civil actions, see "Evidence," § 19.
—— in criminal prosecutions, see "Criminal Law," §§ 56–59.
Of experts as witnesses, see "Evidence," § 76.
Of juror, see "Jury," §§ 15–20.
Of witnesses in general, see "Witnesses," §§ 18–58.

COMPLAINT.

Against accused, see "Extradition," § 4.
In civil actions, see "Pleading," §§ 4–15.
In criminal prosecutions, see "Criminal Law," § 39; "Indictment and Information."

COMPOSITIONS WITH CREDITORS.

§ 1, Requisites and validity. § 2, Rights of creditors.

See, also, "Compromise and Settlement."
In bankruptcy, see "Bankruptcy," §§ 466–499.

§ 1. Requisites and validity.

Parties who sign composition deeds must do so in good faith.—Bean v. Brookmire, Case No. 1,170.

Creditors agreed to accept notes for 50 per cent. from an embarrassed debtor, on condition

that the agreement be signed by all principal creditors. *Held*, that a creditor who had accepted notes was estopped to claim that the agreement was not so signed.—In re Decker, Case No. 3,723.

An agreement of compromise which creditors are induced to make by false representations or fraudulent concealments is void.—Elfelt v. Snow, Case No. 4,342.

Such compromise is avoided by false representations or concealments of the debtor's agent, though innocently made, where the former was aware of the real state of the facts at the time.—Elfelt v. Snow, Case No. 4,342.

A statement that the debtor would have "some means" left after paying his creditors 45 cents on the dollar *held* a false representation, where he had a greater amount left than he actually paid the creditors.—Elfelt v. Snow, Case No. 4,342.

A secret promise to pay one creditor a greater per cent. than another will not vitiate the composition where each creditor is separately compounded with.—White v. Clarke, Case No. 17,540.

Where the debtor compromises with certain of his creditors in consideration of his discharge, and gives a better security to one than to others, the composition is void.—Chuck v. Mesritz, Case No. 2,710.

A composition with creditors, fair upon its face, but in fact fraudulent as to part of them, can be set aside only by the creditors who are wronged.—In re Hamlin, Case No. 5,994.

§ 2. Rights of creditors.

A note given to one creditor for the balance of his claim, in pursuance of a secret agreement, to induce him to enter into the composition, *held* void ab initio.—Fenner v. Dickey, Case No. 4,729.

Concealment of assets and misrepresentations in settlement is a good defense to a suit by the debtor to recover an excess in per cent. paid to defendant over other creditors.—Armstrong v. Mechanics' Nat. Bank, Case No. 545.

The acceptance by a creditor, under a previous secret arrangement with the debtor, of a sum in excess of the proportion due under the composition deed, will not bar an action upon the original obligation, brought upon the ground that the composition deed was fraudulently procured.—Elfelt v. Snow, Case No. 4,342.

A settlement with a debtor by accepting an offer of compromise, with a proviso that no other creditor should receive better terms, is not vitiated by the debtor's afterwards voluntarily paying some of his other creditors in full.—In re Sturges, Case No. 13,565.

COMPOUNDING FELONY.

Validity of contract, see "Mortgages," § 6.

COMPROMISE AND SETTLEMENT.

§ 1, Requisites and validity. § 2, Construction. § 3, Operation and effect. § 4, Rescission.

See, also, "Accord and Satisfaction"; "Compositions with Creditors"; "Payment"; "Release."

As an act of bankruptcy, see "Bankruptcy," § 76.
By administrator, see "Executors and Administrators," § 12.
By assignee in bankruptcy, see "Bankruptcy," § 290.
By insolvent debtor, see "Bankruptcy," § 233.
Offer of compromise as evidence, see "Evidence," § 29.
Of suits by and against assignees in bankruptcy, see "Bankruptcy," § 366.

§ 1. Requisites and validity.

A compromise agreement must, to constitute a good defense to an action on contract, be binding on both parties, and operate as a satisfaction of the contract.—Luce v. Springfield Fire & Marine Ins. Co., Case No. 8,589.

To sustain a contract of settlement on the ground that it was a compromise of doubtful claims, the doubt must be such as an ordinarily intelligent person would entertain.—Memphis v. Brown, Case No. 9,415.

The proposal by defendant to deposit a certain sum to secure the government for any amount that might be found due is not an admission of any amount being due, but a proposal of compromise.—United States v. Forsythe, Case No. 15,133.

§ 2. Construction.

A compromise agreement, under which a bill for infringement of a patent was dismissed, settling all claims to infringement set forth in the bill, *held* no estoppel to a suit for an infringement of a reissued patent subsequently granted.—Pickering v. Phillips, Case No. 11,122.

§ 3. Operation and effect.

A debt is discharged by a tender and acceptance of a less sum in full satisfaction.—Bank of North Carolina v. Dewey, Case No. 897.

An agreement of compromise fairly made must be executed without regard to the merits of the dispute compromised.—Sargent v. Larned, Case No. 12,364.

§ 4. Rescission.

A compromise cannot be set aside as having been procured by false representations as to matters of law or as to facts which the party giving the release was bound to know.—Dunn v. Commonwealth Ins. Co., Case No. 4,174.

Compromise settlement of a decree for damages for collision in a suit brought by a married woman, as owner, *held* should not be set aside after eight years, as unauthorized by her.—The Deer, Case No. 3,738.

Where draft given in compromise of suit is unpaid, suit may proceed.—Anderson v. Brown, Case No. 355.

COMPUTATION.

Of period of limitation, see "Limitation of Actions," §§ 9–16.
Of time, see "Time."

CONCEALMENT.

By insured, see "Insurance," § 45.
Effect on limitation of action, see "Limitation of Actions," § 14.
Of fraud, see "Fraud," § 4.

CONCURRENT JURISDICTION.

Of courts, see "Courts," §§ 109–111.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

Of goods, see "Sales," §§ 52–54.
Of vessel, see "Shipping," § 32.

CONDITIONS.

Annexed to estate, see "Wills," § 33.
Delivery of deeds, see "Escrow."

In bonds, see "Bonds," §§ 11, 16–24.
In contract, see "Contracts," § 24; "Sales," §§ 2, 10.
In deeds, see "Deeds," § 13.
In grants of lands, see "Public Lands," §§ 30, 84.
In insurance policies, see "Insurance," §§ 44–95.
In wills, see "Wills," § 41.
On amendment of pleadings, see "Pleading," § 50.
On granting new trial, see "New Trial," § 24.
On subscription to corporate stock, see "Corporations," § 19.
Precedent to action, see "Action," § 1; "Limitation of Actions," § 10.
Promise to pay, see "Limitation of Actions," § 21.
To pardon, see "Pardon," § 2.

CONFESSION.

Admissibility in evidence, see "Criminal Law," §§ 67–71.
Of judgment, see "Judgment," §§ 4–10.
Pleading by way of confession and avoidance, see "Pleading," § 34.
Weight of, see "Criminal Law," § 78.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," §§ 54–58.

CONFIRMATION.

Of report of commissioners in admiralty, see "Admiralty," § 105.
Of sale in bankruptcy, see "Bankruptcy," § 305.
Of tax title, see "Taxation," § 13.

CONFISCATION.

Of enemy's property, see "War," §§ 4, 86–90.

CONFLICT OF LAWS.

See "Bills and Notes," §§ 14, 36, 45, 61; "Bonds," §§ 1, 9; "Champerty and Maintenance," § 1; "Contracts," §§ 1, 15; "Costs," § 2; "Customs Duties," § 9; "Deeds," § 2; "Depositions," § 19; "Executors and Administrators," § 3; "Extradition," § 9; "Frauds, Statute of," § 3; "Insolvency," §§ 1–4; "Insurance," § 10; "Interest," §§ 2, 3; "International Law"; "Judgment," § 52; "Limitation of Actions," § 4; "Marriage," § 1; "Mortgages," § 8; "Patents," § 122; "Sales," § 7; "Seamen," §§ 14, 33, 50, 184; "Usury," § 11; "Wills," § 23.
Charter parties, see "Shipping," § 42.
Conflicting jurisdiction of courts, see "Courts," §§ 109–119.
Rate of interest, see "Railroads," § 41.

CONFUSION OF GOODS.

§ 1. Rights of owners as to property.

When the goods of two persons, being articles of equal value, are mixed by one without the consent of the other, the latter is only entitled to his proportionate share of the common quantity.—Adams v. Meyers, Case No. 62.

By mutual consent of owners, makes them tenants in common sharing in proportion contributed.—Adams v. Meyers, Case No. 62.

A person who has changed the marks on goods of others, and mingled them with his own so as to prevent identification, must lose the entire amount.—The Idaho, Cases Nos. 6,997, 6,998.

An agent who, without authority, mixes his principal's goods with his own, so that he cannot distinguish them, must lose what he contributed.—Yates v. Arden, Case No. 18,126.

CONGRESS.

See "United States," § 3.
Attendance of member as ground of continuance, see "Continuance," § 14.
Compelling attendance of members, see "Witnesses," §§ 2, 4.
Powers, see "Army and Navy," § 1; "Counterfeiting," § 1; "Patents," § 2; "War," § 1.
Privilege of congressmen from arrest, see "Arrest," § 11.

CONNECTING CARRIERS.

See "Carriers," §§ 33–35.

CONSIDERATION.

See "Bills and Notes," §§ 9, 10, 91; "Bonds," § 5; "Contracts," §§ 5, 7–13; "Deeds," § 4; "Fraudulent Conveyances," §§ 5–14; "Guaranty," § 3; "Pledges," § 4; "Subscriptions"; "Vendor and Purchaser," § 3.
As affecting right to prove claim in bankruptcy, see "Bankruptcy," §§ 380, 381.
Bottomry bond, see "Shipping," § 115.
Inadequacy as ground of cancellation of contract, see "Cancellation of Instruments," § 1.
Towage contract, see "Towage," § 4.

CONSIGNMENT.

See "Factors."

CONSOLIDATION.

Of actions, see "Actions," § 5.
—— in admiralty, see "Admiralty," § 47.
Of cases at trial, see "Trial," § 1.
Of corporations, see "Corporations," § 68; "Municipal Corporations," § 3; "Railroads," §§ 10, 30.

CONSORTSHIP.

Agreements of, see "Shipping," § 40.

CONSPIRACY.

§ 1, What constitutes in general. § 2, Conspiracy against United States. § 3, Treasonable conspiracies. § 4, Persons liable. § 5, Defenses. § 6, Indictment. § 7, Variance. § 8, Evidence. § 9, Verdict.

Evidence of acts and declarations of conspirators, see "Criminal Law," § 63.
Limitation of prosecution, see "Criminal Law," § 26.
Venue, see "Criminal Law," § 17.

§ 1. What constitutes in general.

A conspiracy is where two or more persons confederate or combine to do an unlawful act.—United States v. Smith, Case No. 16,322; Same v. Babcock, Id. 14,487.

Both the agreement or combination to do an unlawful act, and an act done by one or more in pursuance thereof, are necessary to constitute the offense.—United States v. Nunnemacher, Case No. 15,902.

But such agreement does not constitute the offense unless followed by an act done by one or more of the parties to carry the object of the

conspiracy into execution.—United States v. Goldberg, Case No. 15,223.

It makes no difference in guilt if the motive of one joining a conspiracy was not illegal at the time of joining, if he was afterwards aware of its illegality, and still remained a member.—United States v. Mitchell, Case No. 15,790.

Identity of conspiracy is not destroyed by the connection at a subsequent time of new parties therewith.—United States v. Nunnemacher, Case No. 15,902.

An agreement whereby a commissioner taking evidence in support of a claim against the United States is to have a contingent fee of $5,000 is not necessarily criminal.—United States v. Noblom, Case No. 15,896.

Employés, if acting without any illegal purpose, may quietly and peaceably leave the service of their employer by concerted action at a given time, so long as they do not violate any contract to remain longer.—United States v. Stevens, Case No. 16,392.

It is unlawful for employés whose employment is at an end to combine to induce others to quit the same service at the same time, but before their employment has expired.—United States v. Stevens, Case No. 16,392.

An indictment will lie for a conspiracy to cheat by selling a free negro as a slave.—United States v. Spalding, Case No. 16,364.

A conspiracy to deprive colored citizens of the equal protection and privileges of the law is proved by evidence that the colored people of a certain township were entitled to a public school, and that defendants conspired by illegal means to deprive such colored persons, as a class, and on account of their color, of such school by intimidation.—United States v. Blackburn, Case No. 14,603.

§ 2. Conspiracy against United States.

To constitute a conspiracy under Rev. St. § 5440, there must have been an agreement between the parties, a unity of design and purpose, and an overt act committed by one for the purpose of effecting the object of the conspiracy.—United States v. Hamilton, Case No. 15,288; Same v. Hutchins, Id. 15,430.

Conspiracy, under Act March 2, 1867, is a combination between two or more persons by agreement, expressed or implied, to effect the illegal purpose, regardless of the manner in which it is to be done.—United States v. Rindskopf, Case No. 16,165.

Elements stated of the offense of conspiring to defraud the government by obtaining allowance of false claims and by false affidavits. (Act March 2, 1863, §§ 1-3.)—United States v. Jennison, Case No. 15,475.

Rev. St. § 5440, prohibits a conspiracy to defraud the United States, not only by committing an offense described in other sections of the original act, but in any manner whatever.—United States v. Dennee, Case No. 14,948; Same v. Whalan, Id. 16,669.

A conspiracy to obstruct the mail in violation of Rev. St. § 3995, is a violation of section 5440, as a conspiracy to commit an offense against the United States.—United States v. Stevens, Case No. 16,392.

Rev. St. § 5440, in relation to conspiracies to defraud the United States, does not extend to a case where the contemplated fraud was to depend entirely upon the passage of a future act of congress to make it effective.—United States v. Crafton, Case No. 14,881.

A conspiracy to conceal or destroy papers relating to imported merchandise (Rev. St. § 5443) sent by the consignor to the consignee, showing its fraudulent entry, is punishable under Rev. St. § 5440.—United States v. De Grieff, Case No. 14,936.

§ 3. Treasonable conspiracies.

A conspiracy to prevent, by force, the execution of any one law of the United States in all cases, is a treasonable conspiracy; and if there be an actual assemblage of men for the purpose of carrying this intention into effect,—that is, of acting together, and preventing by force the execution of the law generally,—this constitutes a levying of war, and involves the crime of treason.—Charge to Grand Jury, Fugitive Slave Law, Case No. 18,262; Charge to Grand Jury, Treason, Id. 18,274, 18,275.

A mere treasonable conspiracy, whether for the purpose of entirely overthrowing the government, or to prevent the execution of any of its laws, is not sufficient to constitute the crime of treason, as defined by the constitution of the United States. In addition to the conspiracy, there must be an actual assemblage of men for the purpose of carrying the conspiracy into effect by force.—Charge to Grand Jury, Fugitive Slave Law, Case No. 18,262; Charge to Grand Jury, Treason, Id. 18,270, 18,271, 18,274.

Prior to Act July 31, 1861, there was no law for punishing treasonable combinations or conspiracies which were not consummated by an overt act. The statute of that date, however, makes criminal not only combinations to overthrow the government, but conspiracies or mutual agreements, whether by few or many, whether public or private, forcibly to resist, or even to delay, the execution of any law.—Charge to Grand Jury, Treason and Piracy, Case No. 18,277; Charge to Grand Jury, Treason, Id. 18,272.

To constitute the offense, there must be a conspiracy to resist generally and publicly by force, and an actual resistance by force or by intimidation of numbers, a law of the United States.—United States v. Hanway, Case No. 15,299.

A conspiracy to resist by force the execution of such law in particular instances only, for personal or private purposes only, is not t[illegible]—United States v. Hanway, Case No. 15,299; Same v. Hoxie, Id. 15,407.

§ 4. Persons liable.

Both the collector who issues the permit and the one who removes spirits from a bonded warehouse, without payment of tax, in pursuance of a conspiracy to defraud the government, are guilty of a misdemeanor. Act March 2, 1867, § 30.—In re Calicott, Case No. 2,311.

Where the existence of an unlawful conspiracy is proved, an overt act by one of the parties thereto becomes the act of all, and they are all alike guilty.—United States v. Noblom, Case No. 15,896; Same v. Butler, Id. 14,700.

Each member of a conspiracy is responsible for every act of every other member, done by common consent in furtherance of the illegal purposes, and also for such acts, though not consented to beforehand, if assented to afterwards.—United States v. Mitchell, Case No. 15,790.

§ 5. Defenses.

On a prosecution for conspiracy to deprive colored citizens of the equal protection and privileges of the laws, it is no defense that such colored persons were charged by defendants or others with illegal acts or crimes.—United States v. Blackburn, Case No. 14,603.

§ 6. Indictment.

If an overt act in violation of law is charged as in pursuance of a previous conspiracy, it is sufficient.—United States v. Dustin, Case No. 15,011.

Allegations of the overt act are not required to be as full and minute in an indictment for conspiracy as in an indictment for fraud without any conspiracy.—United States v. Dustin, Case No. 15,011.

An indictment for conspiracy to do an unlawful act need not aver the means agreed upon, whereby the conspiracy was to be carried into effect.—United States v. Dennee, Case No. 14,948.

The time and place of conspiracy must be alleged in the indictment.—United States v. Sowers, Case No. 16,353.

But it is not necessary to set forth the county in which the alleged conspiracy was formed, and it may be rejected as surplusage.—United States v. Smith, Case No. 16,322.

The crime of conspiracy to defraud the United States (Rev. St. § 5440) is materially different from the offense of conspiracy as it existed at common law, and every ingredient of the offense must be clearly alleged.—United States v. Walsh, Case No. 16,636.

An indictment for conspiracy to defraud the government must allege an overt act.—United States v. Blunt, Case No. 14,615.

It is sufficient to allege that the overt acts were done "in pursuance" of the conspiracy.—United States v. Boyden, Case No. 14,632; Same v. Dustin, Id. 15,011.

An indictment for conspiracy, under Rev. St. § 5440, which avers the conspiracy, and the overt acts done to carry it into effect, is sufficient, without stating the means agreed on to accomplish the purpose of the conspiracy.—United States v. Dennee, Case No. 14,948.

An indictment charging a conspiracy to defraud the United States of the taxes due upon distilled spirits (Act March 2, 1867, § 30) need not allege the specific mode agreed upon by which the object of the conspiracy was to be carried out.—United States v. Dustin, Case No. 15,011.

If an indictment under Rev. St. § 5440, charges conspiracy by two or more persons, but is an indictment of one only, it is good on demurrer.—United States v. Miller, Case No. 15,774.

An indictment under Act March 2, 1867, § 30, is sufficient, if it charges an unlawful combination as actually made, and an act by one of the parties as an act intended to be relied upon to show the agreement in operation, although it does not appear in what manner the act described would tend to effect the object of the conspiracy.—United States v. Donau, Case No. 14,983.

Under the act of March 2, 1867, it is an offense for an officer of a national bank to conspire with another, not an officer, to abstract or embezzle the funds thereof; and an indictment charging the two with a conspiracy to commit such offense is good.—United States v. Martin, Case No. 15,728.

An indictment charging the conspiracy to consist in "certifying that certain false and fraudulent accounts and vouchers for material furnished for use in the construction of said customhouse and post office, and for labor performed on said building, were true and correct," *held* bad for uncertainty.—United States v. Walsh, Case No. 16,636.

In an indictment under Act March 2, 1867, § 30, for a conspiracy to defraud the United States, the subject-matter is sufficiently described as "taxes upon distilled spirits, distilled in the United States, and situated in certain bonded warehouses."—United States v. Boyden, Case No. 14,632.

Though a revenue officer is liable to a greater penalty than other persons, he may be joined in the same indictment with others; but in such case he will be liable in his individual capacity.—United States v. Boyden, Case No. 14,632.

Where the charge is an attempt to defraud, acts constituting the attempt should be specified:—United States v. Ulrici, Case No. 16,594.

Sufficiency of indictment charging a conspiracy to conceal or destroy papers relating to imported merchandise sent by the assignor to the consignee showing its fraudulent entry. Rev. St. §§ 5440, 5443.—United States v. De Grieff, Case No. 14,936.

§ 7. Variance.

A variance between the indictment and the evidence as to the time when the alleged overt act was committed is immaterial. — United States v. Graff, Case No. 15,244.

The conspiracy need not be shown to have been formed at the precise time or times alleged in the indictment.—United States v. Goldberg, Case No. 15,223.

Acts charged to have been done to effect the object of the conspiracy must be proved as laid, but time and quantity need not be proved.—United States v. Hamilton, Case No. 15,288; Same v. Hutchins, Id. 15,430.

If the jury find that a conspiracy existed, and that accused was a party to it, it is sufficient if the object of the conspiracy was to effect one of the purposes alleged. — United States v. Mitchell, Case No. 15,790.

§ 8. Evidence.

A conspiracy may be proved by direct and positive evidence, or by facts showing that there was a concert of action and a unity of purpose in effecting an unlawful object.—United States v. Smith, Case No. 16,322.

The fact that the overt acts charged and proven were severally criminal is no answer in an indictment for conspiracy, and such overt acts may be proven to show the existence of the conspiracy charged.—United States v. Rindskopf, Case No. 16,165.

The evidence to establish a conspiracy is generally circumstantial, and is sufficient if it proves the existence of an agreement to do the unlawful act, although its terms and the time and place where it was entered into are not shown.—United States v. Hamilton, Case No. 15,288; Same v. Hutchins, Id. 15,430.

To sustain a conviction for a conspiracy to procure persons to go into another county to vote illegally, it need not be shown that illegal votes were actually cast or offered, or that any person went into the other county to vote illegally.—United States v. Wrape, Case No. 16,767.

Where the syndic of a firm is charged with conspiracy to defraud the United States in preferring a false claim, there is no conclusive presumption that he had acquired all the knowledge from the books of the firm which a proper execution of his trust would have required him to gain.—United States v. Noblom, Case No. 15,896.

On an indictment for a conspiracy under Act March 2, 1867, § 30, there must be satisfactory evidence not only of the conspiracy charged, but of the overt act averred, to carry into effect the object of the conspiracy.—United States v. Smith, Case No. 16,322.

On an indictment for conspiracy to defraud the United States by smuggling goods, an affidavit indorsed by the master on the manifest, a month after it was filed, is not admissible as a part thereof.—United States v. Graff, Case No. 15,244.

A concert of action and of intent, though there was no pecuniary consideration or a definite absolute contract between the parties, is sufficient to constitute a conspiracy to defraud the United States, under Act March 2, 1867, § 30.—United States v. Allen, Case No. 14,432.

To prove a conspiracy to remove whisky without paying the tax, it is only necessary to show that defendants were acting in concert, or with a mutual understanding, to effect the removal without inspection and branding according to law.—United States v. Sulzberger, Case No. 16,415.

§ 9. Verdict.

Where two only are charged with a conspiracy, and one is acquitted, the other must be acquitted also.—United States v. Hamilton, Case No. 15,288.

Where two were indicted for conspiracy to insure a vessel and have her cast away, and one of them was indicted individually for the same thing, and both were acquitted of the conspiracy, *held* that the individual must also be acquitted if he could not be found guilty without assuming the existence of the conspiracy.—United States v. Morris, Case No. 15,812.

CONSTABLES.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

§ 1, Construction, operation, and enforcement of constitutional provisions. § 2, Distribution of governmental powers and functions. § 3, Police power in general. § 4, Personal, civil, and political rights. § 5, Vested rights. § 6, Obligation of contracts—In general. § 7, —— Contracts with municipalities. § 8, —— Legislative grants. § 9, —— Laws relating to remedy. § 10, Retrospective and ex post facto laws. § 11, Privileges or immunities, and class legislation. § 12, Equal protection of laws. § 13, Due process of law.

Application of constitutional provisions to corporations, see "Corporations," § 78.
Enactment and validity of statutes, see "Statutes," §§ 1–6.
Exemption laws, see "Bankruptcy," § 515.
Former jeopardy, see "Criminal Law," §§ 30–37.
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Necessity of indictment or presentment in criminal prosecution, see "Indictment and Information," § 1.
Regulation of fisheries, see "Fish," §§ 5, 6.
Removal of causes arising under federal constitution, see "Removal of Causes," § 10.
Special or local laws, see "Statutes," §§ 7, 8.
Subjects and titles of statutes, see "Statutes," §§ 9, 10.

Provisions relating to particular subjects.

See "Admiralty," §§ 1–36; "Bankruptcy," § 1; "Civil Rights"; "Commerce"; "Copyrights," §§ 2, 3; "Eminent Domain," § 1; "Insolvency," § 1; "Jury," §§ 1–4; "Limitation of Actions," § 1; "States"; "Taxation," §§ 1–3.

Statutes relating to particular subjects.

See "Elections," § 8; "Pensions," § 1; "Removal of Causes," § 1.

§ 1. Construction, operation, and enforcement of constitutional provisions.

The question of the constitutionality of an act will not be determined, where the case may be decided on other points.—Ex parte Randolph, Case No. 11,558.

To warrant a court in declaring unconstitutional a law passed by congress, the defect of legislative power must be of the most plain and indisputable character.—United States v. Mackenzie, Case No. 18,313.

A law may be unconstitutional in some of its provisions and not in others, and in its effect upon some classes of citizens and not upon others, and may be so treated.—Ex parte Touchman, Case No. 14,108.

A grant of power is to be construed according to the fair and reasonable import of its terms, and not necessarily controlled by a reference to conditions existing when the constitution was adopted.—In re Jackson, Case No. 7,124.

The fact that a law of congress has been in course of execution for many years, and has been acquiesced in during that time, is a strong reason why the courts, especially those of a subordinate character, should not decide the same to be unconstitutional.—United States v. Mackenzie, Case No. 18,313.

Persons in office, by lawful appointment or election, before the promulgation of the fourteenth amendment, were not removed therefrom by the direct and immediate effect of the prohibition to hold office contained in section 3, and they could continue to perform their official functions until congress should act.—Griffin's Case, Case No. 5,815.

The fifth amendment to the constitution is not applicable to state legislation.—Griffing v. Gibb, Case No. 5,819.

Section 9, art. 1, of the federal constitution, does not apply to state governments.—Butler v. Hopper, Case No. 2,241.

A corporation is not a "citizen of the United States" or a "person," within the meaning of Const. U. S. Amend. 14, § 1.—Insurance Co. v. New Orleans, Case No. 7,052.

Provisions, in a treaty, addressed to the judicial power, are carried into execution by the courts without other authority.—In re Metzger, Case No. 9,511.

§ 2. Distribution of governmental powers and functions.

Where a constitutional grant or guaranty is that congress or the state legislatures shall not pass laws for abridging a certain right, congress has no power to legislate over the subject generally, but only to provide remedies for a violation of the prohibition.—United States v. Cruikshank, Case No. 14,897.

The power of deciding between conflicting interests of river navigation and of transportation across navigable rivers by permanent structures is a legislative, and not a judicial, power.—Silliman v. Hudson River Bridge Co., Case No. 12,852.

The constitution of New Jersey confers general powers of legislation.—Bennett v. Boggs, Case No. 1,319.

The legislature of Oregon has power to confer on probate courts jurisdiction to compel specific performance by administrator of intestate vendor.—Adams v. Lewis, Case No. 60.

The Pennsylvania statutes providing for the sale of lands of John Nicholson in satisfaction of the liens of the state, and the proceedings under them, are not unconstitutional.—Livingston v. Moore, Case No. 8,416.

Statutes of Pennsylvania giving the state a lien on the debtor's property for balances on settlement of public accounts confirmed by the supreme executive council *held* not unconstitutional.—Livingston v. Moore, Case No. 8,416.

The act of 1820, authorizing a treasury agent to issue a distress warrant against a defaulting officer and his sureties, is unconstitutional as vesting the executive with judicial power.—United States v. Taylor, Case No. 16,440.

The provision of Act March 2, 1867, authorizing certain proceedings before commissioners, does not violate the constitutional provision vesting the judicial power in officers appointed by the president with the consent of the senate.—Russell v. Thomas, Case No. 12,162.

The appointment of supervisors of congressional elections by the federal circuit judges under Rev. St. § 2011, is a judicial act, and the statute is not unconstitutional.—In re Supervisors of Election, Case No. 13,628.

The legislature cannot impose upon the courts a construction of statutes previously passed.—Wheaton v. Peters, Case No. 17,486.

It belongs to the judiciary, and not to the legislative power to determine the extent and operation of laws after they are made, and an attempt by the legislature to determine retroactively whether one act operated to repeal or suspend a prior one is void.—Ogden v. Witherspoon, Case No. 10,461.

A later act which declares that a previous act did not repeal by implication a still earlier inconsistent act is ineffectual, as an invasion of judicial authority.—Ogden v. Witherspoon, Case No. 10,461.

Illinois Act 1838–39, "to quiet possession and confirm titles to land" is unconstitutional as a legislative adjudication.—Arrowsmith v. Burlingim, Case No. 563.

Under an act extending the laws of the United States over a territory, "so far as the same or any portion may be applicable," the courts have the exclusive right to determine the applicability of the laws to the territory.—Lownsdale v. Portland, Case No. 8,578.

A statute forbidding attorneys to practice in the federal courts except on taking an oath that they have never borne arms against the United States, etc., is unconstitutional.—In re Shorter, Case No. 12,811.

A promise in a treaty for nondiscriminating import duties comes within the political, and not the judicial, department of the government, and the courts cannot try the question of its observance.—Taylor v. Morton, Case No. 13,799.

The power given by congress to the corporation of Washington to pass by-laws for the government of the city is not a delegation of the power of exclusive legislation given to congress by the constitution of the United States.—Washington v. Eaton, Case No. 17,228.

The distinction between "necessary" and "voluntary," as applied to validity of treaties, pointed out, and the power of the judiciary to decide upon the validity *held* restricted to the "necessary" validity.—Jones v. Walker, Case No. 7,507.

§ 3. Police power in general.

Act N. Y. Feb. 11, 1824, imposing penalties for neglecting to report passengers brought from foreign countries into the port of New York, is within the police power of the state.—Milne v. New York, Case No. 9,618.

§ 4. Personal, civil, and political rights.

A state law authorizing the seizure and imprisonment of free negroes brought into the state on board of any foreign vessel is unconstitutional.—Elkison v. Deliesseline, Case No. 4,366.

The right to be secure in one's house is not a right, privilege, or immunity granted or secured by the constitution of the United States.—United States v. Crosby, Case No. 14,893.

Under the fourteenth amendment, congress has the power to protect, by appropriate legislation, the right of freedom of speech and the other rights enumerated in the first eight articles of amendment.—United States v. Hall, Case No. 15,282.

The right or privilege of voting is one arising under the constitution of the state, and not under the constitution of the United States.—United States v. Anthony, Case No. 14,459.

The restriction, under the constitution and laws of a state, of the right to vote, to males, is not in violation of Const. Amend. 14.—United States v. Anthony, Case No. 14,459.

Congress is not limited, in adopting legislation for the purpose of enforcing the fifteenth amendment, to cases in which there has been actual legislation by the general government, or by a state, denying or abridging the right secured.—United States v. Given, Case No. 15,211.

In adopting legislation for carrying such amendment into effect, congress may provide for the punishment of a state official who refuses to perform the duties necessary to qualify colored citizens to vote.—United States v. Given, Case No. 15,211.

Act March 2, 1867, authorizing the issuance of a search warrant in certain cases of frauds upon the revenue, is constitutional.—Kimball v. Weld. Case No. 7,776.

The marshal may examine all books and papers on the premises in order to select those mentioned in the warrant, but for no other purpose.—Kimball v. Weld, Case No. 7,776.

The examination of the books of a person, under section 14 of the revenue act, is not an infringement of the constitutional provision protecting persons from unreasonable searches, etc.—In re Strouse, Case No. 13,548.

A proceeding against a distillery for forfeiture under the revenue law is not a criminal proceeding, within the meaning of the constitution.—United States v. Three Tons of Coal, Case No. 16,515.

§ 5. Vested rights.

The constitution protects property against arbitrary seizure or divesture only, and a law divesting vested rights is void only if the right is by a contract, and compensation is not provided or made.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

An act punishing a slave, for theft, by imprisonment, is not unconstitutional as a taking of private property without just compensation.—United States v. Amy, Case No. 14,445.

The provision that private property cannot be taken for public use without just compensation is applicable to inventions secured by patents and to the government.—Brady v. Atlantic Works, Case No. 1,794.

The government, in a case of extreme necessity, in time of war and of immediate and impending public danger, taking an invention secured by patent, is bound to make full compensation to the owner.—Brady v. Atlantic Works, Case No. 1,794.

A statute levying a uniform tax of 10 cents per acre per annum on all lands in certain counties for levee purposes, and directing a sale, without notice, of all lands on which the tax was not paid by a certain day, does not violate Const. Miss. § 13, which prohibits the taking of private property for public use without just compensation.—O'Reilly v. Holt, Case No. 10,563.

An act validating conveyances of land made under a joint power of attorney from husband and wife is constitutional, as respects prior deeds, when no vested rights are infringed.—Randall v. Kreiger, Case No. 11,554.

Act May 8, 1830, providing a new remedy, is not invalid as affecting prior vested rights.—United States v. Samperyac, Case No. 16,216a.

Laws which go to the remedy on past as well as on future contracts are valid, provided they do not impair their obligation.—Gordon v. South Fork Canal Co., Case No. 5,621.

A law or ordinance reviving a claim already barred by the statute of limitations is unconstitutional as interfering with vested rights.—Lockhart v. Horn, Case No. 8,445.

§ 6. Obligation of contracts—In general.

The inhibition against laws impairing the obligation of contracts does not apply to federal legislation.—Michigan Cent. R. Co. v. Slack,

Case No. 9,527a; Bloomer v. Stolley, Id. 1,559; Evans v. Eaton, Id. 4,559.

Marriage is not a contract within the provision relating to the impairment of obligations of contracts.—Starr v. Hamilton, Case No. 13,314.

A legislative act adopting certain school textbooks, and providing that they shall be exclusively used by the schools, does not constitute a contract with the publishers, nor authorize state agents to contract with them.—Bancroft v. Thayer, Case No. 835.

The admission of an attorney to practice is not a contract, and an act declaring a forfeiture is not invalid as impairing the obligation of a contract.—In re Baxter, Case No. 1,118.

Interest is not a subject of common-law right, and a state statute allowing an abatement of interest which accrued during the Civil War does not impair the obligations of contracts.—Harmanson v. Wilson, Case No. 6,074.

A state legislature cannot by any law impair the obligation of a contract.—Bennett v. Boggs, Case No. 1,319.

The constitution of a state is amendable to the prohibitory clauses of the constitution of the United States as to the violation of obligations of contracts.—Marsh v. Burroughs, Case No. 9,112.

A law authorizing the discharge of a contract by payment of a smaller sum at a different time and in a different manner than agreed *held* unconstitutional.—Golden v. Prince, Case No. 5,509.

A state law which relieves from a contract cannot be enforced against nonresidents of the state, or in cases where the contract was prior to the law.—Beers v. Haughton, Case No. 1,230.

A statute declaring the construction of a prior statute is unconstitutional and void as regards prior contracts.—Dundas v. Bowler, Case No. 4,141.

Legislation authorizing change in manner of procuring and securing loan by railroad *held* not to impair obligation of contracts of prior mortgagees, whose lien was made inferior by express reservation.—Campbell v. Texas & N. O. R. Co., Case No. 2,369.

The tenure of the office of a person holding during good behavior, with a fixed salary and certain fees annexed, cannot be altered without impairing the obligations of a contract.—Allen v. McKean, Case No. 229.

An act authorizing the sale of land devised for life, with power of appointment in fee, the proceeds to be invested in other realty with like trusts, *held* not unconstitutional.—Blagge v. Miles, Case No. 1,479.

§ 7. —— Contracts with municipalities.

A legislative act authorizing the issue of municipal bonds, and providing a method for their payment, *held* to constitute a contract with the bondholders.—Maenhaut v. New Orleans, Cases Nos. 8,939, 8,940.

A statute requiring a county court to levy a special tax to pay interest and principal of negotiable bonds issued thereunder becomes a part of the obligation of the contract between the county and the bondholders, which cannot be impaired by subsequent state legislation.—United States v. Jefferson County, Case No. 15,472.

Act Mo. March 8, 1879, restricting levies of taxes for payment of county indebtedness to the method therein prescribed, impairs the obligation of contracts if considered applicable to judgments against counties on railroad aid bonds issued prior to the act.—United States v. Johnson County, Case No. 15,489; Same v. Justices of Lincoln County Court, Id. 15,503.

An act of a state legislature discriminating specially against taxes levied to pay judgments upon railroad bonds, *held* unconstitutional, as impairing the obligations of contracts.—United States v. Treasurer of Muscatine County, Case No. 16,538.

A state statute abolishing the writ of fi. fa. to enforce judgments against a particular city, and limiting the judgment to fixing the amount of the demand, impairs the obligation of previous contracts and is inoperative as to them.—New Orleans v. Morris, Case No. 10,183.

A statute for refunding state bonds declared that the new consolidated bonds should be used for no other purpose, and that the act authorizing them was a contract with bondholders making the exchange. *Held*, that a subsequent act authorizing payment of consolidated bonds to general creditors of the state violated the obligations of the contract and was void.—McComb v. Board of Liquidation, Case No. 8,707.

A law authorizing a county to subscribe for building a railroad which runs beyond the county does not, by placing a burden on each freeholder, violate the contract of the patent issued to him by the state for his lands. Neither is such a law void as a violation of the fundamental principles of "republican government."—McCoy v. Washington County, Case No. 8,731.

The repeal of a law passed to supply the place of an invalid law, under which municipal work was done, will not defeat the enforcement, by mandamus, of a judgment previously obtained.—Brooks v. Memphis, Case No. 1,954.

§ 8. —— Legislative grants.

The charter of a private corporation is a contract within the meaning of the provision prohibiting impairing the obligations of contracts.—Louisiana State Lottery Co. v. Fitzpatrick, Case No. 8,541.

A state legislature has no power, by repealing a municipal charter, to invade the rights of creditors.—Milner v. Pensacola, Case No. 9,619.

The legislature has power to alter the terms of a municipal charter, in respect to service of process in suits on municipal bonds previously issued.—Perkins v. Watertown, Case No. 10,991.

A charter authorizing a bank to construct waterworks for a city to be purchased by the latter at its election after the expiration of a certain number of years, to be paid for by its bonds, creates a contract whose obligations cannot be impaired by the imposition of onerous terms upon the issue of the bonds.—Sala v. New Orleans, Case No. 12,246.

A charter of a lottery company for a certain number of years, with a grant of the monopoly of drawing lotteries for the expressed purpose of making the business a source of revenue to the state, cannot be repealed.—Louisiana State Lottery Co. v. Fitzpatrick, Case No. 8,541.

A mere license to draw lotteries which is not inseparable from the essential functions of a corporation, but which has been acted upon, and under which rights have vested, cannot be withdrawn by the legislature to the prejudice of such rights.—Louisiana State Lottery Co. v. Fitzpatrick, Case No. 8,541.

A grant by the state of immunity from taxation cannot be abrogated without impairing the obligation of the contract, unless the right so to do was reserved as a part of the contract.—Hewitt v. New York & O. M. R. Co., Case No. 6,443.

A legislative act incorporating a railroad company, and granting lands on certain conditions to be performed by the company, is a contract between the state and the company, and a constitutional provision, subsequently adopted, an-

nulling it, is unconstitutional and void.—Gray v. Davis, Case No. 5,715.

The federal court will interfere to defend the franchises of a corporation from invasion, though disguised in form, and to be effected through state officers clothed with statutory power.—Louisiana State Lottery Co. v. Fitzpatrick, Case No. 8,541.

The repeal of a charter of a corporation does not of itself violate or impair the obligations of any contract which the corporation has entered into.—Lothrop v. Stedman, Case No. 8,519.

An act repealing a statute which confirmed to certain claimants their title to land upon complying with certain conditions precedent, is not a law impairing the obligation of contracts, where the conditions have not been complied with at the time of the repeal.—Vanhorne v. Dorrance, Case No. 16,857.

§ 9. —— Laws relating to remedy.

It is competent for a state legislature to give a right of action on contracts which were prohibited at the time they were made.—Milne v. Huber, Case No. 9,617.

A law which takes away all remedy is equivalent to a law impairing the obligation of the contract, and hence unconstitutional and void.—Johnson v. Bond, Case No. 7,374.

An alteration by law of a remedy to such extent as to materially affect a right vested under a prior contract is unconstitutional.—Gordon v. South Fork Canal Co., Case No. 5,621.

The provision of the Georgia constitution of 1868 (article 5, § 17), that the courts shall have no jurisdiction to enforce a debt, the consideration of which was a slave or slaves, or the hire thereof, is void, as impairing the obligation of contracts, so far as it relates to contracts made before the emancipation proclamation.—French v. Tumlin, Case No. 5,104.

A state, in regulating the remedy, may protect insolvents from imprisonment.—Beers v. Haughton, Case No. 1,230.

Insolvent laws, though retroactive, are not unconstitutional as impairing the obligation of contracts.—Adams v. Storey, Case No. 66.

An act abolishing imprisonment for debt does not impair the obligation of contracts, as it affects the remedy only.—Gray v. Munroe, Case No. 5,724.

Act March 26, 1814, § 14, providing that a majority in value of creditors may discharge an insolvent debtor for seven years, is unconstitutional.—Bank of United States v. Frederickson, Case No. 945.

A New Jersey statute for the relief of the creditors of a certain manufacturing corporation *held* void because it deprived the mortgagees of a remedy existing at the date of their contract.—Martin v. Somerville Water Power Co., Case No. 9,165.

The state legislature cannot take away the right of the holder of a county bond, which existed when the bond was made, to sue the county thereon, by prescribing a different remedy for collection of such bond.—National Bank of Western Arkansas v. Sebastian County, Case No. 10,040.

A state constitutional provision throwing the burden of proof on plaintiff to show that bills sued on have never been used in aid of the Rebellion, where defendant swears that he has reason to believe that they were so used, violates the constitution of the United States.—Marsh v. Burroughs, Case No. 9,112.

A state statute requiring, as a condition precedent to recovery in the state courts on any debt or contract made since June 1, 1865, proof that all taxes thereon have been paid (Act Ga. Oct. 13, 1870), is void, as impairing the obligation of contracts.—Lathrop v. Brown, Case No. 8,108.

A law regulating the issue of executions on judgments previously rendered, affects the remedy merely, and is not unconstitutional.—Bank of the United States v. Longworth, Case No. 923.

A state law prohibiting a sale on execution unless the property will bring two-thirds of the valuation affixed to it by three householders is void as to contracts made before its passage, but valid as to all others.—Moore v. Fowler, Case No. 9,761.

A law which reserves property from sale on execution for one year, if two-thirds of the appraised value shall not be offered, is not unconstitutional as to prior contracts.—United States v. Conway, Case No. 14,849.

An act making liens given thereby on certain property prior to all mortgages placed on the property subsequent to the passage of the act is not unconstitutional.—Walker v. Mississippi Val. & W. Ry. Co., Case No. 17,079.

Act N. Y. March 24, 1797, to settle disputes as to titles to lands in Onondaga county, construed, and *held* valid.—Barker v. Jackson, Case No. 989.

§ 10. Retrospective and ex post facto laws.

Retrospective laws devesting vested rights are not ex post facto laws, nor repugnant to constitution.—Albee v. May, Case No. 134.

A retrospective state law, allowing ejected occupants of land to recover for improvements is not unconstitutional.—Albee v. May, Case No. 134.

A defense to a forfeiture granted by a subsequent law must be taken subject to the terms and conditions imposed by such law.—United States v. Hall, Case No. 15,285.

The right of an attorney to practice his profession is his property, and an act (Jan. 24, 1865) declaring a forfeiture of such property for offenses not so punishable when committed is ex post facto and void.—In re Baxter, Case No. 1,118.

The term "ex post facto" is used solely with reference to laws affecting crimes and criminal cases, and does not apply to acts of a civil nature.—Evans v. Robinson, Case No. 4,571; Minge v. Gilmour, Id. 9,631.

An ex post facto law is one which in its operation makes that criminal or penal which was not so at the time when the act was performed, or which increases the punishment, or which, in relation to the offense or its consequences, alters the situation of the party to his disadvantage.—United States v. Hall, Case No. 15,285.

The clause within the act of 1862 creating a penalty for nonpayment of the direct tax is not unconstitutional, as a discriminating tax or an ex post facto law.—Sharpleigh v. Surdam, Case No. 12,711.

Act March 2, 1867, validating punishment of certain offenders, and protecting from civil process persons striving under executive orders, to suppress the Rebellion, *held* ex post facto as to the former provision, but valid as to the latter.—In re Murphy, Case No. 9,947.

An act repealing a statute which confirmed to certain claimants their title to land upon complying with certain conditions precedent is not an ex post facto law, where the conditions have not been complied with at the time of the repeal.—Vanhorne v. Dorrance, Case No. 16,857.

§ 11. Privileges or immunities, and class legislation.

A state law cannot take away rights and privileges secured by the constitution and laws of the

United States.—United States v. Rathbone, Case No. 16,121.

The fourteenth amendment implies equal exemption with others of same class from all charges and burdens of every kind.—In re Ah Fong, Case No. 102.

Section 1 of the fourteenth amendment applies to white as well as colored people, and is intended to protect them in their privileges and immunities, as citizens of the United States, against the action as well of their own state as of other states in which they may happen to be.—Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., Case No. 8,408.

Such privileges and immunities do not consist merely in being placed on an equality with others, but embrace all the fundamental rights of a citizen of the United States, as such.—Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., Case No. 8,408.

The fourteenth amendment forbids the states to abridge the privileges belonging to a person as a citizen of the United States, but not the privileges belonging to their citizens as citizens of the state.—Ex parte Kinney, Case No. 7,825.

Marriage is a privilege belonging to persons as citizens of the states, and is not a contract which the states are forbidden to abridge by the federal constitution.—Ex parte Kinney, Case No. 7,825,

A state statute passed before the fourteenth amendment, prohibiting a white person from marrying a negro, and inflicting a penalty upon the former alone for its violation, is not rendered nugatory by the fourteenth amendment.—Ex parte Francois, Case No. 5,047.

The provision that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states does not apply to corporations.—Warren Mfg. Co. v. Etna Ins. Co., Case No. 17,206.

Act Va. 1874, prohibiting persons other than citizens of Virginia from taking or planting oysters in the waters of the state, on pain of forfeitures and indictment, is unconstitutional as denying equal privileges.—Ex parte McCready, Case No. 8,732.

The right to pursue any lawful employment in a lawful manner is a fundamental right, and an act granting an exclusive privilege to carry on certain business within certain limits is unconstitutional.—Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., Case No. 8,408.

A grant of an exclusive right by a state to carry on a slaughterhouse business for several miles in extent in and around a certain city cannot be sustained under the right of the legislature to pass license laws and police regulations and to grant exclusive rights for the exercise of public franchises.—Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., Case No. 8,408.

A devise or bequest cannot be defeated on the ground that the beneficiary is a citizen or a corporation of another state than testator. (Const. art. 4, § 2.)—Magill v. Brown, Case No. 8,952.

The legislature of a state cannot take away the right of citizens of other states to sue in the federal courts, by providing a special remedy in its own courts.—Mason v. Boom Co., Case No. 9,232.

Const. Mo. art. 11, § 4, exempting persons from liability for acts during the Civil War by virtue of military authority vested in them by the government, is valid.—Clark v. Dick, Case No. 2,818.

A law dividing the railroads in the state into different classes based on their earnings, and prescribing a rate of charges for each class, is not unconstitutional.—Chicago, B. & Q. R. Co. v. Attorney General, Case No. 2,666.

Act Mo. March 19, 1870, to establish normal schools, *held* not to violate the principle of equal taxation, nor to be prohibited as special legislation.—Briggs v. Johnson County, Case No. 1,872.

Corporations have no right to establish themselves or transact business in other states under the constitutional provision that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.—Warren Mfg. Co. v. Etna Ins. Co., Case No. 17,206.

§ 12. Equal protection of laws.

Act March 1, 1875, so far as it seeks to inflict penalties for the violation of rights of citizens of a state, as distinguished from citizens of the United States, is unconstitutional.—Cully v. Baltimore & O. R. Co., Case No. 3,466.

Denial of privilege of using public conveyance, where not on the ground of race, color, etc., does not subject to the penalties of such act.—Cully v. Baltimore & O. R. Co.. Case No. 3,466.

A law providing separate public schools for white and colored children is not unconstitutional.—Bertonneau v. Board of Directors of City Schools, Case No. 1,361.

The equality of protection assured by the fourteenth amendment implies that no charges or burdens shall be laid upon one person which are not equally borne by others, and that, in the administration of criminal justice, one person shall suffer for his offenses no greater or different punishment than another.—Ho Ah Kow v. Nunan, Case No. 6,546.

The inhibition upon the state applies to all instrumentalities and agencies employed in the administration of its government, and to the subordinate legislative bodies of its counties and cities.—Ho Ah Kow v. Nunan, Case No. 6,546.

A city ordinance requiring that prisoners shall have their hair clipped *held* invalid, as directed against the Chinese only, and imposing upon them a degrading and cruel punishment.—Ho Ah Kow v. Nunan, Case No. 6,546.

§ 13. Due process of law.

The revenue act which prohibts a suit to restrain the assessment or collection of any tax authorized is not unconstitutional, either as depriving the party of his property without due process of law, or as refusing a trial by jury.—Pullan v. Kinsinger, Case No. 11,463.

A denial of the writ of habeas corpus by a state judge is not a deprivation of liberty without due process of law.—In re Taylor, Case No. 13,774.

A complaint against no person in particular, and not containing a charge of the substantive facts necessary to constitute the offense, is not due process of law.—Greene v. Briggs, Case No. 5,764.

The words, "the law of the land," in Const. R. I. art. 1, § 10, mean due process of law, in which is included the right to contest the charge, and be discharged, unless it is proved. —Greene v. Briggs, Case No. 5,764.

Act R. I. Jan., 1853, authorizing a seizure of intoxicating liquors, *held* unconstitutional in not providing for notice to the owner, or for a trial of the question whether the liquors were held for sale in violation of the law.—Greene v. James, Case No. 5,766.

A statute levying a uniform tax of 10 cents per acre per annum on all lands in certain counties for levee purposes, and directing a sale without notice of all lands on which the tax was not paid by a certain day, does not violate

Const. Miss. § 10, which declares that a citizen shall not be deprived of his life, liberty, or property but by due process of law.—O'Reilly v. Holt, Case No. 10,563.

A distress warrant issued by a government officer to seize property under the laws for collection of internal revenue is due process of law.—Mason v. Rollins, Case No. 9,252.

CONSTRUCTIVE NOTICE.

To purchaser, see "Vendor and Purchaser," § 25.

CONSTRUCTIVE TRUSTS.

See "Trusts," §§ 3–7.

CONSULS.

See "Ambassadors and Consuls."

CONTEMPT.

§ 1, Acts or conduct constituting contempt of court. § 2, Power to punish. § 3, Nature of proceedings to punish. § 4, Attachment and rule to show cause. § 5, Right of defendant to be heard. § 6, Evidence. § 7, Summary proceedings. § 8, Sentence, commitment, and punishment.

By jurors, see "Jury," § 14.
By marshal, see "United States Marshals," § 23.
Effect of removal of cause on proceedings for contempt, see "Removal of Causes," § 49.
Of authority of congress, see "United States," § 3.
—— of register, see "Bankruptcy," § 312.

§ 1. Acts or conduct constituting contempt of court.

Refusal to testify, see "Witnesses," § 7.
Violation of injunction, see "Injunction," §§ 35–41; "Patents," §§ 251, 252.

Contempt is a conclusion of law from the act, and disobedience to the legitimate authority of the court is, by law, a contempt, unless the party can show sufficient cause to excuse it.—Wartman v. Wartman, Case No. 17,210.

The question whether a contempt has or has not been committed does not depend on the intention of the party, but on the act done.—Wartman v. Wartman, Case No. 17,210.

The master of a foreign vessel who refuses to obey a citation, and is sued in a suit by a seaman for wages, and confines him in irons on his return from court, giving as his excuse that our courts have no jurisdiction over him, is in contempt.—Weiberg v. The St. Oloff, Case No. 17,357.

Strikers or other persons, who, in violation of the court's orders, interfere with the operation of a railroad in charge of a receiver, are punishable for contempt.—King v. Ohio & M. Ry. Co., Case No. 7,800.

Any interference with property over which a receiver has been appointed pending foreclosure of a mortgage is punishable as a contempt.—Secor v. Toledo, P. & W. R. Co., Case No. 12,605.

A person who brings an action in one court against a receiver appointed by another, without the consent of the latter, is guilty of a contempt, although the receiver's possession is not disturbed thereby.—Thompson v. Scott, Case No. 13,975.

An offer of a sum of money to a witness, to remove his objections to going without the jurisdiction of the court to testify, is not necessarily an attempt to contaminate the source of justice, and a contempt of court.—United States v. Burr, Case No. 14,692f.

It is a contempt to serve process, either of summons or capias, in the actual or constructive presence of the court.—Blight v. Fisher, Case No. 1,542.

It is a contempt of court for an acquitted prisoner to threaten vengeance, in the presence of the court, against the witnesses.—United States v. Carter, Case No. 14,740.

An assault and battery committed in the hall of entrance into the court room, separated from it by a door without panels, covered with cloth, is a contempt, either "in the presence of the court, or so near thereto, as to obstruct the administration of justice."—United States v. Emerson, Case No. 15,050.

A contempt in the piazza of the court house, into which the windows of the court room open, is a contempt in the presence of the court.—United States v. Carter, Case No. 14,740.

It is a contempt of court, under Act March 2, 1831, to call another a liar, openly, in the presence of the court, while in session.—United States v. Emerson, Case No. 15,050.

It is a contempt of court for a juror, after being summoned, to voluntarily form and deliver an opinion as to the guilt or innocence of the accused, with a view of disqualifying himself.—United States v. Devaughan, Case No. 14,952.

A witness who refuses to answer proper questions before a grand jury may be fined for contempt of court, and be required to give security for his good behavior.—United States v. Caton, Case No. 14,758.

Any publication, pending a suit, reflecting upon the court, the jury, the parties, the officers of the court, the counsel, etc., with reference to the suit, or tending to influence the decision of the controversy, is a contempt of the court, and punishable by attachment.—Hollingsworth v. Duane, Case No. 6,616.

A wanton attack upon the character of a register in bankruptcy in a paper filed before the judge is a contempt.—In re Breck, Case No. 1,823.

A party is guilty of contempt in parting with an alleged trust fund while the question of its disposition is pending before the court.—Wartman v. Wartman, Case No. 17,210.

The taking of a vessel by force from the possession of a party to whom she had been delivered on the giving of a bond for value in admiralty is not a contempt of court.—United States v. Towns, Case No. 16,534.

Where a person attached for contempt in failing to obey an order directing certain moneys in his hands to be brought into court has transferred all his property to a trustee in insolvency, he will be discharged.—Wartman v. Wartman, Case No. 17,210.

Where the suit is discontinued through operation of law, the goods are no longer in the custody of the law, and defendant is not guilty of contempt in taking possession of them.—Mitchell v. Wilson, Cases Nos. 9,671, 9,672.

§ 2. Power to punish.

Powers of commissioners, see "United States Commissioners," § 1.
Punishment of witnesses, see "Depositions," § 24.

The authority to punish for contempt follows as a necessary incident in establishing a tribunal of justice.—United States v. New Bedford Bridge, Case No. 15,867.

A court of admiralty has full power to punish by fine the action of one of the parties in taking a vessel away from the custody of the court

without permission.—United States v. Bearnes, Case No. 14,551a.

The federal court has no power to punish for contempt in publishing in a newspaper an article tending to prejudice or affect the rights of parties to a suit on trial in such court. (Act March 7, 1831.)—Ex parte Poulson, Case No. 11,350.

An application to compel an officer of the court to pay over money due from him in his official capacity is a proceeding as for a contempt, and the court has jurisdiction, under Act March 2, 1831.—In re Pitman, Case No. 11,184.

The federal circuit court, as a court of equity, may award attachments for contempt in vacation.—Vose v. Reed, Case No. 17,011.

§ 3. Nature of proceedings to punish.

Prosecutions for contempt of court are criminal in their character, the United States being plaintiff.—Durant v. Washington County, Case No. 4,191; Fanshawe v. Tracy, Id. 4,643.

§ 4. Attachment and rule to show cause.

The pendency of a criminal prosecution is no objection to the hearing of a motion for attachment for a contempt in the irregular examination of witnesses prior to the hearing.—United States v. Burr, Case No. 14,693.

An attachment will not be granted unless a case of clear contempt is established.—In re Judson, Case No. 7,563.

The court may, in its discretion, issue an attachment in the first instance, and without any rule to show cause.—Fanshawe v. Tracy, Case No. 4,643.

On the filing of affidavits charging a person with disobedience of the orders or process of the court, the practice is to enter a rule on him to show cause why attachment should not issue.—Fanshawe v. Tracy, Case No. 4,643.

Such practice comes within the exception in rule 19 of the supreme court.—Fanshawe v. Tracy, Case No. 4,643.

A rule to show cause why an attachment should not issue for a contempt must be served personally, but in a proper case the court will order that service at the last place of abode shall be deemed sufficient. — Hollingsworth v. Duane, Case No. 6,617.

Motions and affidavits for attachments in civil suits are proceedings on the civil side of the court until the attachments issue, and are to be entitled with the names of the parties.—United States v. Wayne, Case No. 16,654.

Practice as to issuance of commission of rebellion.—Boudinot v. Symmes, Case No. 1,695.

§ 5. Right of defendant to be heard.

The court will, at any time, give the party alleged to be in contempt full opportunities to be heard.—Fanshawe v. Tracy, Case No. 4,643.

A person guilty of contempt for failure to obey an order in an action is not entitled to be heard on any motion, or to proceed in any manner, until the contempt is purged.—Wartman v. Wartman, Case No. 17,210.

§ 6. Evidence.

Upon a proceeding as for a contempt to compel one of the officers of the court to pay over money owing in his official capacity, the sworn answers of the officer are evidence in his favor. —In re Pitman, Case No. 11,184.

When the contempt is not committed in facie curiæ, it must be proved by affidavits from persons who witnessed it.—In re Judson, Case No. 7,563.

§ 7. Summary proceedings.

Striking employés of one railroad, who prevent the employés of the receiver of another from working, commit a contempt of court, and are to be treated in as summary a manner as if the contempt were committed in the actual presence of the court.—Secor v. Toledo, P. & W. R. Co., Case No. 12,605.

In this proceeding the court may proceed in a summary manner, and the accused is not of right entitled to a jury trial. The offense being clearly proved, the court will summarily punish the offender.—King v. Ohio & M. Ry. Co., Case No. 7,800.

Officers representing a corporation defendant are not in court for punishment for contempt for disobedience of an order, unless they personally knew of the order.—Fanshawe v. Tracy, Case No. 4,643.

§ 8. Sentence, commitment, and punishment.

Sentence of prisoner in a contempt proceeding. —United States v. Duane, Case No. 14,997.

An attachment for contempt does not authorize the marshal to imprison the party, after the return day, without a commitment.—Ex parte Burford, Case No. 2,149.

As process committing the marshal for a contempt would run to him in his official capacity, the issue of such process will be refused as impracticable.—Ex parte Benedict, Case No. 1,292.

It seems that if a man imprisoned for contempt of a federal court breaks jail, and escapes to another state, he can be arrested and returned.—Fanshawe v. Tracy, Case No. 4,643.

An arrest in New Hampshire for contempt of a register's order in Vermont is illegal, and an imprisonment in pursuance thereof in Vermont is also illegal.—In re Allen, Case No. 208.

Defendant should clearly prove his financial inability to entitle him to mitigation of fine imposed for a contempt.—Doubleday v. Sherman, Case No. 4,020.

See, also, ante, § 2.

CONTINGENT REMAINDERS.

Creation, see "Wills," § 40.

CONTINUANCE.

§ 1, Grounds for continuance—Surprise. § 2, —— Absence of witnesses, evidence or party. § 3, —— Newly discovered evidence. § 4, —— Irregular proceedings in taking depositions. § 5, —— Prejudice. § 6, —— Sickness or death. § 7, —— Rule to employ new counsel. § 8, —— Want of preparation. § 9, —— Setting aside writ of inquiry. § 10, —— Failure of issue. § 11, —— Failure to pay or give security for costs. § 12, —— Failure to serve papers. § 13, —— Case pending in state court. § 14, —— Members of congress. § 15, Motion for continuance.

Costs on, see "Costs," § 4.
In admiralty, see "Admiralty," § 97.
In criminal prosecutions, see "Criminal Law," § 82.
In equity, see "Equity," § 100.
On appeal, see "Appeal and Error," § 26.

§ 1. Grounds for continuance—Surprise.

An allegation of surprise will not prevail when made by plaintiff who pressed a trial.—Murray v. Marsh, Case No. 9,965.

Continuance granted where plaintiffs filed a new count to their declaration to which no plea had been entered.—Le Roy v. Delaware Ins. Co., Case No. 8,270.

Where the nature of the action is changed by amendment, the cause may be continued, although at the fifth term after its commencement.—Schnertzel v. Purcell, Case No. 12,472.

Continuance granted where plaintiffs abandoned a commission to take testimony abroad, in which defendant filed cross interrogatories, and sought to prove the same facts by another witness.—Le Roy v. Delaware Ins. Co., Case No. 8,270.

A notice given at the trial term in Alexandria that security for costs will be required is no ground for postponing the trial.—Bennett v. Bennett, Case No. 1,317.

If the blanks in a declaration have been filled up at the trial term, and defendant pleads with knowledge thereof, it is no ground for continuance.—Lambert v. Smith, Case No. 8,027.

If, after a plea of nil debet by the appearance bail, the principal gives special bail, and pleads the same plea, plaintiff is entitled to a continuance of course.—Wise v. Groverman, Case No. 17,910.

§ 2. —— Absence of witnesses, evidence, or party.

The court will not continue a cause for the absence of a witness who has been summoned, if no attachment has been moved for, if the witness resides within 100 miles of the place, although he resides out of the district.—Woods v. Young, Case No. 17,994.

Absence of a material witness may be good ground for a continuance, although he resides more than 100 miles from the place of trial, so that the moving party might have taken his deposition.—Symes v. Irvine, Case No. 13,714.

A continuance will not be granted where the material witness is in the employ of defendant, and within 35 miles, where defendant had 35 days to procure his attendance.—Stedman v. Hamilton, Case No. 13,343.

Plaintiff *held* entitled to a continuance where he sent away his principal witness to obtain testimony to meet a new ground of defense.—Echeveria v. Nairac, Case No. 4,261.

The absence of a witness on the hearing of an admiralty appeal is no ground of continuance, where he failed to attend in the court below, and no effort was made to secure his attendance in the circuit court until five days before the case on appeal was called for trial.—Taylor v. Harwood, Case No. 13,794.

Continuance will not be granted for absence of a material witness where the party knew he intended to depart, and failed to take his deposition, or where, knowing the place to which the witness had gone, he failed to issue a commission to take testimony.—King of Spain v. Oliver, Case No. 7,812.

The circumstances of diligence used to obtain the testimony of an absent witness may be proved ore tenus.—Higgs v. Heugh, Case No. 6,472.

Plaintiff *held* entitled to a continuance at any time before the fifth term after the appearance term, to obtain the testimony of persons beyond sea, although a day had been set for trial.—Fowle v. Bowie, Case No. 4,995.

Cause not continued on affidavit of defendant, made at the trial, that he has heard of one who could be a material witness for him.—Hollingsworth v. Duane, Case No. 6,614.

A motion for a continuance on account of absent witnesses will be overruled if the facts which the party states he expects to prove would not be admissible.—Warburton v. Aken, Case No. 17,143.

The court will not continue a cause because the plaintiff cannot find out the place of residence of his witness.—Smith v. Potts, Case No. 13,094.

Where proper diligence has been shown, the expected arrival of a deposition which may be material is ground for continuance.—Marsh v. Hulbert, Case No. 9,116.

Where one of joint defendants offers ready for trial, plaintiff cannot continue until the other is taken, but may amend.—Bank of Columbia v. Hyatt, Case No. 869.

§ 3. —— Newly-discovered evidence.

Cause continued in favor of an administrator who, a few days before, discovered material testimony among intestate's papers.—Hourquibee v. Gerard, Case No. 6,733.

§ 4. —— Irregular proceedings in taking depositions.

A continuance will be granted where depositions have been taken by one party without notice to the other.—Straas v. Marine Ins. Co., Case No. 13,518.

Cause will be continued to give party opportunity to cross-examine a witness whose deposition is taken under the act of congress.—Dade v. Young, Case No. 3,534.

§ 5. —— Prejudice.

A newspaper publication of the evidence, arguments of counsel, etc., in a case depending upon the same facts and principles, is no ground for a continuance.—Hurst v. Wickerly, Case No. 6,940.

§ 6. —— Sickness or death.

It is good ground for continuance that the leading counsel is sick, and the counsel in attendance is not prepared to go on with the trial.—Shultz v. Moore, Case No. 12,825.

A motion for a continuance, made at the first term after joinder of issue, granted, on the ground of the severe illness of defendant's attorney, who had charge of the case and previous cases involving the same subject-matter.—Rumford Chemical Works v. Hecker, Case No. 12,131.

Where a juror is taken suddenly ill, the jury may be discharged and the cause continued to the next term.—Young v. Marine Ins. Co., Case No. 18,164.

Defendant not, of course, entitled to continuance on death of plaintiff.—Alexander v. Patten, Case No. 171.

§ 7. —— Rule to employ new counsel.

Where there is a rule to employ new counsel, the cause may be continued after the fifth term.—Fenwick v. Brent, Case No. 4,732.

§ 8. —— Want of preparation.

Want of preparation of the attorney, from attention to other necessary matters, is no ground for continuance.—Hammond v. Haws, Case No. 6,002.

§ 9. —— Setting aside writ of inquiry.

Where a writ of inquiry is set aside at the trial term, plaintiff is entitled to continuance until next term, at defendant's costs.—Beck v. Jones, Case No. 1,206; McCulloch v. Debutts, Id. 8,736.

§ 10. —— Failure of issue.

Cause continued at defendant's request, where, at the last calling for trial, the issue is not made up, and no rule to plead has been laid.—Morgan v. Voss, Case No. 9,811.

§ 11. —— Failure to pay or give security for costs.

Failure to give security for costs is no ground for continuance, where it has not been demanded within a reasonable time.—Hawkins v. Willbank, Case No. 6,247.

The court will not, on motion of the defendant, continue a cause because the costs of non pros. have not been paid.—Wheaton v. Love, Case No. 17,485.

After notice of trial, defendant cannot demand payment of costs of a former judgment

as a condition of proceeding.—Den v. Bacon, Case No. 3,783.

§ 12. —— Failure to serve papers.

The refusal of one of the parties in an action at law to file an answer to a bill seeking discovery of facts essential to the case of his opponent is a ground for continuance.—Hurst v. Hurst, Case No. 6,929.

Suit at law not continued because plaintiff failed to answer a bill of discovery which also sought relief.—Bennett v. Wilson, Case No. 1,326.

The Ohio statute relating to service of copies of all writings upon which the declaration is founded applies only to actions on contract; consequently the failure to respond to a notice given in an action of ejectment is no ground for continuance.—Copperthwait v. McCord, Case No. 3,216.

§ 13. —— Case pending in state court.

The pendency of another suit in the state court is no ground of continuance of a suit in the circuit court of the United States when it appears to the court that the subject-matter and parties are not the same.—Loring v. Marsh, Case No. 8,514.

The case will not be referred to a master to inquire whether the subject-matter and parties are the same, where it appears from an inspection of the pleadings that different questions are raised.—Loring v. Marsh, Case No. 8,514.

It is no ground of continuance that the case depends upon the local law which has not been construed by the state court, as in such case the federal court may properly determine the true construction of the statute.—Loring v. Marsh, Case No. 8,514.

Cause continued to permit party to procure reversal of decree in another court, procured without notice to him.—Calladay v. McKinsey, Case No. 2,318.

§ 14. —— Members of congress.

Attendance upon congress as a member of that body does not confer such privilege as to entitle a party to postponement of a trial as of right.—Nones v. Edsall, Case No. 10,290.

§ 15. Motion for continuance.

Continuance by consent or order of court, while the cause is under rule for trial or non pros., does not discharge the rule.—King of Spain v. Oliver, Case No. 7,812.

Supplemental affidavits will not be received on a motion for a continuance.—Norwood v. Sutton, Case No. 10,365; Union Bank of Georgetown v. Riggs, Id. 14,361.

Counter affidavits on motion for continuance, held admissible.—Anonymous, Case No. 434. CONTRA, see Manning v. Jamesson, Case No. 9,045.

A continuance will not be granted on the affidavit of an attorney, stating what his client told him.—Read v. Haynie, Case No. 11,608.

Where the ground alleged is the absence of a witness, the moving affidavit must state that the party cannot safely proceed to trial without the attendance of the witness.—Union Bank of Georgetown v. Riggs, Case No. 14,361.

An affidavit for continuance for absence of a witness cannot be explained by extrinsic matters.—Smith v. Barker, Case No. 13,012.

Continuance not granted because a commission to examine a witness is not returned, unless the materiality of the witness be shown by affidavit.—Morgan v. Voss, Case No. 9,812.

An affidavit for continuance on the ground that defendant's receipts have been mislaid must state their amount and date, and set forth facts showing reasonable diligence in searching for them.—Hyde v. Liverse, Case No. 6,972.

CONTRABAND.

Of war, see "War," § 38.

CONTRACTS.

I. REQUISITES AND VALIDITY.

§ 1, What law governs. § 2, Capacity of parties. § 3, Proposals and acceptance. § 4, Reducing to writing. § 5, Consideration. § 6, Validity of assent. § 7, Legality of object and of consideration—Contravention of law in general. § 8, —— Violation of statutory prohibition. § 9, —— Contract against public policy. § 10, —— Immorality. § 11, —— Restraint of trade. § 12, —— Influencing legislation. § 13, —— Effect of illegality.

II. CONSTRUCTION AND OPERATION.

§ 14, General rules of construction. § 15, What law governs. § 16, Written contracts. § 17, Reading statutes into contract. § 18, Entire and severable contracts. § 19, Construction by parties. § 20, Parties. § 21, Subject-matter. § 22, Place of performance. § 23, Time of performance. § 24, Conditions. § 25, Compensation.

III. MODIFICATION OR RESCISSION.

§ 26, What constitutes modification. § 27, Right to rescind. § 28, Effect of rescission.

IV. PERFORMANCE OR BREACH.

§ 29, Performance in general. § 30, Building contracts. § 31, Demand. § 32, Excuse for delay. § 33, Excuse for nonperformance. § 34, Waiver of condition. § 35, Effect of breach.

V. ACTIONS FOR BREACH.

§ 36, Right of action. § 37, Defenses. § 38, Parties. § 39, Pleading. § 40, Issues and proof. § 41, Evidence.

I. REQUISITES AND VALIDITY.

Agreements within statute of frauds, see "Frauds, Statute of."
Alteration, see "Alteration of Instruments."
Assignment, see "Assignments."
By officer of corporation with corporation, see "Corporations," § 36.
Cancellation, see "Cancellation of Instruments."
Damages for breach, see "Damages," § 11.
Effect of offer, see "Limitation of Actions," § 20.
—— of war, see "War," §§ 2, 81, 82.
Enforceable in admiralty, see "Admiralty," §§ 13–28.
Impairing obligations, see "Constitutional Law," §§ 6–9.
Liabilities of vessels and owners on contracts, see "Shipping," § 96.
Liability of master of vessel on contract, see "Shipping," § 93.
Liquidated damages and penalties, see "Damages," § 7.
Made on Sunday, see "Sunday," § 2.
Novation, see "Novation."
Operation and effect of champerty, see "Champerty and Maintenance."
—— of customs or usages, see "Customs and Usages."
—— of gaming laws, see "Gaming," § 1.
—— of insolvency laws, see "Insolvency."
—— of usury laws, see "Usury."
Parol or extrinsic evidence, see "Evidence," §§ 63–74.
Powers of agent, see "Insurance," §§ 5, 6.
Reformation, see "Reformation of Instruments."
Relief against, see "Equity," § 9.
Restraining performance or breach, see "Injunction," § 7.

Specific performance, see "Specific Performance."
Subrogation to rights or remedies of creditors, see "Subrogation."

Contracts of particular classes of parties.

See "Banks and Banking," § 18; "Carriers," §§ 2–5, 39; "Corporations," §§ 36, 41–47, 84; "Counties," §§ 4, 5; "Executors and Administrators," § 16; "Husband and Wife," §§ 3, 7, 8; "Indians," § 6; "Infants," §§ 1, 2; "Insane Persons," § 5; "Municipal Corporations," §§ 10, 16; "Parent and Child," § 4; "Partnership," § 23; "Seamen," §§ 21–48; "Slaves," § 16; "States," § 6; "Towns," § 2; "United States," § 15; "Warehousemen."
Foreign corporation, see "Corporations," § 84.
Married women, see "Husband and Wife," § 4.
Trustee, see "Trusts," § 22.

Contracts relating to particular subjects.

See "Copyrights," §§ 20–22; "Interest"; "Mines and Minerals," §§ 13, 14; "Patents," §§ 150–163; "Salvage," §§ 27, 43; "Towage," §§ 2–14.
Affreightment, see "Shipping," §§ 128–193.
Army supplies, see "Army and Navy," § 12.
Building vessel, see "Shipping," § 18.
Carriage of mails, see "Post Office," § 10.
Convict labor, see "Convicts."
Making bequests or devise, see "Wills," § 6.
Railroad construction, see "Railroads," §§ 21–24.
Sale of liquors, see "Intoxicating Liquors," § 4.
Traffic contracts between railroads, see "Railroads," § 29.
Transportation of goods, see "Carriers," §§ 2–5.
—— of passengers, see "Carriers," § 39.
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Particular classes of express contracts.

See "Bailment"; "Bills and Notes"; "Bonds"; "Covenants"; "Exchange of Property"; "Guaranty"; "Indemnity"; "Insurance"; "Joint Adventures"; "Landlord and Tenant"; "Liens"; "Lotteries"; "Marriage," § 3; "Master and Servant"; "Partnership"; "Principal and Agent"; "Principal and Surety"; "Rewards"; "Sales"; "Subscriptions"; "Vendor and Purchaser."
Bills of lading, see "Carriers," §§ 2–5.
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Employment, see "Master and Servant."
Indentures of apprenticeship, see "Apprentices," § 2.
Marriage settlement, see "Husband and Wife," § 2.
Sale of lands, see "Public Lands," § 59.
—— of water rights, see "Waters and Water Courses."
Stipulations in actions, see "Stipulations."
Submission to arbitration, see "Arbitration and Award," § 1.
Subscription to corporate stock, see "Corporations," §§ 17–22.

Particular classes of implied contracts.

See "Account Stated"; "Assumpsit, Action of"; "Covenants," § 1; "Money Received"; "Use and Occupation"; "Work and Labor."

Particular modes of discharging contracts.

See "Accord and Satisfaction"; "Compromise and Settlement"; "Payment"; "Release."

§ 1. What law governs.

A note made and signed in Michigan, given in payment of liquors sold in Massachusetts, is not affected by the Michigan laws prohibiting the sale of intoxicating liquors.—In re Town, Case No. 14,111.

A promise by a consignor, on drawing upon the consignee, to reimburse him if the proceeds of the goods fall short of the amount of the draft, is a contract governed by the law of the place of the residence of the consignee, at which the amount is payable. — Woodhull v. Wagner, Case No. 17,975.

A contract of a corporation relative to personal property is governed by the law of the state in which it is incorporated and has its principal place of business, and within which the property is situated and the contract was made.—Samuel v. Holladay, Case No. 12,288.

See, also, post, § 15.

§ 2. Capacity of parties.

Occasional insanity, arising from intemperance, is not sufficient to set aside a contract.—Lewis v. Baird, Case No. 8,316.

§ 3. Proposals and acceptance.

Express acceptance of a proposition need not be proved, where both parties are shown to have acted on it.—United States v. Carlisle, Case No. 14,724.

A contract made by telegraph is completed when an acceptance of the proposition is deposited for transmission in the telegraph office.—Minnesota Linseed Oil Co. v. Collier White Lead Co., Case No. 9,635.

Although a letter of retraction of an offer of sale be actually on the way at the time that letter of acceptance is mailed, yet the contract is closed unless such letter of retraction be received prior to the mailing of the letter of acceptance.—Winterport Granite & Brick Co. v. The Jasper, Case No. 17,898.

There is no obligation where the acceptance of an offer is not according to its terms.—Snow v. Miles, Case No. 13,146.

Where a tailor has dealt with the customer on credit, he should notify the latter of his change to cash dealings before making up the goods.—Carter v. Lane, Case No. 2,477.

§ 4. Reducing to writing.

Where a parol agreement was to be reduced to writing, a party cannot escape its obligation by refusing to execute the written instrument.—Blight v. Ashley, Case No. 1,541.

A verbal agreement which is to be put into writing and signed the next day is not complete, so as to bind either party, until reduced to writing and signed. — Riggs v. Magruder. Case No. 11,828.

§ 5. Consideration.

Unless the inadequacy of consideration be so gross as to strike every person with a presumption of fraud, it is not evidence of unfairness.—Follett v. Rose, Case No. 4,900.

A verbal agreement to repay certain advances is a sufficient consideration for a substituted agreement made by correspondence between the parties.—United States v. Carlisle, Case No. 14,724.

Where an illegal contract has been executed, a balance of account of moneys received thereunder can be recovered upon a new promise, the receipt of the moneys being a good consideration for such promise. — Walker v. Kremer, Case No. 17,076.

An agreement by defendant to ship certain goods, on the faith of which the consignees accepted a draft for the amount, *held* enforceable by them without a consideration moving from them to defendant.—Rabaud v. D'Wolf, Case No. 11,519.

Patented machines for condensing and molding peat into convenient blocks for fuel, though of grossly overestimated value, yet, being of some value when operated under the most favorable circumstances, a contract for their exclusive use is founded upon a consideration.—Leavitt v. Connecticut Peat Co., Case No. 8,170.

A promise by a person for whom a vessel is built under contract to pay for materials

and labor is without consideration where made after the vessel is finished.—Leslie v. Glass, Case No. 8,275.

But where the owner advances money during the construction, and takes a secret assignment of the contractor's interest in the vessel, thus enabling him to secure credit, such subsequent promise will be *held* to have been founded upon a good consideration.—Leslie v. Glass, Case No. 8,275.

Mutuality is essential to the validity of a contract.—Walton v. Coulson, Case No. 17,132.

A promise by a passenger, who had left a steamer injured in a collision, to its officers and crew, who stayed about the wreck in small boats, to reward them for saving his effects, is not legally binding.—Mesner v. Suffolk Bank, Case No. 9,493.

A mere moral obligation is not sufficient to support an express promise.—Society for Propagation of the Gospel v. Wheeler, Case No. 13,156.

After a contract is executed, third persons cannot question its consideration.—Mason v. Crosby, Case No. 9,236.

A contract payable in gold coin is valid and enforceable.—Pollard v. City of Pleasant Hill, Case No. 11,253.

A promise, in writing, made under a supposed previous legal liability which did not exist, is void for want of consideration.—Offutt v. Parrott, Case No. 10,453.

A subsequent agreement by the maker of a note to pay a certain sum if the note is not paid punctually when due is without consideration, and not enforceable.—Shirly v. Harris, Case No. 12,798.

An agreement to pay the expense of the payee of a note coming into another state to collect the note may be enforced.—Shirly v. Harris, Case No. 12,798.

§ 6. Validity of assent.

Notwithstanding fraud committed by one party to a contract upon the other, the contract remains operative until disapproved by the injured party.—Foreman v. Bigelow, Case No. 4,934.

A party waives a fraud if, with knowledge thereof, he offers to perform the contract on a condition which he had no right to exact.—Blydenburgh v. Welsh, Case No. 1,583.

A contract will not be avoided on account of duress by imprisonment, unless the imprisonment was unlawful, and the contract was made during the imprisonment, and in consideration of release therefrom.—Plant v. Gunn, Case No. 11,205.

A threat of criminal prosecution is not such duress as will avoid a contract. (Code Ga. 2637.)—Plant v. Gunn, Case No. 11,205.

§ 7. Legality of object and of consideration—Contravention of law in general.

A contract in violation of law or against public policy cannot be enforced.—Scudder v. Andrews, Case No. 12,564; Piatt v. Oliver, Id. 11,114, 11,115.

A promise to do what is forbidden by law, or a promise made in consideration of an act done in violation of law, is void.—Powhattan Steamboat Co. v. Appomattox R. Co., Case No. 11,363.

Confederate treasury notes are unlawful currency, and cannot form a legal consideration to support a contract.—Bank of Tennessee v. Union Bank of Louisiana, Case No. 899.

§ 8. —— Violation of statutory prohibition.

A party cannot recover upon a contract prohibited by statute, although the statute contain no express declaration that the contract shall be void.—The Pioneer, Case No. 11,177.

The infliction of a penalty for doing an act is an implied prohibition of it.—Powhattan Steamboat Co. v. Appomattox R. Co., Case No. 11,363.

A contract lawful when made, whose performance is subsequently made unlawful, must be considered as at an end, without prejudice to either party.—Odlin v. Insurance Co. of Pennsylvania, Case No. 10,433.

A contract to do a thing contrary to an act of the legislature, made in reference to an alteration of the act, subsequently procured before the thing was done, is not illegal.—Columbus, P. & I. R. Co. v. Indianapolis & B. R. Co., Case No. 3,047.

Where a statute contains both a prohibition and a penalty, a contract or transaction contrary thereto is absolutely illegal and void, unless it appears, upon a consideration of the whole act, that the legislature did not so intend.—In re Pittock, Case No. 11,189.

§ 9. —— Contract against public policy.

A promise of indemnity against a private wrong or public crime (libel) is void in law.—Arnold v. Clifford, Case No. 555.

An agreement between two or more persons not to bid at a sheriff's sale against each other, and that one shall purchase for the benefit of all, is void.—Piatt v. Oliver, Cases Nos. 11,114, 11,115.

Where, on a contract for the sale of grain, the parties do not contemplate delivery, but expect simply to settle the differences as established by future prices, the contract is void as a wager contract.—Ex parte Young, Case No. 18,145.

"Puts," or the privilege, for a nominal consideration, of delivering a large quantity of grain within a certain time at a specified price, when taken of persons notoriously running a "corner," are wager contracts, and void as against public policy.—Ex parte Young, Case No. 18,145.

If a purchase or sale of grain for future delivery, made in the form of a contract, is in fact simply a bet or wager on differences, the form it assumes does not affect its invalidity.—Williar v. Irwin, Case No. 17,761.

A contract for the sale or purchase of grain for future delivery, legitimate on its face, cannot be held void as a wagering contract merely by showing that one of the parties so understood it. To render it void, it must be proved that both parties regarded it simply a wager on differences.—Williar v. Irwin, Case No. 17,761.

A contract between the heir contesting a will, which excluded him, and the executor, for a division of the estate between them if the heir was successful, is void as against public policy.—Wilson v. Jordan, Case No. 17,814.

A contract between a railroad company and a telegraph company that the former will allow no other telegraph company to construct a line along its road is not inoperative, as against public policy.—Western Union Tel. Co. v. Atlantic & P. Tel. Co., Case No. 17,445.

An agreement by a manufacturer to pay the consul general for a foreign government a commission upon all orders for goods placed with the promisor by the purchasing agent of the government is void as against public policy.—Oscanyan v. Winchester Repeating Arms Co., Case No. 10,600.

§ 10. —— Immorality.

A woman keeping prostitutes for gain cannot recover from them for board and lodging.—Mackbee v. Griffith, Case No. 8,660.

The feeding and training a race horse is not an immoral consideration, and will support an assumpsit to pay for the same.—Maddox v. Thornton, Case No. 8,935.

§ 11. —— Restraint of trade.

A contract in restraint of trade, made at a time when it is the policy of the law to restrict such trade, is not invalid.—Dixon v. United States, Case No. 3,934.

An agreement between part owners of a patent that the patented device should not be sold for less than a certain profit is not void as in restraint of trade.—Parkhurst v. Kinsman, Case No. 10,757.

§ 12. —— Influencing legislation.

A contract to pay for services rendered in obtaining the passage of a law by "lobbying" is void.—Marshall v. Baltimore & O. R. Co., Case No. 9,124.

A contract for obtaining legislation, or to prevent legislative investigation into the affairs of a railway corporation, is void, and will not support a claim to relief in equity.—Usher v. McBratney, Case No. 16,805.

A contract to pay for services in obtaining the passage of a law is void if the parties agree to conceal the fact of the employment, or if the party employed did in fact conceal it, from the members of the legislature, while advocating the passage of the law.—Marshall v. Baltimore & O. R. Co., Case No. 9,124.

§ 13. —— Effect of illegality.

A promise unconnected with the illegal act, and founded on a new consideration, is not tainted with it, although remotely caused by it.—Toler v. Armstrong, Case No. 14,078.

A contract in part only connected with an illegal transaction, and growing immediately out of it, though in fact it be a new contract, is equally tainted by it.—Toler v. Armstrong, Case No. 14,078.

II. CONSTRUCTION AND OPERATION.

§ 14. General rules of construction.

Contracts are to be construed to effectuate the intention of the parties, where that is consistent with the principles of law.—Hollingsworth v. Fry, Case No. 6,619.

Every instrument is to be interpreted by a consideration of all its provisions, and its obvious design is not to be controlled by the precise force of single words.—Washburn v. Gould, Case No. 17,214.

Where the language of the covenants is more comprehensive than that of the recitals, the intent will be ascertained from the entire instrument.—Lamb v. Davenport, Case No. 8,015.

Particular words in a contract should give way to the evident intent appearing from a view of the whole instrument.—Donahoe v. Kettell, Case No. 3,980.

Where two instruments are executed at the same time, between the same parties, relative to the same subject-matter, to effectuate one object, they are to be taken in connection, as parts of the same instrument.—Wildman v. Taylor, Case No. 17,654.

Several successive contracts between the same parties in respect to the same subject-matter, and apparently in pursuance of the same general purpose, may be read together, to ascertain the intent of particular covenants in one of them.—Lamb v. Davenport, Case No. 8,015.

Mutual understanding at time of making governs construction,—The Ada, Case No. 38.

The act of a party to a contract, and not his intention, is to be considered in construing the contract.—In re Freyvogel, Case No. 5,115.

In construing a contract courts will consider the circumstances existing at the time and with reference to which it was made.—Lamb v. Davenport, Case No. 8,015; Van Epps v. Walsh, Id. 16,850.

§ 15. What law governs.

The exclusion of the maritime law will not be inferred. The mere absence of a tribunal to enforce it is not sufficient evidence of an intention to exclude it.—The Avon, Case No. 680.

Where obligations growing out of international commerce are to be adjudicated with reference to the maritime law, the lex loci contractus, the lex rei sitæ, and the lex loci delicti are inapplicable.—The Avon, Case No. 680.

Effect must be given to a contract according to the law of the country where it was made or to be performed, which law, so far as it affects the construction, mode of discharge, or obligation, is essentially incorporated into the contract.—Camfranque v. Burnell, Case No. 2,342; Naylor v. Baltzell, Id. 10,061; Green v. Sarmiento, Id. 5,760; Webster v. Massey, Id. 17,336; Payson v. Withers, Id. 10,864; Pope v. Nickerson, Id. 11,274; Lorman v. Clarke, Id. 8,516.

Matters incidental to the performance of a contract are governed by the law of the place of performance, while matters which go to its execution or validity are determined by the law of the place where it is made.—Howenstein v. Barnes, Case No. 6,786.

The rule that a contract shall be judged by the law of the place in which it is made is not applicable to real estate, which can be conveyed only according to the law of the place in which it is situated.—Northwestern Mut. Life Ins. Co. v. Overholt, Case No. 10,338.

A contract made in one state, to be partly performed there, and partly in several others, is governed by the law of the place where it is made.—Morgan v. New Orleans, M. & T. R. Co., Case No. 9,804.

But conveyances and transfers of property subject to the local law, where required to be made in performance of the contract, must be made in accordance with the lex rei sitæ.—Morgan v. New Orleans, M. & T. R. Co., Case No. 9,804.

Where the contract was that the purchasers should pay the sellers in England, and the uniform mode of payment was to remit bills of exchange on England, the contract will be *held* to be governed by the laws of that country.—York v. Wistar, Case No. 18,141.

While the nature, validity, and construction of contracts are governed by the law of the place where they are made, or to be performed, the form of action, the course of judicial proceedings, and the time for commencing the action are governed by the law of the place where suit is brought.—Nicolls v. Rodgers, Case No. 10,260; Smith v. Atwood, Id. 13,006; Van Reimsdyk v. Kane, Id. 16,871.

The law of the place where the contract is made or broken prevails as to the measure of damages for the breach, but the law of the forum governs as to the remedy for enforcing the claim.—Consequa v. Willings, Case No. 3,128.

The rule lex loci contractus discussed.—Adams v. Storey, Case No. 66.

Principles of the lex fori discussed and examined by Story, J.—Le Roy v. Crowninshield, Case No. 8,269.

See, also, ante, § 1.

§ 16. Written contracts.

The construction of a written contract is determined entirely by the writing.—Wetherill v. Passiac Zinc Co., Case No. 17,465.

A contract free from ambiguity cannot be varied or contradicted by extrinsic evidence.—McNamara v. Gaylord, Case No. 8,910.

Ambiguous terms are to be explained by the common use of such terms in the country where the contract, etc., was made.—The Huntress, Case No. 6,914.

Where the meaning of the language is obscure or uncertain, the construction is against the party in whose words it is expressed.—The Ada, Case No. 38.

The word "or" cannot be construed to mean "and," to change a contract at pleasure.—Douglass v. Eyre, Case No. 4,032.

§ 17. Reading statutes into contract.

An instrument cannot be construed with reference to a foreign statute, unless the intent of the parties to be governed by such statute is evident from the instrument itself without the aid of extrinsic evidence.—Paret v. Bryson, Case No. 10,710.

§ 18. Entire and severable contracts.

A contract between an insurance company and its agent, by which he was to receive a percentage on all renewals of policies procured by him, is indivisible.—Ensworth v. New York Life Ins. Co., Case No. 4,496.

§ 19. Construction by parties.

An agreement as to the proper interpretation of a contract bars each party from thereafter claiming a construction inconsistent therewith.—Marriner v. Luting, Case No. 9,104.

Subsequent acts of the parties tending to show the construction put upon the contract by them may be considered where the meaning is doubtful.—Starr v. Stark, Case No. 13,317.

§ 20. Parties.

Words "representing," etc., added to name of party, *held* simply words of description.—Grau v. McVicker, Case No. 5,708.

§ 21. Subject-matter.

Persons undertaking to pack pork are bound to exercise all the skill and care which the business requires.—Forman v. Miller, Case No. 4,940.

Construction of contract for the building of an engine and boiler for a steamboat "of the most approved construction."—The Isaac Newton, Case No. 7,089.

§ 22. Place of performance.

The obligee may designate any reasonable place for the performance, where the obligation is silent in that respect, and no place can be inferred from the collateral facts proved by parol.—Peisch v. Dickson, Case No. 10,911.

§ 23. Time of performance.

Time may be made of the essence of the contract by the parties.—Longworth v. Taylor, Case No. 8,490.

Where the time of payment is made a substantial, and not a mere formal, circumstance, it enters into the essence of the contract, and must be observed.—Hollingsworth v. Fry, Case No. 6,619.

Where an act is to be done on a certain day and at a certain place, the legal time of performance is the last convenient hour of the day for transacting business; but a tender and refusal at any other time of such day is sufficient.—Savary v. Goe, Case No. 12,388.

Where an agreement provided that certain parties might redeem their half interest in a contract by paying certain drafts drawn upon them, no time being mentioned, *held* that the redemption must be made within a reasonable time.—Kendall v. Almy, Case No. 7,690.

A contract to manufacture certain articles without specifying any time, means a reasonable time.—Cocker v. Franklin Hemp & Bagging Co., Case No. 2,931; Same v. Franklin Hemp & Flax Mfg. Co., Id. 2,932.

§ 24. Conditions.

In determining whether covenants are dependent or concurrent, the intention may be determined by the order of time in which the acts are to be done.—Goodwin v. Lynn, Case No. 5,553.

In determining whether covenants are independent, the rule of construction as to part performance does not apply where the part unperformed is the essential consideration.—Green v. Dyersburg, Case No. 5,756.

Contract of lumber dealers to pay for sawing logs furnished by them *held* dependent on stipulations to saw and pile in a specified manner; but their agreement to furnish logs *held* dependent only on stipulations in respect to the boom for receiving them.—Mason v. Newell, Case No. 9,249.

Construction of agreement to pay money after the promisor should obtain, or be in a legal capacity to obtain, certain land.—Bleecker v. Bond, Case No. 1,534.

§ 25. Compensation.

Plaintiff agreed to let defendant have in exchange 6 extra copies of his printed testimony. The amount was subsequently increased to 40. *Held*, that defendant was liable only for their extra cost, and not for a ratable proportion of the cost of the entire edition.—Detroit Stove Works v. Perry, Case No. 3,835.

A custom to make monthly payments as the work progressed, under a contract silent as to time of payment, establishes a rule of payment under the contract binding on the parties.—Boody v. Rutland & B. R. Co., Case No. 1,635.

The mode of paying for extra work, where not stipulated, *held* to be the same as that provided for in the original contract.—Boody v. Rutland & B. R. Co., Case No. 1,635.

Act March 3, 1843, fixing the value of the "mark," does not apply to its value for commercial purposes.—The Blohm, Case No. 1,556.

A provision that work shall not be done for less than seven dollars per 1,000 feet is satisfied, although the work at that rate was paid for in lumber instead of cash.—Bloomer v. Gilpin, Case No. 1,558.

The addition of the words "in gold," in a contract to pay a certain sum, will be treated as surplusage in an action to recover the amount or for damages.—Baker v. Ward, Case No. 785.

The act of March 2, 1799, § 61, fixing the value of foreign coins, does not apply to contracts between private parties, as in the case of an insurance of a cargo invoiced in rupees.—Phillips v. Insurance Co. of Pennsylvania, Case No. 11,102.

Where plaintiff agrees to build certain bridges, to be paid partly in cash and partly in stock, he is entitled to pay in cash for extra work necessary to be done.—Childs v. Somerset & K. R. Co., Case No. 2,682.

III. MODIFICATION OR RESCISSION.

§ 26. What constitutes modification.

A party does not waive his rights, in accepting a proposition which the other party afterwards refuses to carry out.—Henry v. Henry, Case No. 6,383.

§ 27. Right to rescind.

An entire failure of consideration is sufficient to rescind a contract.—Warner v. Daniels, Case No. 17,181.

Before a contract can be rescinded for any cause whatever, the parties must be placed in statu quo.—Garland v. Bowling, Case No. 5,242.

The enforcement of a judgment obtained on a note given as the purchase price of slaves cannot be enjoined on the ground that the slaves were unsound, where the debtor still retains possession.—Garland v. Bowling, Case No. 5,242.

Where fraud is imputed in the making of a contract, the injured party cannot adopt it in part, and reject it as to the rest, but must rescind the entire contract, where he seeks a remedy.—Foreman v. Bigelow, Case No. 4,934.

An agreement to do work to the "full satisfaction" of the other party does not authorize it to arbitrarily rescind the contract.—Lee v. New Haven, M. & W. R. Co., Case No. 8,197.

Where the whole consideration for a stipulation fails, or it becomes incapable of performance by the voluntary act of one party, the other party may decline to proceed further under it.—Kleine v. Catara, Case No. 7,869.

A party who abandons a contract on the failure of the other party to perform a material part is not liable.—Chapin v. Norton, Case No. 2,599.

Where one party refuses to do something necessary to enable the other party to perform the contract, the latter may abandon it.—Chapin v. Norton, Case No. 2,599.

To justify the party in putting an end to a contract, the contractor must, in effect, abandon it, or so act as to show that he cannot complete it within the time limited.—Cook v. Hamilton County Com'rs, Case No. 3,157.

Where the time for delivery is extended, though no consideration is given therefor, the contract cannot be rescinded for nondelivery until the expiration of the extended time.—United States v. Derringer, Case No. 14,950a.

If the contract be legal when made, and the performance is rendered illegal by a subsequent law, both parties are discharged from its obligations.—Gray v. Sims, Case No. 5,729.

§ 28. Effect of rescission.

Under a contract providing for completion of certain work on a specified date, and for payment in installments, the contractor may quit work after default in payments, and recover for the value of the work actually done.—Lee v. New Haven, M. & W. R. Co., Case No. 8,197.

Where a subsequent contract expressly rescinds a prior agreement, the rescission of the subsequent contract does not revive the earlier one.—Oakley v. Ballard, Case No. 10,393.

Construction of clause in contract in relation to forfeiture of payment for work done on abandonment of the contract.—Miller v. Hubbard, Case No. 9,574.

Forfeiture of contract declared under mistaken view of facts will not prevent recovery of amount due on contract at time of forfeiture.—Culbertson v. Ellis, Case No. 3,461.

Where, in a suit to rescind a contract on the ground of fraud, neither party can restore the property in good condition, damages may be given. Relief will not be denied complainant because the inability to restore is due to him if he was not aware of the fraud.—Warner v. Daniels, Case No. 17,181.

IV. PERFORMANCE OR BREACH.

§ 29. Performance in general.

Where a party creates a duty or charge against himself by express contract, he is bound to make it good, notwithstanding any accident, through necessity, as he may have provided against such in the contract.—West v. The Uncle Sam, Case No. 17,427.

§ 30. Building contracts.

Under a contract to build bridges to be paid for at a certain sum per foot, where no time of payment is fixed, no recovery can be had until a complete performance.—Boody v. Rutland & B. R. Co., Case No. 1,635.

Advances in part payment of the work on a contract with the government for the construction of a fort do not vest title in the government in the materials purchased therewith.—United States v. Tillotson, Case No. 16,524.

There is no breach of a contract to build a boat with plank to be delivered by the other party at either of two places, until the plank is delivered.—Hart v. Rose, Case No. 6,154a.

§ 31. Demand.

A demand is necessary if no time be fixed in the contract or by other agreement for payment.—Boody v. Rutland & B. R. Co., Case No. 1,635.

§ 32. Excuse for delay.

Delay in performing the contract to raise a vessel gives no ground of action when due to the breaking of a bulkhead in the dry dock used, unless the delay is unreasonable.—New York Balance Dry Dock Co. v. Howes, Case No. 10,202.

Delays in repairing a vessel, caused by the master's unfounded objections to certain work, will not subject the contractor to damages.—The Planter, Case No. 11,207.

Acquiescence by one party to a contract in the delay of the other in fulfilling it prevents the court from relieving the former from the consequences of the delay.—Sloo v. Law, Case No. 12,956.

§ 33. Excuse for nonperformance.

An engagement to perform a future act is subject to an implied condition that the performance is not rendered impossible by an accident of major force or fortuitous event.—The Eliza, Case No. 4,348.

Unfitness caused by secret defects in materials used will not exonerate one who contracts to make and finish the specific article.—Cunningham v. Hall, Case No. 3,482.

§ 34. Waiver of condition.

Where a contract covers various undertakings, and plaintiff complains of the breach of one, he waives any right as to the others.—Chinn v. Hamilton, Case No. 2,685.

Where a contract provides that the estimate of an engineer as to the amount and value of the work shall be conclusive unless objected to within 20 days, an objection as to the quality alone waives an objection as to the quantity.—Carothers v. Chesapeake & O. Canal Co., Case No. 2,425.

Where the owners of a steamboat take possession, and run her, without giving the builders of her engines opportunity to test their work as agreed, the conditions as to the test will be *held* to be waived.—The Isaac Newton, Case No. 7,089.

§ 35. Effect of breach.

Abandonment of repairs to a vessel by a contractor before completion thereof bars recovery for more than a quantum meruit.—McMahon v. The Primera, Case No. 8,900.

Nonperformance of stipulation in mining lease to commence operations by a specified time does not work a forfeiture, but gives right of action.—Barker v. Dale, Case No. 988.

Where the work under a contract on property placed in the hands of a contractor for repairs and improvements thereto is to be paid for in installments as the work advanced, the owner cannot take possession without compensating the contractor for the benefits actually received, though the work did not comply with the specifications.—The Isaac Newton, Case No. 7,089.

V. ACTIONS FOR BREACH.

Forms of action, see "Debt, Action of," § 1.

§ 36. Right of action.

Where covenants are mutually dependent, neither party can sue without having offered to perform or showing an excuse for not doing so.—Barbee v. Willard, Case No. 969.

Where the promises are to be concurrently performed, neither can sue for a violation of the agreement, or insist on a specific performance without showing an offer to comply, or a sufficient excuse for not doing so.—McNamara v. Gaylord, Case No. 8,910.

Where a party positively refuses to perform according to the contract, a demand and readiness to perform by the other party need not be shown.—Somers v. Tayloe, Case No. 13,170.

A covenant which goes only to part of the consideration on both sides, and a breach of which may be paid for in damages, is an independent covenant, and an action for breach may be maintained without averring performance in the declaration.—Coe v. Bradley, Case No. 2,941.

A party may sue without averring performance, where the consideration has been accepted by defendant, and plaintiff has no other remedy than on the covenant, and any breach by plaintiff may be paid for in damages.—Coe v. Bradley, Case No. 2,941.

One not a party to a written instrument, but who is the person to be benefited by the performance of its stipulations, *held* entitled to maintain an action against the promisor thereon.—Opdyke v. Pacific R., Case No. 10,546.

An action will lie for breach of an agreement by B. that if A., who had a claim against B. and C., would obtain judgment against C., and levy on his property, B. would bid the amount of the claim, though the claim was not valid as against B.—Hoppock v. Wicker, Case No. 6,701.

A third person who, at the request of a contractor, executes the contract, cannot maintain an action against him thereon.—Jones v. Smoot, Case No. 7,498.

Covenants between joint vendors, in an agreement for a partition for the purpose of obtaining title from the United States, *held* to be for the benefit of their vendees, who could sue thereon in equity in their own names, though not parties to the agreement.—Lamb v. Davenport, Case No. 8,015.

Plaintiff, who contracted to do certain work on certain terms, may recover for the whole amount in his own name, though the work was done jointly with another.—Evans v. Blakeney, Case No. 4,553.

No action lies for breach of a contract on a sale of slaves that the purchaser would not sell them out of the district, where it was stipulated that such slaves should be immediately entitled to freedom upon such sale.—Corcoran v. Jones, Case No. 3,229.

Upon an agreement to do certain brickwork at a certain price in a workmanlike manner, plaintiff may recover, although the work was not done in a workmanlike manner.—Voss v. Varden, Case No. 17,016.

Where an illegal contract is but partially performed, money paid under it may be recovered, although the parties are in pari delicto.—Knowlton v. Congress & Empire Spring Co., Case No. 7,903.

A notice, before the time of performance, that defendant will not fulfill his contract, will justify an immediate suit.—Grau v. McVicker, Case No. 5,708; Greenway v. Gaither, Id. 5,788.

In an action on the case for failure to perform a parol contract, the time of making it is not material.—Scull v. Higgins, Case No. 12,570a.

Officers and engineer of navigation company *held* not liable to contractor in damages for forfeiture of contract declared under mistaken view of facts.—Culbertson v. Ellis, Case No. 3,461.

§ 37. Defenses.

In an action on contract, the plea of alien enemy is good in bar to show that the contract was made in time of war, with a public enemy, by a party in allegiance to the government in whose courts the suit is brought.—Elgee's Adm'r v. Lovell, Case No. 4,344.

A contractor with the state cannot insist that his contract is invalid for failure to make the deposit required by law.—In re Burt, Case No. 2,209.

It is no defense to a breach of promise to keep a slave for the promisor's personal use that the slave was unfit for such use.—Fenwick v. Grimes, Case No. 4,733.

§ 38. Parties.

In Arkansas, all or any number of the parties to a joint and several contract may be sued; and, after bringing suit against all, plaintiff may discontinue as to any one before final judgment.—Deloach v. Dixon, Case No. 3,775; Johnson v. Byrd, Id. 7,376.

§ 39. Pleading.

In the case of dependent or concurrent covenants, plaintiff must aver and prove performance, or offer of performance, on his part.—Goodwin v. Lynn, Case No. 5,553.

Where certain things were necessary to be done by plaintiffs to enable defendant to perform his contract, the declaration in an action thereon must show performance of the precedent acts.—United States v. Beard, Case No. 14,551.

Where a debt is contracted in a foreign country, and the case depends upon the lex loci contractus, it should be especially averred in the bill.—Vose v. Philbrook, Case No. 17,010.

An agreement in a contract to submit disputes arising thereunder to private arbitration will bar an action thereon in which plaintiff does not aver and prove either an arbitration and award, or facts excusing it.—Fox v. Hempfield R. Co., Case No. 5,010.

A person cannot be charged on his agreement to surrender himself to a suit by another, without an averment that the suit was instituted.—Gill v. Stebbins, Case No. 5,431.

Sufficiency of complaint in an action on a contract by plaintiff to furnish defendant 66 or more men, at different rates of wages, to work upon a certain railroad for an indefinite time.—Toy William v. Hallett, Case No. 14,123.

There may be a recovery under the common counts where plaintiff fails to prove the special contract alleged.—Ames v. Le Rue, Case No. 327.

Sufficiency of pleading and proof of bad faith in officers of corporation in declaring forfeiture of contract.—Culbertson v. Ellis, Case No. 3,461.

In the case of mutual and independent promises, the omission to state in the declaration performance of that made by plaintiff is cured by the verdict.—Corcoran v. Dougherty, Case No. 3,227.

Where a contract contains various substantive and independent stipulations, and there is a breach of more than one of such stipulations, there arise distinct causes of action which should be pleaded separately.—Oh Chow v. Hallett, Case No. 10,469.

In assumpsit on a promise to pay if plaintiff would give time, the declaration need not aver that the promise was accepted by plaintiff, where it was averred that time was given.—Lonsdale v. Brown, Case No. 8,494.

A plea that the written contract set forth in the declaration is not the contract made by the

parties, but is a fraud upon defendant, is bad on demurrer.—McDonald v. Orvis, Case No. 8,764.

A plea of fraud in the execution of an instrument need not state the facts constituting the fraud.—McClintick v. Johnston, Case No. 8,700.

§ 40. Issues and proof.

The defense that the contract is void as against public policy is available under a plea of the general issue.—Oscanyan v. Winchester Repeating Arms Co., Case No. 10,600.

In an action for damages for a breach of contract, no evidence of fraud is admissible.—Willings v. Consequa, Case No. 17,767; Consequa v. Willings, Id.

Where covenants are mutually dependent, plaintiff cannot show partial performance under a general averment of performance.—Barbee v. Willard, Case No. 969.

Under a count on a contract to deliver rations for a year, plaintiff cannot recover for rations furnished only a part of a year, unless prevented by defendant from completing the contract.—Krouse v. Deblois, Case No. 7,938.

Allegation of an undertaking in consideration of a contract by plaintiff to build a ship, and evidence of a contract to finish a ship partly built, *held* a fatal variance.—Smith v. Barker, Case No. 13,013.

§ 41. Evidence.

A promise in writing without consideration is void, but the burden of showing want of consideration is on the defendant.—Watson v. Dunlap, Case No. 17,282.

Previous course of dealing is admissible to show intention in respect to time and mode of delivery and payment not set out in contract of purchase.—The Alida, Case No. 200.

In an action on a contract between an insurance company and its agent, by which he was to receive a percentage on all renewals of policies procured by him, evidence is admissible to show the probable expectancy of duration of the policies.—Ensworth v. New York Life Ins. Co., Case No. 4,496.

Splits in bottom planks of vessel, discovered on first voyage, eight months after delivery, where the vessel had met with no disaster or strain, *held* sufficient evidence of improper building.—Cunningham v. Hall, Case No. 3,482.

Where value of extra work has not been fixed by arbitration, as agreed in building contract, evidence of such value may be given in action upon a quantum merult.—Baker v. Herty, Case No. 771.

CONTRIBUTION.

Between insurers, see "Insurance," § 165.
—— parties to negotiable paper, see "Bills and Notes," § 34.
—— sureties, see "Principal and Surety," § 14.
General average, see "Shipping," §§ 223–243.
Promises to contribute, see "Subscriptions."

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 3.

CONVERSION.

§ 1, Realty into personalty—In general. § 2, —— Direction in will. § 3, Election.

Wrongful conversion of personal property, see "Trover and Conversion."

§ 1. Realty into personalty—In general.

On a voluntary sale of real estate by persons having independent interests therein, the proceeds of sale do not retain the character of real estate; otherwise, where equity interferes in adversum.—Foster v. Hilliard, Case No. 4,972.

§ 2. —— Directions in will.

Real estate devised to executors with a direction to apply the rents and profits until the happening of a certain event, and then to sell it and divide the proceeds among certain persons, is, in equity, to be considered as personalty from the death of the testator.—Reading v. Blackwell, Case No. 11,612.

The shares of the legatees who die before the time of sale go to their next of kin, as personal property.—Reading v. Blackwell, Case No. 11,612.

Where the proceeds of lands devised to be sold are given to a feme covert, who dies before a sale, the right to the legacy devolves upon her husband, and, if he also die before the sale, it goes to his representatives, and not to the next of kin of the wife.—Rinehart v. Harrison, Case No. 11,840.

It is no exception to the rule that land directed by will to be sold and turned into money is considered as money from testator's death, because the period of sale is remote, and the conversion cannot be made until the time arrives.—Rinehart v. Harrison, Case No. 11,840.

The proceeds of sales of lands made under a will to pay debts are equitable assets.—Dixon v. Ramsay, Case No. 3,933.

§ 3. Election.

On the bequest of the proceeds of land to a residuary legatee, none but the first taker, and a person who is entitled to the whole surplus, can make an election to consider the proceeds as land.—Rinehart v. Harrison, Case No. 11,840.

CONVEYANCES.

As acts of bankruptcy, see "Bankruptcy," §§ 62–78.
Contracts to convey, see "Vendor and Purchaser," § 11.
Effect on lien, see "Maritime Liens," § 46.
For purposes of conferring jurisdiction, see "Courts," § 52.
In fraud of creditors, see "Bankruptcy," §§ 214–250; "Fraudulent Conveyances."
In trust, see "Trusts," § 1.

Conveyances of particular species of property.

See "Homestead," § 6; "Mines and Minerals," §§ 12–14; "Public Lands," §§ 57, 58; "Slaves," § 7.
Vessels, see "Shipping," § 39.
Water right, see "Waters and Water Courses," § 8.

Conveyances to or by particular classes of parties.

See "Corporations," § 40; "Guardian and Ward," §§ 5–7; "Husband and Wife," §§ 3, 4, 8; "Infants," § 1; "Insane Persons," § 4; "Parent and Child," § 4.
Assignee in bankruptcy, see "Bankruptcy," § 304.
Settler on public land, see "Public Lands," § 34.
Sheriffs, see "Execution," § 19.

Particular classes of conveyances.

See "Assignment for Benefit of Creditors"; "Assignments"; "Chattel Mortgages"; "Deeds"; "Mortgages."
Bills of sale, see "Sales," §§ 20, 21.
Partition deeds, see "Partition."

CONVICTS.

Competency as witness, see "Witnesses," § 24.
Pardon, see "Pardon."
Right to vote, see "Elections," § 3.

§ 1. Contracts by public authorities for labor.

The hiring of 400 convicts under four separate contracts, for 100 each, is not a violation of a law prohibiting the hiring of over 100 convicts in any one contract.—In re Southwestern Car Co., Case No. 13,192.

A loss and damage caused by the failure of the state to perform its stipulation to keep the convicts under good discipline, and at diligent and faithful labor, may be deducted from the contract price.—In re Southwestern Car Co., Case No. 13,192.

COPY.

As evidence, see "Evidence," § 26.

COPYRIGHTS.

I. NATURE AND ACQUISITION.

§ 1, Nature of statutory copyright. § 2, Power to grant and regulate. § 3, Constitutional and statutory provisions. § 4, Subjects of copyright—In general. § 5, —— Books. § 6, —— Newspapers and single sheets. § 7, —— Maps or charts. § 8, —— Dramatic compositions. § 9, —— Musical compositions. § 10, —— Engravings, cuts, and prints. § 11, —— Designs. § 12, —— Private letters. § 13, Persons entitled to copyright—Citizens or residents. § 14, Proceedings to obtain copyright—Deposit of title and copies of work. § 15, —— Inserting or inscribing notice. § 16, —— Penalties for inserting or impressing false notice. § 17, Registration. § 18, Extent of rights acquired. § 19, Abandonment or dedication.

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III. INFRINGEMENT.

(A) What Constitutes Infringement.

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(B) Actions.

§ 36, Actions at law for damages. § 37, Penalties and actions therefor. § 38, Forfeitures of copies, sheets, or plates. § 39, Suits in equity—In general. § 40, —— Right to sue. § 41, —— Defenses. § 42, —— Parties. § 43, —— Pleading. § 44, —— Evidence. § 45, —— Discovery. § 46, —— Temporary injunction. § 47, —— Permanent injunction. § 48, —— Account of profits. § 49, —— Hearing.

See, also, "Literary Property."

Jurisdiction of actions respecting, see "Courts," § 34.

I. NATURE AND ACQUISITION.

§ 1. Nature of statutory copyright.

Copyright law is intended to encourage learning, and not mere industry.—Clayton v. Stone, Case No. 2,872.

§ 2. Power to grant and regulate.

In exercising its constitutional power in relation to copyrights and patents, congress may discriminate in favor of good morals and against vice.—Martinetti v. Maguire, Case No. 9,173.

In the United States there is no common-law right of copyright. The protection of authors rests exclusively upon the statutes expressly enacted by congress for that purpose.—Wheaton v. Peters, Case No. 17,486.

§ 3. Constitutional and statutory provisions.

The requirements of the copyright statutes are not merely directory, but their performance is essential to a vesting of the copyright, and relief in equity for alleged infringement.—Ewer v. Coxe, Case No. 4,584.

A provision of a state constitution that all judicial decisions shall be free for publication by any person is not repugnant to the provision of the federal constitution in relation to copyrights.—Little v. Gould, Case No. 8,394.

Laws N. Y. 1850, c. 245, providing that "the copyright of any notes or references made by the state reporter" to any reports of the decisions of the court of appeals shall be vested in the secretary of state, for the benefit of the people, is not inconsistent with the constitutional provision that all judicial decisions shall be free for publication by any person.—Little v. Gould, Cases Nos. 8,394, 8,395.

§ 4. Subjects of copyright—In general.

The rule stated for determining whether a copyrighted work is an original one in the sense of the law.—Boucicault v. Fox, Case No. 1,691.

Any new and original plan, arrangement, or combination of materials will entitle the author to a copyright therein, whether the materials themselves be new or old.—Emerson v. Davies, Case No. 4,436; Gray v. Russell, Id. 5,728; Greene v. Bishop, Id. 5,763; Lawrence v. Dana, Id. 8,136.

Whosoever, by his own skill, labor, and judgment, writes a new work, may have a copyright therein, unless it be directly copied or evasively imitated from another work.—Emerson v. Davies, Case No. 4,436.

An inchoate intended publication is not the subject of copyright, as such right extends to the book only, and not to the subject.—Centennial Catalogue Co. v. Porter, Case No. 2,546.

§ 5. —— Books.

A literary composition may be a book entitled to copyright, without being printed.—Roberts v. Myers, Case No. 11,906.

Where the judges of the court prepared the headnotes to their opinions, the reporter has no copyright in the volumes he edits.—Chase v. Sanborn, Case No. 2,628.

Reporters of judicial opinions delivered in writing cannot appropriate, by copyright, an exclusive property in the publication of such opinions.—Gould v. Hastings, Case No. 5,639.

Under Laws N. Y. 1850, c. 245, the reporter is entitled to copyright in the syllabi and the statement and arguments of counsel prepared by him, but not in the statements of facts which form the basis of the decisions reported.—Little v. Gould, Cases Nos. 8,394, 8,395.

The editor of a subsequent edition is entitled to a copyright on his notes and additions, where they can be clearly separated from those of a previous edition, but where they cannot thus be separated he cannot use them without violating the copyright of the former notes.—Lawrence v. Dana, Case No. 8,136.

A translation from the original Hebrew, of the Pentateuch, is subject to copyright.—Lesser v. Sklarz, Case No. 8,276a.

A compilation of information respecting railroads, express, telegraph, and post offices, etc., such as "Bullinger's Guide," is a proper sub-

ject of a copyright.—Bullinger v. Mackey, Case No. 2,127.

The author cannot claim an exclusive right in a combination in his guidebook of old methods, previously separately published.—Bullinger v. Mackey, Case No. 2,127.

Labels used on vials and bottles to designate certain medicines and the diseases cured by their use are not books, entitled to protection under the copyright act.—Scoville v. Toland, Case No. 12,553.

§ 6. —— Newspapers and single sheets.

Literary production may be copyrighted, though printed on single sheet.—Clayton v. Stone, Case No. 2,872; Scoville v. Toland, Id. 12,553.

A newspaper or price current is not a subject of copyright.—Clayton v. Stone, Case No. 2,872.

§ 7. —— Maps or charts.

A chart on a single sheet, containing diagrams representing a system of taking measures for and cutting women's dresses, with instructions for its use, is a "book," within the copyright law.—Drury v. Ewing, Case No. 4,095.

A copyright cannot subsist in a chart as a general subject.—Blunt v. Patten, Case No. 1,580.

New editions of maps are included in the copyright laws.—Farmer v. Calvert Lithographing, Engraving & Map Pub. Co., Case No. 4,651.

§ 8. —— Dramatic compositions.

A dramatic composition is entitled to copyright as original, although a reproduction of old materials in a new form and combination.—Boucicault v. Fox, Case No. 1,691.

A written play consisting of directions for its representation by action without the use of spoken language by the characters, is a "dramatic composition," within Act Aug. 18, 1856.—Daly v. Palmer, Case No. 3,552.

The act of August 18, 1856, relating to dramatic compositions suitable for public representation, does not include a mere exhibition or spectacle of scenic effects, but having no literary character; especially if of immoral tendencies.—Martinetti v. Maguire, Case No. 9,173.

The translator of a play by a foreign author who has obtained a copyright upon it is entitled to protection against the use of any part of his translation by another.—Shook v. Rankin, Case No. 12,804.

A mechanical contrivance used in the production of a play, being patentable, *held* not protected by the copyright of the play.—Freligh v. Carroll, Case No. 5,092a.

§ 9. —— Musical compositions.

A musical composition, to be the subject of a copyright, must be substantially a new and original work, and not a copy of an older piece, with additions or variations which a skilled writer might readily make.—Jollie v. Jaques, Case No. 7,437.

§ 10. —— Engravings, cuts, and prints.

A photograph is not a print, cut, or engraving, within Act Feb. 3, 1831, § 1.—Wood v. Abbott, Case No. 17,938.

§ 11. —— Designs.

The fact that playing cards may be used by persons to violate the laws against gambling does not, of itself, deprive them of the protection of the copyright law relating to designs.—Richardson v. Miller, Case No. 11,791.

The novelty of a design may consist in the form, outline, or grouping, or in the use, combination, arrangement, or harmony of colors, or the combination of some or all of these attributes.—Richardson v. Miller, Case No. 11,791.

§ 12. —— Private letters.

The copyright act (1831, § 9) protects the author's right to his manuscript, which includes private letters.—Bartlett v. Crittenden, Case No. 1,076.

§ 13. Persons entitled to copyright— In general.

Labor bestowed on the production of another is enough to constitute a claim to copyright.—Schuberth v. Shaw, Case No. 12,482.

A person who accompanied a government expedition, upon the understanding that all sketches and drawings he might make were to be the exclusive property of the government, where the same, upon his return, were incorporated in his report, and published for distribution, *held* not entitled to a copyright therein.—Heine v. Appleton, Case No. 6,324.

A copyright obtained by a person for whom literary matter has been prepared gratuitously is valid without a written assignment.—Lawrence v. Dana, Case No. 8,136.

A person is not entitled to a copyright on an historical print composed and executed by artists employed and paid by him. Act April 28, 1802.—Binns v. Woodruff, Case No. 1,424.

A copyright in the original work of a state reporter of judicial decisions, who is paid a salary for such work, may be taken in the name of the secretary of state, for the benefit of the people, and the exclusive right of publishing such copyrighted matter may be vested in a publisher under contract with the state.—Little v. Gould, Cases Nos. 8,394, 8,395.

An agreement by an actor and stage manager, with the proprietor of a theater, to write a drama, which should be performed in his theater so long as it should draw good audiences, does not give the latter a right to the copyright.—Roberts v. Myers, Case No. 11,906.

§ 13a. —— Citizens or residents.

Residence entitling an alien to the benefit of the copyright laws is determined by the intention existing at the time of filing the title, and is unaffected by any change of intention.—Boucicault v. Wood, Case No. 1,693.

Where an officer of the British navy files a declaration of intent to become a citizen, but, trouble with Canada seeming imminent, he offers his services to that province, he is not a resident, within the meaning of the copyright act of 1831.—Carey v. Collier, Case No. 2,400.

A nonresident alien author cannot, by assignment of his work to a resident of the United States, give the latter a right therein subject to the protection of the copyright act.—Keene v. Wheatley, Case No. 7,644.

§ 13b. —— Authors.

An author is one who, by his own intellectual labor, produces an arrangement or compilation new in itself.—Atwill v. Ferrett, Case No. 640.

The person who writes a book, and prepares it for publication, is the author, whom the copyright law was intended to protect, and not the one who employed him for such purpose.—De Witt v. Brooks, Case No. 3,851.

The person who furnishes the incidents and events of a person's life to another, who prepares them for publication, is not the author, and his assignee of the copyright taken out by him cannot maintain an action for infringement.—De Witt v. Brooks, Case No. 3,851.

An agreement to write a play for another, and to act in it, with a share in the profits as compensation, does not create a legal or equitable title in the latter, which will prevent the author taking out a copyright.—Boucicault v. Fox, Case No. 1,691.

§ 14. Proceedings to obtain copyright—Deposit of title and copies of work.

Deposit of title page, and delivery of copy of book, as provided by law (Feb. 3, 1831), are indispensable conditions.—Baker v. Taylor, Case No. 782; Jollie v. Jaques, Id. 7,437; Struve v. Schwedler, Id. 13,551.

The record of a copyright, made in the form prescribed by the statute of 1831, is at least prima facie evidence that a printed title to the book was duly deposited in the clerk's office.—Roberts v. Myers, Case No. 11,906.

Sale of book prior to deposit of copy of title page will defeat copyright, as actual publication is presumed from a sale.—Baker v. Taylor, Case No. 782.

Deposit of title of drama not original with depositor does not preclude its use by others, who have previously applied it to the dramatic composition.—Benn v. Leclercq, Case No. 1,308.

A delivery of a copy of the book to the secretary of state (Act 1790, § 4) is a condition precedent to the right of copyright.—Wheaton v. Peters, Case No. 17,486.

A delivery of 80 copies of reports, as required by the reporters' act of 1817, is not a compliance with Act 1790, § 4.—Wheaton v. Peters, Case No. 17,486.

Public representation of a drama is not a publication, within the meaning of the act requiring a copy to be deposited within a certain time.—Roberts v. Myers, Case No. 11,906.

The delivery to the secretary of state of the first volume of a work within six months after its publication, and the rest of the volumes before suit for infringement, is a sufficient compliance with the law.—Dwight v. Appleton, Case No. 4,215.

The work must be published within a reasonable time after filing the title page.—Carillo v. Shook, Case No. 2,407.

§ 15. —— Inserting or inscribing notice.

The publication of notice is an indispensable condition in procuring a copyright.—Baker v. Taylor, Case No. 782; Jollie v. Jaques, Id. 7,437.

Where title page was deposited in 1846, a notice stating entry as 1847 is fatal.—Baker v. Taylor, Case No. 782.

The entry of the notice of copyright on the title page, with the date at the bottom, where the date of publication usually appears, with a notice of its assignment intervening, *held* insufficient.—Tompkins v. Rankin, Case No. 14,090.

In the case of a work published in several volumes at different dates, the copyright notice need only be inserted in the first volume.—Dwight v. Appleton, Case No. 4,215.

The copyright notice may be inserted in a second edition of the same work published in a different number of volumes, without impairing the copyright.—Dwight v. Appleton, Case No. 4,215.

A publication of revised rules of court is not a new edition of a previous publication of the rules before revision.—Banks v. McDivitt, Case No. 961.

The notice of copyright in a subsequent edition of a book need not specify the date of the original copyright in addition to the date of the subsequent one.—Lawrence v. Dana, Case No. 8,136.

The notice of copyright is sufficient, in the case of an engraving, when engraved on the plate, and printed from it in such a position as not to be covered when the picture is properly framed, with a reasonable margin.—Rossiter v. Hall, Case No. 12,082.

Omission to have the date of depositing the title of a map engraved thereon is fatal.—King v. Force, Case No. 7,791.

§ 16. —— Penalties for inserting or impressing false notice.

The penalty imposed for putting the imprint of a copyright upon a work not legally copyrighted, and given to "the person who shall sue for the same," cannot be recovered in the name of more than one person.—Ferrett v. Atwill, Case No. 4,747.

A declaration for such penalty in the name of two persons is bad on general demurrer.—Ferrett v. Atwill, Case No. 4,747.

§ 17. Registration.

The rights and remedies of persons registering in the patent office prints and labels under the act of June 18, 1874 (18 Stat. 78), are regulated by Rev. St. 4948–4971, relating to copyrights.—Marsh v. Warren, Case No. 9,121.

§ 18. Extent of rights acquired.

Copyright only secures to the owner the exclusive right of multiplying copies.—Lawrence v. Dana, Case No. 8,136.

The title of a copyrighted publication, separate from the publication which it is used to designate, is not within the protection of the copyright.—Osgood v. Allen, Case No. 10,603.

The title is an appendage to the work, and, where the latter is not protected by a copyright, the former is not.—Jollie v. Jaques, Case No. 7,437.

§ 19. Abandonment or dedication.

Consent of the author to publication abroad places him in the position of a foreign author, and is an abandonment of his rights to a copyright.—Boucicault v. Wood, Case No. 1,693.

The performance, with the author's consent and for his benefit, of a play which has not been printed by him, is not an abandonment to the public, nor a publication, within the copyright act.—Boucicault v. Fox, Case No. 1,691; Same v. Hart, Id. 1,692; Same v. Wood, Id. 1,693.

In the case of a copyrighted translation of a play by a foreign author, *held*, that there had been no dedication by complainant, or a memorization by defendant, which would entitle them to represent it without authority from plaintiff.—Shook v. Rankin, Case No. 12,805.

The publication, by authority of the owner of a copyright of a drama, of a novel founded thereon, is not a dedication of the drama to the public.—Shook v. Rankin, Case No. 12,805.

II. TITLE, CONVEYANCES, CONTRACTS, AND REGULATIONS.

§ 20. Assignments.

A copyright may be assigned to be transferred to a person not entitled, under the act, to take out a copyright.—Boucicault v. Fox, Case No. 1,691.

A usage among booksellers. to consider the second term as passing with the first, does not control the rights of the author, who was not a bookseller, nor shown to be conversant with such usage.—Pierpont v. Fowle, Case No. 11,152.

§ 21. Sale of copyrighted works.

A purchaser under a sheriff's sale of a copper plate on which a copyrighted map is engraved, may take impressions therefrom and sell the same.—Stevens v. Gladding, Case No. 13,400.

§ 22. Contracts relating to copyrights and copyrighted works.

A contract in respect to copyright between publisher and author will be construed liberally in favor of the author.—Pierpont v. Fowle, Case No. 11,152.

An author who renews the copyright for his own benefit cannot sue for infringement one who originally published the work under an agreement with him that he should have the copyright forever.—Paige v. Banks, Case No. 10,671.

Where the publisher takes the copyright in his own name, with the knowledge and acquiescence of the author, he is the lawful owner, subject to the condition of accounting to the author pursuant to the contract.—Pulte v. Derby, Case No. 11,465.

Such publisher cannot transfer the copyright to a third person, but may sell his stereotype plates, and authorize the purchaser to publish, accounting to the author pursuant to the contract.—Pulte v. Derby, Case No. 11,465.

In such case the author has no right to print an edition for himself, and take out a copyright, so long as the publisher complies with his contract.—Pulte v. Derby, Case No. 11,465.

A person employed to compile a book for a certain sum, and credited as author on the title page, the employer giving some suggestions as to character and form and taking a conveyance of the copyright, has the sole interest in the additional term allowed to authors.—Pierpont v. Fowle, Case No. 11,152.

III. INFRINGEMENT.

(A) WHAT CONSTITUTES INFRINGEMENT.

§ 23. Intent or purpose.

The result and not the intention at the time of doing the act complained of determines the question of infringement.—Lawrence v. Dana, Case No. 8,136.

§ 24. Books or other literary works—In general.

A part of a book may be an infringement and the other parts not. In such case the relief will only extend to the part considered an infringement.—Story v. Holcombe, Case No. 13,497.

The taking of so much of a copyrighted work as to materially diminish its value, or the appropriation of the labors of its author to an injurious extent, constitutes infringement.—Greene v. Bishop, Case No. 5,763; Lawrence v. Dana, Id. 8,136; Folsom v. Marsh, Id. 4,901.

A limited use of a copyrighted book may be made by a subsequent writer, but it is not necessary that the larger part of the work should be copied, to constitute an infringement.—Lawrence v. Dana, Case No. 8,136; Drury v. Ewing, Id. 4,095.

A work of 866 pages, of which 353 were copies of official and private letters taken from a copyrighted work, which had published them under contract with the owners, *held* a piracy.—Folsom v. Marsh, Case No. 4,901.

§ 25. —— Copying.

Piratical copying is not confined to literal repetition.—Greene v. Bishop, Case No. 5,763.

§ 26. —— Compilations.

One compiler cannot avail himself of the labor of another by copying from his book extracts from common sources.—Story v. Holcombe, Case No. 13,497; Banks v. McDivitt, Id. 961.

A compiler or reviewer cannot extract from a copyrighted work so as to convey the same knowledge as the original book.—Story v. Holcombe, Case No. 13,497.

A dictionary of flowers *held* not infringed by a much smaller dictionary on a different plan, copying 20 out of 148 definitions.—Webb v. Powers, Case No. 17,323.

Some similarities and some use of prior works, even to copying small parts, are tolerated in some kinds of books, such as dictionaries of all descriptions, gazetteers, grammars, maps, arithmetics, almanacs, concordances, cyclopædias, itineraries, guide books, and similar publications.—Webb v. Powers, Case No. 17,323.

A compilation of matter in the form of notes to matter not subject to copyright is protected by a copyright of the entire book, and such copyright is infringed by the adoption of such notes in another edition of the same matter.—Gray v. Russell, Case No. 5,728.

To constitute a piracy of copyright of a compilation of old materials, it must be shown that the original work has been either substantially copied, or has been so imitated as to be a mere evasion of the copyright.—Emerson v. Davies, Case No. 4,436.

Bullinger's Guidebook *held* not infringed by Mackey's Guide.—Bullinger v. Mackey, Case No. 2,127.

§ 27. —— Annotations.

Where the owner of the copyright of a book agreed with one who prepared annotations therefor not to use the same in subsequent editions, and that such author should make such use of them as he saw fit, *held*, that the use of the same without the author's consent in a subsequent edition was an infringement.—Lawrence v. Dana, Case No. 8,136.

The editor of a subsequent edition of a copyrighted book cannot borrow citations from annotations in the previous edition, though the extracts are not copied, and the notes to which they are prefixed or appended are not otherwise objectionable.—Lawrence v. Dana, Case No. 8,136.

In printing court rules, it is an infringement to copy, from an annotated edition of such rules, citations of authorities contained in such annotations.—Banks v. McDivitt, Case No. 961.

§ 28. —— Abridgments.

A fair abridgment, though it injure the sale of the original book, is lawful; otherwise as to a compilation.—Story v. Holcombe, Case No. 13,497.

A book of 1856 pages *held* to be infringed by an abridgment in 348 pages, which copied one-sixtieth part of the former book in the form of scattered paragraphs, constituting one-fifteenth part of the infringing book.—Story v. Holcombe, Case No. 13,497.

The question of violation of copyright may depend upon the value, rather than the quantity, of the selected materials; as where, in an abridgment, only the unimportant parts are omitted, or, under pretense of a review, the substance of an original work is given.—Gray v. Russell, Case No. 5,728.

An abridgment, in which there is a substantial condensation of the materials of the original work, and which requires intellectual labor and judgment, does not constitute piracy; but an abridgment consisting of extracts of the essential or most valuable portions of the original work is a piracy.—Folsom v. Marsh, Case No. 4,901.

The doctrine of the right to abridge criticised, and *held*, that a copyright should be protected under the rule applicable to a patented machine.—Story v. Holcombe, Case No. 13,497.

§ 29. —— Translations.

A translation of a copyrighted romance into another language is not an infringement of the copyright, though the author has herself a copyrighted translation.—Stowe v. Thomas, Case No. 13,514.

§ 30. —— Improvements.

The fact that one publication is an improvement on the other will not prevent it being an infringement if a material part of the other

publication is used.—Drury v. Ewing, Case No. 4,095.

§ 31. Maps or charts.

The copyright in a chart is violated only when another copies therefrom, and avails himself of the labor and skill of the author.—Blunt v. Patten, Case No. 1,580.

Taking the boundaries of townships from another map without going to the common source of information is an infringement.—Farmer v. Calvert Lithographing, Engraving & Map Pub. Co., Case No. 4,651.

The unauthorized use by a map maker of the surveys upon which a copyrighted map is based is an infringement of the copyright.—Blunt v. Patten, Case No. 1,579.

A copyright of a chart or compilation from common sources is infringed where the defendants have used the plan, arrangements, and illustrations of complainant's work as the model for their own work, with colorable alterations and variations only.—Lawrence v. Cupples, Case No. 8,135.

§ 32. Dramatic compositions.

It is not necessary that a play, to infringe the copyright of another, should be identical, word for word.—Boucicault v. Wood, Case No. 1,693.

Where two exhibitions, called "Black Crook" and "Black Rook," produced upon spectators the impression that they were substantially the same, *held* that one was a colorable imitation.—Martinetti v. Maguire, Case No. 9,173.

It is an infringement of a copyrighted play to use a great part of a scene represented by actions alone, in the same order and sequence of events, in a manner to convey the same sensations and impressions to the spectators.—Daly v. Palmer, Case No. 3,552.

The sale of an infringing play to another, with a view to its public representation, makes the seller a participant in causing the play to be publicly represented.—Daly v. Palmer, Case No. 3,552.

The question of infringement of a copyrighted dramatic composition considered.—Daly v. Palmer, Case No. 3,552.

The author of a copyrighted dramatic composition is entitled to be protected against piracy, in whole or in part, by representation. Act 1856.—Daly v. Palmer, Case No. 3,552.

§ 33. Musical compositions.

The right to a copyright in a musical composition depending upon authorship, and what constitutes an infringement therefor.—Reed v. Carusi, Case No. 11,642.

Every printing for sale is a new infringement, though the plates were engraved more than two years before the commencement of the suit.—Reed v. Carusi, Case No. 11,642.

The appropriation of the whole or any substantial part of a new air or melody is a piracy.—Jollie v. Jaques, Case No. 7,437.

§ 34. Engravings.

The copyright for an engraving is infringed by reproducing copies of it by the photographic process.—Rossiter v. Hall, Case No. 12,082.

§ 35. Models or designs.

A design for playing cards is infringed by the appropriation of those features which substantially embrace the novelty of the conception, and the value in the application of the art of the designer.—Richardson v. Miller, Case No. 11,791.

A copyright of an engraving of a patented design, where the patent is void for want of novelty, will not prevent a manufacturer from advertising the article covered by the design by publishing an engraving of it.—Collender v. Griffith, Case No. 3,000.

(B) ACTIONS.

§ 36. Actions at law for damages.

Case, and not trespass, is the proper form of remedy to recover damages for violation of copyright.—Atwill v. Ferrett, Case No. 640.

An action at law for infringement must be brought within two years thereof.—Reed v. Carusi, Case No. 11,642.

The right of action at law as well as in equity may accrue after the filing of the title, and before actual publication.—Boucicault v. Wood, Case No. 1,693.

It is a proper question for the jury whether one production is a copy of the other or not, and, where there is a small variance, whether it is not merely colorable.—Blunt v. Patten, Case No. 1,580.

§ 37. Penalties and actions therefor.

The publisher of a newspaper who printed therein a piece of music which has been copyrighted is liable for the statutory penalty for infringement, of one dollar per sheet, although he knew nothing of the copyright, and copied the music from another newspaper.—Millett v. Snowden, Case No. 9,600.

The statutory penalty for violation of a copyright is not incurred by printing so much of a book as amounts to an infringement, but only by a transcript of the entire work.—Rogers v. Jewett, Case No. 12,012.

In a qui tam action for infringement of the copyright of a chart, the question whether defendant copied from plaintiff's survey is for the jury.—Blunt v. Patten, Case No. 1,579.

In the case of the importation from England and the sale of copies of a book copyrighted in America, *held*, that the jury were authorized in finding a verdict of 50 cents for every sheet contained in the whole number of volumes imported.—Dwight v. Appleton, Case No. 4,215.

§ 38. Forfeitures of copies, sheets, or plates.

Where it appeared that the pirated publication was substantially identical with that of complainant, the defendant was ordered to surrender all copies within her control, and the plates on which they were printed.—Drury v. Ewing, Case No. 4,095.

§ 39. Suits in equity—In general.

There is no material difference between the principles and rules applicable to equity proceedings in copyright cases and those applicable to other suits in equity.—Scribner v. Stoddart, Case No. 12,561.

§ 40. —— Right to sue.

No suit can be maintained for infringement without evidence of copyright in complainant.—Chase v. Sanborn, Case No. 2,628; Greene v. Bishop, Id. 5,763.

§ 41. —— Defenses.

Long acquiescence in the infringement, or culpable negligence in seeking redress, will prevent relief in equity.—Lawrence v. Dana, Case No. 8,136.

Equity will settle a disputed title to a copyright in a suit to enjoin infringement.—Binns v. Woodruff, Case No. 1,424.

§ 42. —— Parties.

An assignee of an exclusive right of acting and representing a drama for one year throughout the United States, excepting five specified cities, may maintain a suit in his own name to enjoin a mere wrongdoer.—Roberts v. Myers, Case No. 11,906.

The assignee of a copyright may maintain a suit to enjoin infringement without first establishing his title at law.—Gould v. Hastings, Case No. 5,639.

In a suit in equity for the violation of a copyright, brought by the assignees of copyright, the assignments, although not recorded, are still valid as between the parties, and as to all persons, like the defendants, not claiming under the assignors.—Webb v. Powers, Case No. 17,323.

§ 43. —— Pleading.

The objection that a bill for infringement of copyright sets forth no title in plaintiff, and lays no legal foundation for a discovery, may be taken by general demurrer.—Atwill v. Ferrett, Case No. 640.

Inconsistencies of allegations as to authorship in bill for infringement of copyright no ground of objection on general demurrer, if other allegations are sufficient.—Atwill v. Ferrett, Case No. 640.

A bill to restrain the infringement of a copyright which does not allege the performance of the acts required to be performed by the author to obtain a copyright (Rev. St. § 4956) is insufficient.—Parkinson v. Laselle, Case No. 10,762.

A bill for infringement, filed four months after the deposit of the title of a dramatic composition, which does not allege a publication or a delivery of copies to the librarian of congress or any reason for the failure, is demurrable.—Boucicault v. Hart, Case No. 1,692.

It is not a good ground of demurrer to a bill for infringement that the bill does not waive the statutory forfeitures and penalties.—Farmer v. Calvert Lithographing, Engraving & Map Pub. Co., Case No. 4,651.

Where the bill alleged that plaintiffs are citizens of the United States, and this is not denied in the answer, it must be considered as admitted, although no other evidence of citizenship is offered.—Webb v. Powers, Case No. 17,323.

A bill against infringers of a copyright, praying injunction and discovery in aid of a suit at law against one, though declared bad as a bill for discovery, is good on general demurrer, the remedy by injunction being independent.—Atwill v. Ferrett, Case No. 640.

§ 44. —— Evidence.

On the trial of an action for violating the copyright of a play, a witness cannot testify as to identities between parts of the play and a book from which it is alleged to have been dramatized, where either the book or play is not produced in court or its absence accounted for.—Boucicault v. Fox, Case No. 1,691.

The fact that the plan, arrangement, and combination of a copyrighted work originated in the brain of its author may be proved by some other person than such author.—Bullinger v. Mackey, Case No. 2,127.

Coincidence of errors furnishes the strongest proof of copying.—Lawrence v. Dana, Case No. 8,136.

§ 45. —— Discovery.

On bill for infringement of copyright, waiving forfeiture, discovery may be compelled in aid of recovery of damages.—Atwill v. Ferrett, Case No. 640.

§ 46. —— Temporary injunction.

Where an infringement is palpable, a provisional injunction will not be refused if not attended with serious injury—Banks v. McDivitt, Case No. 961.

A preliminary injunction restraining defendant from publishing, in his reprint of a foreign encyclopedia, articles therein duly copyrighted in America, will be denied, where the injury to defendant from its granting would be far greater than the injury to plaintiff by its refusal.—Scribner v. Stoddart, Case No. 12,561.

A preliminary injunction to restrain publication of a work alleged to be an infringement will not be enjoined where defendant is able to meet any damages, and there are grave doubts as to the validity of plaintiff's copyright, and of the infringement complained of.—Miller v. McElroy, Case No. 9,581; Blunt v. Patten, Id. 1,580.

Affidavits evidently intended to be used in a case, but not entitled in it, may be read on motion for an injunction.—Shook v. Rankin, Case No. 12,804.

A preliminary injunction refused where the answer denied the equities of the bill for infringement of a copyright of complainant's edition of the Bible, where there was nothing to identify the parts copyrighted.—Flint v. Jones, Case No. 4,872.

A motion for a provisional injunction for alleged infringement of a copyright of a map will be disposed of on the moving papers and answering affidavits, without a reference to a master.—Smith v. Johnson, Case No. 13,066.

Temporary injunction to prevent performance of a comedy drama entitled "Round the World in Eighty Days" denied.—Leech v. Freligh, Case No. 8,204a.

On the question of infringement, complainant may read affidavits in rebuttal on motion to dissolve the preliminary injunction.—Farmer v. Calvert Lithographing, Engraving & Map Co., Case No. 4,651.

But complainant cannot read affidavits in rebuttal in support of his title on such motion.—Farmer v. Calvert Lithographing, Engraving & Map Co., Case No. 4,651.

§ 47. —— Permanent injunction.

A projected publication will not be protected by injunction.—Centennial Catalogue Co. v. Porter, Case No. 2,546.

Equity will not interfere by injunction when the amount copied is small and of little value, if there is no proof of bad motive.—Lawrence v. Dana, Case No. 8,136.

Where notes are partly original and partly copied the former may be published if they can be distinguished and separated; otherwise, the whole publication will be restrained.—Lawrence v. Dana, Case No. 8,136; Webb v. Powers, Id. 17,323.

Before granting an injunction on a charge of infringement, the court will generally refer the matter to a master with instructions to report the extent of the infringement, if any, that the court may act on the case.—Story v. Derby, Case No. 13,496.

An equity suit for infringement will be referred to a master to examine as to the nature and extent of the infringement, though infringement has been established on the principal hearing.—Lawrence v. Dana, Case No. 8,136.

Where the case is a proper one for an injunction, the court will order it at the time the decision on the merits is announced, where the piracies are few and of a character easily determined without reference to a master; otherwise, where the charges require extended examination.—Lawrence v. Dana, Case No. 8,136.

Where the defense was that plaintiff's musical composition was a copy, with slight additions and alterations, of a composition previously published abroad, the decision on the motion for injunction was suspended, and an issue at law directed, the defendant being required to keep an account of sales.—Jollie v. Jaques, Case No. 7,437.

§ 48. —— Account of profits.

The right to an account does not depend upon the right to an injunction where the copyright has expired.—Blank v. Manufacturing Co., Case No. 1,532.

An account of profits may be decreed to the owner of a copyright as incidental to an injunction, but it must be prayed for in the bill, and cannot embrace penalties.—Stevens v. Cady, Case No. 13,395.

Substantial damages cannot be allowed where the matters charged have not prejudiced complainant.—Chase v. Sanborn, Case No. 2,628.

Commissions received from sales of a pirated map are profits to be accounted for by the commission merchant selling them.—Stevens v. Gladding, Case No. 13,399.

§ 49. —— Hearing.

The allowance of a jury, to settle at law the question of infringement arising in a suit in equity, is not a right, but rests in the sound discretion of the court.—Pierpont v. Fowle, Case No. 11,152.

CORONERS.

§ 1. Duties and liabilities.

The coroner is not bound to put in writing the effect of the evidence given upon an inquisition, unless the offense be found to be murder or manslaughter, and for false statements in other cases he is not liable.—United States v. Faw, Case No. 15,077.

CORPORATIONS.

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§ 1, Classes of corporations. § 2, Power to incorporate. § 3, Constitutional provisions. § 4, Special charters or acts. § 5, General laws. § 6, Defective incorporation or organization. § 7, Prescription. § 8, De facto corporations. § 9, Acts of corporators and promoters.

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§ 26, Rights and liabilities as to corporation. § 26a, Meetings. § 27, Suing or defending on behalf of corporation—Right to sue or defend in general. § 28, —— Grounds of action or defense. § 29, —— Refusal of corporation or officers to act. § 30, —— Who entitled to sue or defend. § 31, —— Parties. § 32, Liability for corporate debts and acts. § 33, Actions to enforce liability.

VI. OFFICERS AND AGENTS.

§ 34, Election and qualification. § 35, Authority and functions. § 36, Rights, duties, and liabilities as to corporation and its members. § 37, Liability for corporate debts and acts.

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VIII. INSOLVENCY AND RECEIVERS.

§ 63, What constitutes corporate insolvency. § 64, Conveyances to officers or stockholders in payment of debts. § 65, Enforcement of liabilities of officers and stockholders. § 66, Actions by receiver. § 67, Payment and distribution.

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§ 69, Insolvency or non-payment of debts. § 70, Suspension of business. § 71, Dissensions as to management. § 72, Jurisdiction of proceedings. § 73, Proceedings for voluntary dissolution. § 74, Proceedings to enforce dissolution. § 75, Collection of assets.

XI. FOREIGN CORPORATIONS.

§ 76, Status in general. § 77, What are foreign corporations. § 78, Application of constitutional provisions. § 79, Power to exclude, restrict, or regulate. § 80, Enabling acts in general. § 81, Designation of agent for service of process. § 82, Meeting of officers. § 83, Acquiring, holding, and conveying property in general. § 84, Contracts. § 85, Actions by or against.

Defective corporations, see "Partnership," § 5.
Mandamus, see "Mandamus," § 5.
Quo warranto, see "Quo Warranto."
Right to salvage compensation, see "Salvage," § 24.
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Particular classes of corporations.

See "Building and Loan Associations"; "Colleges and Universities"; "Municipal Corporations"; "Railroads," §§ 1–11; "Religious Societies."
Banks, see "Banks and Banking."
Bridge companies, see "Bridges."
Insurance companies, see "Insurance," §§ 1–6.
Mutual benefit assurance companies, see "Insurance," §§ 196–199.
Telegraph companies, see "Telegraphs and Telephones."
Water companies, see "Waters and Water Courses," § 9.

I. INCORPORATION AND ORGANIZATION.

§ 1. Classes of corporations.

A corporation is private unless the whole interest belongs to the government, or it be created for the administration of political or municipal

power.—Rundle v. Delaware & R. Canal, Case No. 12,139.

§ 2. Power to incorporate.

Several states may unite in creating the same corporation, or in combining several pre-existing corporations into one.—Copeland v. Memphis & C. R. Co., Case No. 3,209; Wilmer v. Atlanta & R. Air Line Ry. Co., Id. 17,775.

§ 3. Constitutional provisions.

A constitutional provision that "the legislature shall pass no act of incorporation unless with the assent of at least two-thirds of each house" (Const. Mich. art. 12, § 2) does not prevent the creation of an indefinite number of corporations by one act.—Falconer v. Campbell, Case No. 4,620.

§ 4. Special charters or acts.

The acceptance of the charter essential to constitute a corporation will be presumed from facts consistent only with such hypothesis, without proof of express declaration.—Dorsey Harvester Revolving-Rake Co. v. Marsh, Case No. 4,014.

Whether a charter be a continuation of an old corporation or the creation of a new one must be decided by the legislative intent, and not by the conduct of its officials.—Bellows v. Hallowell & Augusta Bank, Case No. 1,279.

§ 5. General laws

In Ohio, a corporation cannot be created or authorized except in pursuance of a general statute.—Griffin v. Clinton Line Extension R. Co., Case No. 5,816.

A certificate of incorporation, in Ohio, filed without seals to the name of the corporators, is a nullity.—Griffin v. Clinton Line Extension R. Co., Case No. 5,816.

The original certificate or articles of association need not be filed in the office of secretary of state, under 2 Rev. St. Ind. c. 60. A copy is sufficient.—Logansport Gas Light & Coke Co. v. Knowles, Case No. 8,466.

In Iowa a corporation for pecuniary profit becomes a body corporate as soon as the articles of incorporation are duly filed, though it has no paid-up capital, and does not file a sworn statement or procure a certificate authorizing it to commence business, as required by law.—Stokes v. Findlay, Case No. 13,478.

Certain persons formed a corporation under Act Cal. April 11, 1862, and before transacting any business, but without a formal disincorporation, reincorporated themselves under Act 1853, under which all their business was done. *Held*, that the validity of their acts must be determined by Act 1853.—Hyde v. Doe, Case No. 6,969.

Plaintiffs, in Rhode Island, *held* not entitled to sue as a corporation, having failed to pay the fee into the state treasury, as required by general law of the state.—Union Horse Shoe Works v. Lewis, Case No. 14,365.

Due organization, in compliance with the statute, will be presumed.—Bank of United States v. Lyman, Case No. 924.

§ 6. Defective incorporation or organization.

Defects in the proceedings for incorporation are cured by the subsequent legislative recognition of the existence of the corporation.—Kanawha Coal Co. v. Kanawha & O. Coal Co., Case No. 7,606.

§ 7. Prescription.

There can be no corporate existence by prescription.—Griffin v. Clinton Line Extension R. Co., Case No. 5,816.

§ 8. De facto corporations.

In Ohio there can be a corporation de facto, only when a corporation de jure continues in the exercise of its functions after a forfeiture or other extinguishment of its franchises.—Griffin v. Clinton Line Extension R. Co., Case No. 5,816.

§ 9. Acts of corporators and promoters.

Persons who organize a corporation for the manufacture of an infringing article are personally liable for the infringement by the corporation.—St. Louis Stamping Co. v. Quinby, Case No. 12,240a.

II. CORPORATE EXISTENCE AND FRANCHISE.

§ 10. Evidence of corporate existence.

Letters patent issued under a general law, when produced by a corporation to establish its existence, will be presumed to have been granted in conformity to the requirement of the law, at the instance of the corporation, and accepted by it.—Dorsey Harvester Revolving-Rake Co. v. Marsh, Case No. 4,014.

§ 11. Estoppel to allege or deny corporate existence.

A corporation which has attempted to increase its capital, filed papers for that purpose, received subscriptions for and sold stock and issued policies under such increase, is estopped to claim that it is not a corporation de jure.—Upton v. Hansbrough, Case No. 16,801.

The validity of the incorporation cannot be questioned after a party has been impleaded, and recognized in decrees made in the cause, as a corporation.—Howard v. La Crosse & M. R. Co., Case No. 6,760.

§ 12. Amendment of charter or acts of incorporation.

The general power to make amendments to existing charters is not taken away by the constitutional provision (Georgia) prohibiting the general assembly to grant corporate powers and privileges to any private companies except business companies.—Jones v. Habersham, Case No. 7,465.

Construction of resolution of repeal of charter containing recitals of fact and designating judges to pass upon certain questions.—Lothrop v. Stedman, Case No. 8,519.

In the absence of laws existing at the time the subscription was made, no fundamental changes in the charter can be made without consent of all the stockholders.—Mowrey v. Indianapolis & C. R. Co., Case No. 9,891.

A subscription to stock must be presumed to have been made with a view to existing laws authorizing fundamental changes in the charter, and such changes may be made against the will of the minority holders.—Mowrey v. Indianapolis & C. R. Co., Case No. 9,891.

Kansas state legislature may amend by special act charter of corporation created by territorial legislature and continued by constitution.—Adams v. Douglas County, Case No. 52.

Where the charter reserves unconditional power to alter or repeal, the legislature may act arbitrarily; but otherwise where reservation is made for "misuse or abuse."—Baltimore v. Pittsburgh & C. R. Co., Case No. 827.

The original subscribers to a corporation are bound by the alterations of a charter made with the consent of the corporation.—Chesapeake & O. Canal Co. v. Robertson, Case No. 2,652.

Where two corporations were created by adjacent states with the same name, *held*, that subsequent acts of the two states uniting their interests did not merge their separate corporate existence.—Farnum v. Blackstone Canal Corp., Case No. 4,675.

§ 13. Repeal of charter.

The legislative repeal of a charter, where the right of repeal is reserved therein, or by ge-

eral statute, cannot be reviewed by the courts unless the power is exercised so wantonly and causelessly as palpably to violate the principles of natural justice.—Lothrop v. Stedman, Case No. 8,519.

The legislature may appoint a trustee to take the assets and manage the affairs of a corporation whose charter has been repealed.—Lothrop v. Stedman, Case No. 8,519.

The legislature has the power to appoint a trustee to take the assets and manage the affairs of a corporation pending an investigation to determine whether the charter should be repealed, where the power of repeal is reserved in the charter.—Lothrop v. Stedman, Case No. 8,519.

III. CORPORATE NAME AND BY-LAWS.

§ 14. Name.

A court of equity will enjoin the unlawful use of the name of one corporation by another.—Newby v. Oregon Cent. Ry. Co., Cases Nos. 10,144, 10,145.

A bondholder of a corporation who sues to prevent another party from wrongfully using the corporate name must join the corporation as plaintiff, but, if it refuses to be so joined, may make it a defendant.—Newby v. Oregon Cent. Ry. Co., Case No. 10,144.

A bondholder of a corporation, having a lien on its lands, may sue to enjoin another corporation from using the corporate name to wrongfully obtain such lands.—Newby v. Oregon Cent. Ry. Co., Cases Nos. 10,144, 10,145.

§ 15. By-laws.

A by-law, adopted by the directors, and not by the incorporators, where two-thirds were present as required by the charter, is a nullity.—Thayer v. Herrick, Case No. 13,868.

A by-law authorizing the directors "to take care of the interests and manage the concerns of the corporation" does not import an intention to delegate to the directors the power to lay assessments.—Ex parte Winsor, Case No. 17,884.

A by-law adopted by the board of directors, providing how special meetings of the board shall be called, does not affect third persons dealing with the corporation.—Samuel v. Holladay, Case No. 12,288.

IV. CAPITAL STOCK AND DIVIDENDS.

Assessment of stockholders by assignee in bankruptcy, see "Bankruptcy," § 292.

§ 16. Nature and amount of capital and shares.

The grant of authority to increase stock at the discretion of the stockholders does not give the directors power to make such increase.—Payson v. Stoever, Case No. 10,863.

The requisite assent of the stockholders may be shown by their conduct and acquiescence. No formal assent is necesary.—Payson v. Stoever, Case No. 10,863.

§ 17. Subscription to capital stock—Contract of subscription in general.

The officers of a corporation cannot, as against creditors, relieve a subscriber from his unpaid subscription.—In re Bachman, Case No. 707.

A subscription to stock is not invalidated by a statutory amendment transferring from the stockholders to the directors the power to increase the stock, and an increase made in pursuance thereof.—Payson v. Withers, Case No. 10,864.

It is no ground for setting aside the subscription to corporate stock that defendant did not understand he was liable to installments on the stock.—Chesapeake & O. Canal Co. v. Dulany, Case No. 2,647.

A withdrawal of subscriptions to enable the subscribers to establish a rival company will not relieve them from liability.—Brewers' Fire Ins. Co. v. Clauson, Case No. 1,851.

Money paid in partial performance of a subscription for an illegal increase of capital stock, *held* recoverable, though the parties were in pari delicto.—Knowlton v. Congress & Empire Spring Co., Case No. 7,903.

An illegal subscription to stock may be ratified under a subsequent statute authorizing the ratification.—Putnam v. New Albany, Case No. 11,481.

§ 18. —— Subscription obtained by misrepresentation.

Statements made by the agents of a company at the time of soliciting subscriptions cannot change the stockholder's liability on his subscription.—Payson v. Withers, Case No. 10,864.

A contract to take stock in a corporation, induced by fraudulent representations of its officers, is not void, but only voidable at the option of the stockholder.—Farrar v. Walker, Case No. 4,679.

A contract to purchase shares, induced by fraudulent representations or concealment of the company's agent, is not void, but only voidable, and the contract must be repudiated promptly on discovering the fraud, or it will be held binding as to creditors.—Upton v. Englehart, Case No. 16,800; Same v. Jackson, Id. 16,802.

Though a subscription be obtained by fraud, the stockholder may waive it by assuming its advantages.—National Park Bank v. Nichols, Case No. 10,047.

The claim of a person to be relieved against a contract for the purchase of stock may be based upon fraudulent representations of the company's agent concerning the laws of another state, and the provisions of the charter of the company granted therein.—Upton v. Englehart, Case No. 16,800.

§ 19. —— Conditional subscriptions.

A conditional subscription may be reduced or modified, according to the terms of the condition, while the corporation is solvent.—Putnam v. New Albany, Case No. 11,481.

Subscriptions to stock pledged upon a circulated paper, conditional upon a specified amount being pledged, are binding contracts so soon as the condition is performed.—Brewers' Fire Ins. Co. v. Clauson, Case No. 1,851.

The nonperformance of a condition upon which a subscription was to be binding is no defense, where the withdrawal of the subscription prevented such performance.—Brewers' Fire Ins. Co. v. Clauson, Case No. 1,851.

§ 20. —— Calls or assessments on unpaid subscriptions.

A corporation, while solvent, may buy in and retire a portion of its capital stock without relieving other stockholders from their liability to calls on their unpaid stock.—In re Republic Ins. Co., Case No. 11,704.

Unpaid subscriptions to the capital stock of a corporation are assets applicable to the payment of corporate debts, which the corporate authorities may call in for corporate purposes.—Myers v. Seeley, Case No. 9,994.

But creditors cannot interpose unless the corporation is without other assets to meet its obligations.—Myers v. Seeley, Case No. 9,994.

A stockholder is liable for interest on a call from the time it is payable.—Upton v. Burnham, Case No. 16,799.

Construction of provision in articles of association in relation to assessments upon stockholders and the method of payment.—Wilbur v. Stockholders, Case No. 17,636.

An assessment is necessary to the liability of a subscriber to stock in an incorporated company.—Chandler v. Siddle, Case No. 2,594.

In New York, a receiver appointed under a judgment creditors' bill may recover unpaid subscriptions to the capital stock without a previous call by the corporation.—Winans v. McKean R. & Nav. Co., Case No. 17,862.

A court of equity, at the instance of creditors, will exercise for a debtor corporation the right to call for payment of stock subscriptions.—Marsh v. Burroughs, Case No. 9,112.

§ 21. —— Actions on subscriptions.

In an action for an unpaid subscription to stock, the stockholder, who has exercised rights as such, cannot deny the existence of a corporation.—Rockville & W. Turnpike Road v. Van Ness, Case No. 11,986.

In an action for an unpaid subscription to stock, plaintiff need not show that the managers were elected by a majority of votes.—Rockville & W. Turnpike Road v. Van Ness, Case No. 11,986.

The corporation need not resort to a sale of the shares of a stockholder to enforce his subscription, but may maintain an action against him.—Rockville & W. Turnpike Road v. Maxwell, Case No. 11,985.

Unpaid subscriptions to capital stock are corporate property, constituting a trust fund which can be reached by the creditors in a court of equity.—Marsh v. Burroughs, Case No. 9,112.

In a suit by a judgment creditor to enforce payment of stock subscriptions, defendants cannot question plaintiff's judgment except for fraud or collusion.—Marsh v. Burroughs, Case No. 9,112.

An agreement by the corporation to receive depreciated stock in other companies at its par value in payment of subscriptions is no defense to a suit against other stockholders on their subscriptions.—Swatara R. Co. v. McKim, Case No. 13,681.

A stockholder is estopped, by retention of his stock and participation in profits, from repudiating his subscription for irregularities in the increase of the capital stock.—Payson v. Withers, Case No. 10,864.

Installments due by subscribers to the Chesapeake & Ohio Canal may, under the Virginia statute, be recovered on motion, with costs.—Chesapeake & O. Canal Co. v. Poor, Case No. 2,651.

The original subscription book *held* prima facie evidence of the genuineness of the subscriptions, and that they were made by persons duly authorized.—Rockville & W. Turnpike Road v. Van Ness, Case No. 11,986.

The fact that a subscriber was appointed by the stockholders, and had acted as one of the managers of the corporation, is prima facie evidence of an admission on his part of the existence of the corporation.—Rockville & W. Turnpike Road v. Van Ness, Case No. 11,986.

§ 22. —— Forfeiture of unpaid shares.

Forfeiture of stock for nonpayment of call defeats right to recover on note for previous unpaid assessment.—Ashton v. Burbank, Case No. 582.

§ 23. Issue of certificates.

The president of a turnpike company, without the authority of the directors, *held* to have no power to issue certificates of stock without consideration.—Holbrook v. Fauquier & A. Turnpike Co., Case No. 6,591.

Every person connected with a company which issues certificates for paid-up stock, when the money or value has not been paid, is liable therefor.—Foreman v. Bigelow, Case No. 4,934.

Shares issued to the director of a mining company, as paid-up stock, in payment of land greatly overvalued, are to be considered as paid-up shares in the hands of an innocent purchaser in the open market.—Foreman v. Bigelow, Case No. 4,934.

An agreement between the incorporators of a company and its directors for the issue of full-paid stock for property conveyed to the company, in the absence of fraud, is binding.—Phelan v. Hazard, Case No. 11,068.

Where, to the public, a company has all the external indicia of being a corporation, a stockholder, when sued for a balance due on his stock, cannot deny the authority of the company to issue such stock, or his liability thereunder.—Upton v. Burnham, Case No. 16,798.

Purchasers or holders of stock issued under proceedings regularly taken for an increase of capital cannot, as against the corporation or its creditors, deny the validity of such proceedings, or of the stock so issued.—Upton v. Jackson, Case No. 16,802.

A charter provision requiring a corporation to take securities for stock sold up to a certain amount does not prohibit it from selling stock above such amount upon other terms or without security.—Upton v. Hansbrough, Case No. 16,801.

A sale of stock by the directors at a less rate than that fixed in the charter is unlawful and void.—Sturges v. Stetson, Case No. 13,568.

A bona fide purchaser of stock illegally issued by directors at less than the charter price may rescind his contract, and recover from his vendor, who participated in the illegal issue of the stock, the money paid.—Fosdick v. Sturges, Case No. 4,956.

In a suit for the repayment of the amount paid for stock alleged to have been illegally issued, an injunction will not be granted restraining defendant from disposing of so much of its property as would indemnify plaintiff, where the moneys received from a sale of the stock had not been kept separate.—Whelpley v. Erie Ry. Co., Case No. 17,504.

§ 24. Transfer of shares.

A by-law prohibiting a transfer of stock by one indebted to the corporation is not in violation of the Missouri law.—In re Bachman, Case No. 707.

An unpaid subscription for which the subscriber's notes have been taken is a "debt," within the meaning of the by-law.—In re Bachman, Case No. 707.

A sale of stock in the treasury to a trustee on credit approved by the board of trustees is a valid sale.—Moran v. Strauss, Case No. 9,787.

Under a charter authorizing a corporation to make by-laws for the management of its property, the regulation of its affairs, and the transfer of its stock, and providing that stock shall be transferable in such manner as shall be prescribed by the by-laws, the company has the power to provide that no transfer of stock shall be made upon its books until after the payment of all indebtedness to the company due from the person in whose name the stock stands on its books.—Pendergast v. Bank of Stockton, Case No. 10,918.

The delivery of stock to an officer of the company, with a request to transfer it, is not sufficient to pass the legal title, where by its terms it is transferable only on the company's books.—Brown v. Adams, Case No. 1,986.

The provision that stock is transferable only on the books of the company is waived by entering the name of the transferee upon the books, and the company is thereby estopped from claiming against the original stockholder.—Upton v. Burnham, Case No. 16,799.

A corporation is bound to use proper diligence to protect every one from unauthorized transfers of its stock, and is liable for loss sustained by reason of the negligence of its officers therein.—Lowry v. Commercial & Farmers' Bank, Case No. 8,581.

The assignee of stock is liable for the amount unpaid thereon, though he relied upon the representations of his assignor and an officer of the company that the stock was fully paid for.—Myers v. Seeley, Case No. 9,994.

A purchaser of stock, taking an assignment in blank, may nevertheless be liable for future assessments.—Upton v. Burnham, Case No. 16,798.

If the company accepts as a stockholder a person to whom stock has been transferred in blank, he becomes liable as a stockholder, and the original stockholder is released.—Upton v. Burnham, Case No. 16,799.

The decree of a court of equity transferring stock held in the name of a trustee to his successor *held* a full protection to the corporation against a claim of an innocent purchaser after the decree and the assignment thereunder.—Sprague v. Cocheco Mfg. Co., Case No. 13,249.

The purchaser of a certificate of stock, who surrenders it, and has one issued to himself, and his own name entered upon the stock books, becomes subrogated to the rights and assumes the liabilities of an original subscriber.—Upton v. Hansbrough, Case No. 16,801.

§ 25. Dividends.

In deciding whether a dividend was rightfully made, the transaction must be viewed from the standpoint of that time, and not in the light of subsequent events.—Main v. Mills, Case No. 8,974.

The officers of a moneyed corporation have no right to make a dividend unless there are actual profits over and above all losses.—Main v. Mills, Case No. 8,974.

An officer is bound to know the condition of the corporation's affairs, and he has no right to receive a dividend unless it is earned.—Main v. Mills, Case No. 8,974.

Preferred stock certificates issued by a railroad company construed as to the conflicting rights of holders of common and preferred stock to net earnings.—Bailey v. Hannibal & St. J. R. Co., Case No. 736.

V. MEMBERS AND STOCKHOLDERS.

Effect of bankruptcy of corporation on liability of stockholders, see "Bankruptcy," § 205.
Jurisdiction of suit by stockholder, see "Courts," §§ 44, 45.
Removal of proceedings against stockholder to federal court, see "Removal of Causes," § 2.

§ 26. Rights and liabilities as to corporation.

A purchaser of stock in the hands of a pledgee, standing on the corporate books in his name, who, without obtaining any evidence of title, immediately pledges it to such pledgee, cannot maintain a suit as a stockholder.—Da Ponte v. Louisiana State Lottery Co., Case No. 3,569.

The provision of a by-law requiring transfers of stock to be made upon its books may be waived by the company, and, where waived at the request of the purchaser, or with his assent, he becomes liable as a stockholder.—Upton v. Burnham, Case No. 16,798.

A person who has no shares standing in his name on the books is not a stockholder, though he holds certificates which he has purchased from others, in whose name they stand, and the corporation has wrongfully refused to allow a transfer.—Heath v. Erie Ry. Co., Case No. 6,306.

Slight evidence of mutual recognition of the relation of stockholder will establish the legal position and liability.—Upton v. Burnham, Case No. 16,798.

The ownership of stock does not give the stockholder any legal estate in the property of the corporation.—Morgan v. Railroad Co., Case No. 9,806.

The ownership of stock does not give the stockholders any title to the property of the corporation.—Sala v. New Orleans, Case No. 12,246.

The shareholder must examine his certificate, and ascertain his actual position and liability.—National Park Bank v. Nichols, Case No. 10,047.

An unauthorized assessment of the same amount as a dividend previously declared, made payable on the same day, cannot be collected out of such dividend, without consent of the stockholder.—Ex parte Winsor, Case No. 17,884.

Under Act Mass. March 3, 1809, providing that the "corporation may, * * * at any legal meeting called for that purpose, assess" each share, etc., the power to assess cannot be delegated to the directors.—Ex parte Winsor, Case No. 17,884.

The exception in the charter of the right to call on unpaid stock in case "of losses exceeding the means of the corporation" does not limit the right of the company or court to an assessment for payment of losses only.—In re Republic Ins. Co., Case No. 11,704.

Holders of newly-issued stock, if in a majority, may revoke a delegated authority to officers to lease the property of the corporation.—Pond v. Vermont Val. R. Co., Case No. 11,264.

A lease of the mine, made by a mining corporation to the minority stockholders, to withdraw control from the board of directors about to be elected, and to perpetuate the control of the minority, will be canceled on a bill filed by the corporation.—Mahony Min. Co. v. Bennett, Case No. 8,969.

The equitable owner of stock who permits the holders of the legal title to manage the affairs of the corporation is estopped by their acts as to innocent persons.—Western Division of Western N. C. R. Co. v. Drew, Case No. 17,433.

A corporation cannot be called to account by stockholders or creditors for an error of judgment in choosing between remedies deemed equally effective.—Newby v. Oregon Cent. Ry. Co., Case No. 10,145.

A corporation which has conveyed its property in trust to secure a debt is a necessary party to a suit to vindicate its rights in respect to such property as against a wrongdoer.—Samuel v. Holladay, Case No. 12,288.

A preliminary injunction will not be granted on bill by stockholder against corporation, where there is no question of forfeiture of charter, but only erroneous administration of corporate faculties.—Camblos v. Philadelphia & R. R. Co., Case No. 2,331.

The vendee need not be made a party to a bill by stockholders to enjoin an alleged fraudulent sale by a corporation.—Abbot v. American Hard-Rubber Co., Case No. 9.

In a suit by stockholders against the company to preserve its property, which is being

sacrificed by the fraud of its officers, other persons cannot intervene unless they show an interest as stockholders, or fraud and collusion between complainants and defendant.—Forbes v. Memphis, E. P. & P. R. Co., Case No. 4,926.

See, also, ante, §§ 17–22, 25.

§ 26a. Meetings.

An order that an annual meeting be called in December, and on such day in that month as the board should determine, is not valid, under a by-law fixing the month of June, "or at such other time as the directors may order."—Pond v. Vermont Val. R. Co., Case No. 11,264.

An irrevocable power of attorney or proxy to vote upon stock *held* not contrary to public policy.—Brown v. Pacific Mail S. S. Co., Case No. 2,025.

A meeting of stockholders without notice is invalid.—In re St. Helen Mill Co., Case No. 12,222.

The person holding stock for the common interest of himself and associates will be restrained in equity from voting it in violation of the orders of an executive committee, appointed by the joint owners of the stock under a contract by which it is held for the common good.—Wiggins v. European & N. A. Ry. Co., Case No. 17,626.

See, also, post, § 34.

§ 27. Suing or defending on behalf of corporation—Right to sue or defend in general.

Stockholders may sue at law or in equity for the protection of their rights as such, and to preserve the corporate property from unlawful diversion by its officers.—Forbes v. Memphis, E. P. & P. R. Co., Case No. 4,926.

Bill by stockholders to impeach judgment against corporation dismissed without prejudice.—Atkins v. Steacy, Case No. 605.

Receiver appointed at the suit of stockholders in an action by one corporation against another, where certain persons, who are directors in both companies, are about to discontinue the action in favor of the one in which they have the greater interest.—Hazzard v. Credit Mobilier, Case No. 6,289.

§ 28. —— Grounds of action or defense.

A stockholder may sue to enjoin the collection of a tax against the corporation, making the directors parties defendant to the bill.—Woolsey v. Dodge, Case No. 18,032.

On a bill filed against the state auditor and a trust company by a stockholder, a citizen of another state, an injunction was granted against the collection from the trust company of an alleged unconstitutional tax.—Foote v. Linck, Case No. 4,913.

§ 29. —— Refusal of corporation or officers to act.

When a corporation refuses to bring a suit in a proper case in a controversy between classes of stockholders, a stockholder may bring such suit.—Wheeling v. Baltimore, Case No. 17,502.

When the directors fraudulently and by collusion refuse to institute a suit in the case of an injury to the corporate property, or when they are the wrongdoers, a stockholder may maintain a bill in equity.—Smith v. Poor, Case No. 13,093.

Where a corporation refuses to take steps to protect its rights, threatened with injury, a stockholder may maintain a bill to restrain the commission of the act.—Samuel v. Holladay, Case No. 12,288.

A stockholder or creditor cannot maintain a suit for injury to the corporate rights, unless the bill shows that the corporation refused to protect or redress the same.—Newby v. Oregon Cent. Ry. Co., Case No. 10,145.

A stockholder cannot sue in equity for relief against an injury done or threatened to the corporation in which he is a stockholder, without averring that the corporation or its officers are derelict in their duties.—Morgan v. Railroad Co., Case No. 9,806.

Where the bill sets out acts ultra vires, which are frauds on the stockholders, plaintiff need not aver an application to and refusal by the corporation or its officers to bring the suit.—Heath v. Erie Ry. Co., Case No. 6,306.

Such request and refusal need not be shown where the corporation is under the control of defendants, who must be sued.—Heath v. Erie Ry. Co., Case No. 6,306.

The joinder of a person who is not a stockholder is good ground of demurrer to the whole bill.—Heath v. Erie Ry. Co., Case No. 6,306.

One stockholder in a corporation can maintain a suit, for the benefit of all, to enjoin the collection of illegal taxes, when the board of trustees refuse to do so.—Forbes v. Gracey, Case No. 4,924.

The stockholder has no adequate remedy at law in such a case.—Forbes v. Gracey, Case No. 4,924.

It is unnecessary, in such a suit, to make all the stockholders, or even the directors, parties.—Forbes v. Gracey, Case No. 4,924.

§ 30. —— Who entitled to sue or defend.

A contract of the corporation cannot be attacked as unauthorized, by a stockholder whose stock was derived from persons who had long acquiesced in such contract, and received profits thereunder.—Da Ponte v. Louisiana State Lottery Co., Case No. 3,569.

§ 31. —— Parties.

Stockholders may come in as defendants to suit against company to be relieved from fraud perpetrated by officers of company in transaction in question.—Bayliss v. Lafayette, M. & B. Ry. Co., Case No. 1,140.

Stockholders may come in to take the benefit of the proceedings and decree in a suit by another stockholder against the company to preserve its property, but not to oppose and nullify them.—Forbes v. Memphis, E. P. & P. R. Co., Case No. 4,926.

§ 32. Liability for corporate debts and acts.

Circumstances which make a shareholder liable for previously contracted debts, and effect of misrepresentations by agent.—National Park Bank v. Nichols, Case No. 10,047.

A stockholder is not exonerated individually from debts consequent on a lawful act against which he objected and protested, unless he seasonably sells out or withdraws as a member.—Sumner v. Marcy, Case No. 13,609.

The mere fact that a person has become a shareholder as a party to a scheme which is ultra vires will not relieve him from liability as a contributory, if the shares can be considered as legally existing.—Foreman v. Bigelow, Case No. 4,934.

Stockholders are not entitled to any share of the capital stock, nor any profits, until the debts of the corporation are paid, and a creditor may pursue the property of the corporation into whose possession, save that of a bona fide purchaser, it may be transferred.—Union Nat. Bank v. Douglass, Case No. 14,375.

If a shareholder assumes the benefits and advantages of a partner, he cannot, when called upon to respond for the contracts of the cor-

poration, deny his liability.—National Park Bank v. Nichols, Case No. 10,047.

St. Mass. 1821, c. 28, relating to the individual liabilities of stockholders, applied, not only to debts in a strict sense, but liabilities incurred by the corporation.—Carver v. Braintree Mfg. Co., Case No. 2,485.

A special remedy given by statute against stockholders, for the debts of the corporation, *held* exclusive of all other remedies, legal and equitable.—Haskins v. Harding, Case No. 6,196a.

Under a general law limiting stockholders' liability to unpaid balances due on shares, and a charter providing that balances over 40 per cent. shall not be called for unless with the assent of three-fourths of the stockholders, a stockholder is not liable to a creditor until his balance over 40 per cent. has been called for by a vote of three-fourths of the stockholders.—Louisiana Paper Co. v. Waples, Case No. 8,540.

The withdrawal of any portion of the capital by a stockholder renders him liable under Rev. St. Me. 1857, c. 46, § 24, for corporate debts to the amount so withdrawn.—McKay v. Hill, Case No. 8,845.

The surrender by a stockholder of shares, and receiving in exchange therefor the stock of another corporation, that he originally paid for his shares, on the receipt of unearned dividends, or the surrender of shares in exchange for corporate notes which are subsequently paid, operates as a withdrawal of capital.—McKay v. Hill, Case No. 8,845.

The subscription to stock cannot be rescinded so as to affect the rights of creditors while the corporation is insolvent.—Putnam v. New Albany, Case No. 11,481.

A transfer of shares in a failing corporation, made for the purpose of escaping liability to creditors, is void as to such creditors and other shareholders.—Johnson v. Laflin, Case No. 7,393.

The measure of liability of stockholders, at whatever time they became such, *held* to be that fixed by the charter, and which could not be increased by any subsequent act of the state not assented to by the corporation.—Steacy v. Little Rock & Ft. S. R. Co., Case No. 13,329.

In Iowa, the members of a corporation for pecuniary profit become subject to the statutory penalties and liabilities as soon as the articles of incorporation are filed, though no capital is paid up, nor a sworn statement filed, or certificate procured; but the members are not liable as partners.—Stokes v. Findlay, Case No. 13,478.

§ 33. Actions to enforce liability.

Under the Missouri statutes, the remedy of a judgment creditor of an insolvent manufacturing and business corporation to enforce the personal liability of stockholders is by suit, and not by motion.—Haskins v. Harding, Case No. 6,196.

A condition that the creditor shall sue the corporation within one year after the debt becomes due is not fulfilled by the commencement of a suit within such time in the state court, in which the creditor took a nonsuit, followed by a suit in the federal court more than a year after the debt fell due.—Haskins v. Harding, Case No. 6,196.

False and fraudulent statements as to the condition of the company and the nonassessability of its stock, inducing its purchase, constitute no defense as against the creditors of the company.—Upton v. Hansbrough, Case No. 16,801.

The limitation of one year does not apply to an action on such liability, under Rev. St. Me. 1857, c. 46, § 24.—McKay v. Hill, Case No. 8,845.

The members of a corporation are not bound in their individual capacity by a recovery in an uncontested suit against it in another state, where they had no notice and opportunity to defend.—Sumner v. Marcy, Case No. 13,609.

A decree against stockholders for a *pro rata* contribution to pay the debts of the company is several, and action will lie thereon against one stockholder.—Bank of Circleville v. Iglehart, Case No. 860.

In a suit by a creditor of a corporation to reach a fund which has been distributed among its stockholders, all the stockholders need not be made parties, the impossibility of bringing all before the court being sufficient to dispense with the ordinary rule of making all persons in interest parties.—Wood v. Dummer, Case No. 17,944.

Where an illegal subscription to stock was made, a bill alleging such subscription should aver the ratification, but an omission is cured by the answer putting the question of ratification in issue.—Putnam v. New Albany, Case No. 11,481.

VI. OFFICERS AND AGENTS.

See, also, post, § 39.

Admissions by officers as evidence, see "Evidence," § 34.

§ 34. Election and qualification.

The regularity of corporate elections and the title to corporate offices may be inquired into by a court of equity, when necessary to complete justice in a pending suit.—Pond v. Vermont Val. R. Co., Case No. 11,264.

An election of officers by minority stockholders, effected by the exclusion of other shareholders by a court having jurisdiction, is legal.—Brown v. Pacific Mail S. S. Co., Case No. 2,025.

The mortgagor of stock is entitled to vote upon it at the election of directors, and a court of equity will enforce such rights.—Vowell v. Thompson, Case No. 17,023.

A corporation which has purchased its own stock cannot vote upon the same in an election of directors by a trustee in whose name it is held.—United States v. Columbian Ins. Co., Case No. 14,840.

Under Code Or. 661, the president or secretary can be elected only by the board of directors.—In re St. Helen Mill Co., Case No. 12,222.

A decision declaring an election of officers illegal and void, is ineffectual until decree entered, and until then their acts are binding though they had notice of the decision.—Anglo-Californian Bank v. Mahoney Min. Co., Case No. 392.

Directors de facto are to be considered, prima facie, as directors de jure.—Rockville & W. Turnpike Road v. Van Ness, Case No. 11,986.

Individual bankruptcy of a stockholder and officer of a corporation does not incapacitate him to act as such, though by-laws require officers to be stockholders.—Atlas Nat. Bank v. F. B. Gardner Co., Case No. 635.

§ 35. Authority and functions.

Special meeting of directors may be called at a place other than the principal office of the corporation, where the place of meeting is not prescribed by the by-laws.—Corbett v. Woodward, Case No. 3,223.

Proceedings of the board of directors at a special meeting not called in the manner prescribed by the by-laws may be subsequently ratified by the corporation.—Samuel v. Holladay, Case No. 12,288.

The president of a corporation cannot sue in his own name for injuries done to him, as such officer, and as a stockholder and creditor.—Donovan v. Dean, Case No. 3,992.

The treasurer of a corporation, having general authority to pay debts and borrow money, may give his consent to a transaction by which a selling agent assumes and pays a debt due another.—Bradley v. Richardson, Case No. 1,786.

A cashier, holding the proceeds of corporate property sold by him, is deemed the agent of the managing board, and not of the stockholders. —Brown v. Adams, Case No. 1,986.

§ 36. Rights, duties, and liabilities as to corporation and its members.

A director will not be allowed to secure to himself, as a creditor, any advantage over other stockholders or creditors, though he acted in ignorance of the affairs of the corporation.—Corbett v. Woodward, Case No. 3,223.

The president of a corporation, who has become liable for a loan to the company, will not be restrained from selling collaterals to reimburse him to the extent of moneys actually received by the company, because he has retained excessive commissions for securing and guarantying such loan.—Trust Co. v. Weed, Case No. 14,207a.

A loan to a corporation by a director thereof, and the giving of a mortgage to secure it, is not within the rule prohibiting a trustee to contract with himself in relation to the trust property.—Miller v. Halsted, Case No. 9,572.

The fact that the money was obtained to pay debts for which the director was security will not invalidate the mortgage.—Miller v. Halsted, Case No. 9,572.

An officer of a corporation embarrassed, and without funds, may, with his own means, purchase its past-due outstanding bonds, and hold them as against the company.—Bradly v. Marine & R. Phosphate Min. & Mfg. Co., Case No. 1,789.

A contract made in behalf of a corporation by officers who have a secret interest therein is fraudulent as against the corporation, and may be repudiated by it, though long acted upon and recognized by the officers who made it.—Wardell v. Union Pac. Ry. Co., Case No. 17,164.

Sufficiency of complaint in action against directors of company in depressing market value of stock inducing plaintiff to sell at a loss.—Weeks v. Ladd, Case No. 17,352; Barker v. Same, Id.; Sanderson v. Same, Id.

When a stockholder will be allowed to file a bill in his own name in behalf of all stockholders, making the corporation a defendant, to compel its officers to account for breach of official duty, or misapplication of corporate fund.—Heath v. Erie Ry. Co., Case No. 6,306.

It is not necessary that directors against whom no relief is asked should be made parties, although the bill prays for an injunction against the corporation and for a receiver.—Heath v. Erie Ry. Co., Case No. 6,306.

Equity has jurisdiction, at the instance of stockholders, to restrain the corporation and its managing officers from acts tending to the destruction of its franchises, from violations of its charter, and prejudicial acts, amounting to a breach of trust.—Pond v. Vermont Val. R. Co., Case No. 11,265.

Where the board of directors are themselves the wrongdoers, or they refuse to prosecute, to restrain, or to redress the wrong, stockholders may file the bill.—Pond v. Vermont Val. R. Co., Case No. 11,265.

In the case of the misapplication by a director of a portion of the corporate funds to which the shareholder has a distinct right, he may recover the amount.—Samuel v. Holladay, Case No. 12,288.

§ 37. Liability for corporate debts and acts.

A creditor of a corporation cannot sue the directors thereof for gross negligence in the management of its affairs.—Clark v. Lawrence, Case No. 2,827.

A director who aids in the passage of a resolution by which he appropriates certain corporate assets to his use is liable to the corporate creditors, as trustee, for their value.—Union Nat. Bank v. Douglass, Case No. 14,375.

Where the charter required the officers annually between the 1st and 20th of January to make and publish a certain report, *held*, that a company incorporated in May was bound to make and publish such report in the following January.—Union Iron Co. v. Pierce, Case No. 14,367.

An action of debt lies to enforce the statutory liability of the directors for the debts of a corporation.—Falconer v. Campbell, Case No. 4,620.

In an action to enforce the statutory liability of the officers for the debt of a corporation, *held*, that its existence was sufficiently stated by way of recital, without a special averment of the incorporation.—Falconer v. Campbell, Case No. 4,620.

VII. CORPORATE POWERS AND LIABILITIES.

§ 38. Extent and exercise of powers in general.

A corporation has power to purchase an invention which would tend to facilitate the purposes of its incorporation, as indicated by its corporate name, even in the absence of any law expressly conferring it.—Dorsey Harvester Revolving Rake Co. v. Marsh, Case No. 4,014.

Every act of incorporation must be construed in such a manner, if possible, as not to exceed the sovereignty of the legislature granting it.—Farnum v. Blackstone Canal Corp., Case No. 4,675.

A charter must be construed according to the intent of the legislature, if such intent can be ascertained by the language used.—Coe v. Pennock, Case No. 2,942.

A corporation is limited to the powers especially conferred upon it.—Knowles v. Beaty, Case No. 7,896.

An act incorporating the proprietors of certain lands, and giving the directors power to levy a tax for the purpose of extinguishing the Indian title, making partition, and to meet "all other necessary expenses of the company," does not authorize a tax to pay state taxes.—Knowles v. Beaty, Case No. 7,896.

A corporation cannot, in general, transfer its franchise; but, where a mortgage of a franchise by a corporation has been recognized as valid by the legislature, it is good between the parties. —Hall v. Sullivan R. Co., Case No. 5,948.

The validity of a transfer of the charter by directors without consent of the stockholders cannot be questioned by the latter where they participated in the company's business under the new management, or made no objection.—Upton v. Jackson, Case No. 16,802.

A grant, by the incorporators and exclusive owners of the stock, of the right to exercise the corporate franchises for the charter term, *held* not unlawful.—Da Ponte v. Louisiana State Lottery Co., Case No. 3,569.

Where a corporation, in payment of a debt, takes its own stock, it has authority to sell the same.—Chillicothe Branch of State Bank of Ohio v. Fox, Case No. 2,683.

A corporation chartered for sawing and manufacturing wood cannot legally invest money

in a bank for the purpose of carrying on the business of banking.—Sumner v. Marcy, Case No. 13,609.

Such corporation cannot buy shares in a banking institution to more than its authorized capital, and bind the corporation or members for the payment of promissory notes given therefor.—Sumner v. Marcy, Case No. 13,609.

A company incorporated by a descriptive name *held* to have the power, independently of special provisions, of purchasing patents relating thereto.—Blanchard's Gun-Stock Turning Factory v. Warner, Case No. 1,521.

The visitorial power given to the trustees of a corporation is an hereditament founded in property, and cannot be taken away by the state law, unless the right be reserved in the original act.—Allen v. McKean, Case No. 229.

§ 39. Representation of corporation by officers and agents.

The acts of directors in the transaction of the corporate business bind the corporate body, and not themselves personally, unless they exceed the limit and scope of the powers granted to the corporation.—Smith v. Poor, Case No. 13,093.

An agreement between parties representing the interests of rival companies to incorporate a new company, and transfer the property of the old companies thereto, and dissolve the latter, is binding upon the parties, though the old companies did not join in a certificate of incorporation of the new.—Consolidated Fruit-Jar Co. v. Whitney, Case No. 3,134.

An obligation given by an officer signing his own name with his official designation may be shown by parol to be the obligation of the corporation.—In re Southern Minnesota R. Co., Case No. 13,188.

Officer of corporation making transfer of stock, under authority of an assignment, acts as agent of assignor, and his laches are not chargeable to corporation.—In re Bachman, Case No. 707.

The overdraft of a bank account by officers of a corporation is ratified by the directors ordering the issuing of the company's note for the amount.—Anglo-Californian Bank v. Mahoney Min. Co., Case No. 392.

If it is necessary on paying money to a corporation to give it notice of the purpose of the payment, the giving of such notice to its treasurer and managing agent at its office is sufficient.—New England Car-Spring Co. v. Union India Rubber Co., Case No. 10,153.

Knowledge of a lien on corporate property by stockholders, prior owners, will not affect the corporation where other stockholders are ignorant.—The Admiral, Case No. 84.

Notice to stockholder, or one afterwards becoming an officer, is not notice to corporation.—The Admiral, Case No. 84.

See, also, ante, § 35.

§ 40. Property and conveyances.

Authority in the charter to acquire and hold property to a certain amount is an implied prohibition against the purchase of property to a greater amount, and invalidates a contract therefor.—Second Nat. Bank v. Grand Lodge of Free & Accepted Masons, Case No. 12,603.

A corporation having power to purchase only such real estate as is required for its business, or mortgaged or conveyed for debts, or purchased on judgments, or obtained on debts, cannot, on a foreclosure sale of a prior mortgage, acquire title to that portion of the tract of land not included in its mortgage.—Russell v. Topping, Case No. 12,163.

An unrestricted charter power to make a grant or concession enables the corporation to make it on conditions.—New York & N. H. R. Co. v. New York, Case No. 10,199.

No consent of stockholders is necessary to the mortgaging of personal property or the assignment of patents by a New York manufacturing corporation.—Moran v. Strauss, Case No. 9,787.

The giving of a mortgage by one who, as agent for a corporation, purchased real estate in his own name for the purpose of evading the statute prohibiting the mortgage of real estate by a corporation (Act N. Y. Feb. 17, 1848, § 2), is in violation of the statute.—Cox v. Gould, Case No. 3,301.

Authority to mortgage the corporate franchises cannot be implied where express authority has been given to mortgage real estate.—Randolph v. Wilmington & R. R. Co., Case No. 11,563.

The power to execute a mortgage of real estate by the officers can only be conferred by vote of the directors acting as a board.—In re St. Helen Mill Co., Case No. 12,222.

The only evidence of such vote is the official record of the corporation.—In re St. Helen Mill Co., Case No. 12,222.

A corporation organized under Act Ill. Feb. 18, 1857, has the power to mortgage its property.—Gaytes v. Lewis, Case No. 5,288.

A corporation cannot execute a deed or mortgage otherwise than under its seal.—In re St. Helen Mill Co., Case No. 12,222.

A power given to the directors to sell the property of the company, or notes and bonds belonging to it, does not apply to the capital stock.—Sturges v. Stetson, Case No. 13,568.

The seal of a corporation, together with the signatures of its proper officers, raises a presumption that the deed was made with proper authority from the corporation.—Mickey v. Stratton, Case No. 9,530.

A vote by directors of a corporation authorizing its officers to make a lease of its property does not compel them to take such action, and confers no rights upon the prospective lessee.—Pond v. Vermont Val. R. Co., Case No. 11,264.

A deed to a corporation of land which it is prohibited by its charter from taking is absolutely void as to all persons.—Russell v. Topping, Case No. 12,163.

§ 41. Contracts and indebtedness—Capacity to contract in general.

A contract for the issue of stock at less than the charter price is not enforceable.—Sturges v. Stetson, Case No. 13,568.

The presumption in favor of the validity of a contract by a corporation only arises where power to contract appears from its charter or the laws of the state.—Toppan v. Cleveland, C. & C. R. Co., Case No. 14,099.

A corporation may make a valid contract with its president increasing the rate of interest upon its own past-due bond, held by him, the contract being a fair and equitable one.—Bradly v. Marine & River Phosphate Min. & Mfg. Co., Case No. 1,789.

Public laws limiting corporate powers are notice as well to persons out of the state where the laws were passed as to those within it.—Root v. Godard, Case No. 12,037; Same v. Wallace, Id. 12,039.

§ 42. —— Contracts before incorporation or organization.

A contract entered into with the incorporators for the company before its incorporation, but not perfected until afterwards, is in effect a contract with the company.—Bank of United States v. Lyman, Case No. 924.

Resolutions of directors, authorizing a lease of the corporation's property, which have never

been drawn in question by the board, are valid, although they precede the completion of the organization by filing the articles of association with the proper state officer.—Pond v. Vermont Val. R. Co., Case No. 11,264.

§ 43. —— Contracts of employment.

An agreement by a corporation to indemnify an agent against all liability by reason of a transaction in evasion of the statute is void as against an innocent stockholder.—Cox v. Gould, Case No. 3,301.

§ 44. —— Borrowing and loaning money.

Power to borrow is implied in the creation of all business corporations.—Branch v. Atlantic & G. R. Co., Case No. 1,807.

A corporation may borrow money, or deal in credits, or become a party to negotiable paper, in the transaction of its legitimate business, unless expressly prohibited.—Humphreyville Copper Co. v. Sterling, Case No. 6,872.

§ 45. —— Negotiable instruments.

A corporation has power to make commercial notes, without express authority.—In re Hercules Mut. Life Assur. Soc., Case No. 6,402.

Informality in a transfer of a note from a corporation to a bona fide holder *held* to be cured by a written indorsement of the note, before maturity, by the president with the consent of the directors.—Cooper v. Laber, Case No. 3,198.

The authority of an officer to sign and indorse promissory notes for the company does not imply authority to sign or indorse notes for the accommodation of third persons.—In re Wrentham Mfg. Co., Case No. 18,063; Ex parte Southwick, Id.

An indorsement of a note by the president of a corporation to a director will not pass title where the by-laws require indorsement by the secretary.—Leavitt v. Connecticut Peat Co., Case No. 8,170.

Notes of a corporation given in payment of unearned dividends *held* void in the hands of the stockholder receiving them.—McKay v. Hill, Case No. 8,845.

A corporation may be bound by promissory notes issued by its treasurer in accordance with a usage, as well as by express authority.—In re Great Western Tel. Co., Case No. 5,740.

Notes given by a corporation in violation of law are void, even in the hands of a bona fide holder.—Root v. Godard, Case No. 12,037; Same v. Wallace, Id. 12,039.

Trading corporations may, independently of statute, issue negotiable paper in the course of their business.—Bayerque v. San Francisco, Case No. 1,137.

The presumption is in favor of the validity of negotiable paper of a corporation, signed by its financial officer.—In re Great Western Tel. Co., Case No. 5,740.

A manufacturing corporation is not liable upon a note or evidence of indebtedness indorsed by an officer for the accommodation of a third person.—In re Wrentham Mfg. Co., Case No. 18,063; Ex parte Southwick, Id.

§ 46. —— Bonds and mortgages.

The issuing by the directors of a bond convertible into stock is the same in effect as the sale of so much stock, and the sale of such a bond at a discount is unlawful and void.—Sturges v. Stetson, Case No. 13,568.

An agreement by a corporation to prefer its bondholders in the disposition of one-half the proceeds of its lands, which may be sold before the bonds are due, gives the bondholders no lien on them.—Newby v. Oregon Cent. Ry. Co., Case No. 10,144.

§ 47. —— Liabilities on contracts and securities ultra vires.

Where an investment in stock by a corporation was ultra vires, the corporation will not be held liable as a stockholder.—Wilbur v. Stockholders, Case No. 17,636.

Where a corporation has acted under a contract, and received the benefits arising under it, it is not competent for it to deny its validity as being "ultra vires."—Dimpfel v. Ohio & M. Ry. Co., Case No. 3,918.

§ 48. Civil actions—Capacity to sue and be sued in general.

See, also, ante, §§ 27–31.

Effect of expiration of charter on pending suits, see "Abatement and Revival," § 3.

Removal of action by or against, see "Removal of Causes," §§ 3, 11, 15.

A creditor of a corporation may maintain a bill to prevent an injury to the corporation, without affirmatively showing that the corporation has refused to take measures to protect itself.—Lothrop v. Stedman, Case No. 8,519.

When the legislature creates a corporation, it may also prescribe what remedies shall be used against it, and such remedies then become exclusive.—In re Manufacturers' Nat. Bank, Case No. 9,051.

§ 49. —— Jurisdiction.

Jurisdiction of actions by and against as dependent upon citizenship, see "Courts," § 50.

A corporation can be sued only in the state where its business is done.—Northern Indiana R. Co. v. Michigan Cent. R. Co., Case No. 10,321.

Jurisdiction of corporations attaches from the place where their business is done.—French v. Lafayette Ins. Co., Case No. 5,102.

Where it appears from the face of the charter of a corporation that its business is to be transacted within the state, it is sufficient to sustain the jurisdiction of the court.—Vallette v. Whitewater Valley Canal Co., Case No. 16,820.

A company incorporated by the laws of two states to improve the navigation of a river constituting a boundary between them may be sued in the state where it has its general place of business.—Culbertson v. Wabash Nav. Co., Case No. 3,464.

A suit against a corporation created by a state having more than one district may be brought in any district therein.—Locomotive Engine Safety Truck Co. v. Erie Ry. Co., Case No. 8,452.

A corporation cannot be made a party to a civil suit in a circuit or district court, by original process, in any other district than a district of the state by which it was created.—Myers v. Dorr, Case No. 9,988.

§ 50. —— Use of corporate name.

Corporation may sue under its corporate name and style, and not necessarily by attorney.—Bank of United States v. Roberts, Case No. 934.

A corporation may sue in the name of its president as a citizen.—Dinsmore v. Maroney, Case No. 3,920.

Corporate rights and interests, wrongfully affected must be asserted and defended, both at law and in equity, in the corporate name.—Bradley v. Richardson, Case No. 1,786.

§ 51. —— Parties.

A company for whom its stockholders ask an accounting against another company is a necessary party defendant.—Arapahoe County v. Kansas Pac. Ry. Co., Case No. 502.

In the case of a bill against a corporation, to account for certain property held by them, as collateral security for debts due them from a

third person, and to apply the surplus, after satisfying themselves, to the plaintiff's debt, the debtor is a necessary party to the bill.—Wilson v. City Bank, Case No. 17,797.

§ 52. —— Process and service.

A corporation cannot be served with process outside of the state where it was created.—Hume v. Pittsburgh, C. & St. L. R. Co., Case No. 6,865.

The court acquires jurisdiction over a defendant corporation by service of its subpœna upon the superintendent and general managing agent within the district.—Thornburgh v. Savage Min. Co., Case No. 13,986.

Service upon duly-authorized officer of corporation is good though fraudulently concealed by him.—Allen v. Dallas & W. R. Co., Case No. 221.

Service of notice on clerk of corporation, as directed by president and directors, *held* sufficient.—Davidson v. Donovan, Case No. 3,603.

Service upon a corporation of process from a federal court must be made under the United States, and not the state, statute.—Hume v. Pittsburgh, C. & St. L. R. Co., Case No. 6,865.

§ 52a. —— Appointment of receivers.

Receiver will be appointed at suit of creditors of corporation where its assignee's conduct is improper and prejudicial to their rights.—Bell v. Ohio Life Ins. Co., Case No. 1,261.

§ 53. —— Defenses.

Subscribers to stock upon which payments are due, made defendants with the company in a suit by a creditor, may set up the defense that the certificate of incorporation is a nullity, for want of seals annexed to the names of the incorporators.—Griffin v. Clinton Line Extension R. Co., Case No. 5,816.

The court will not inquire as to the legal capacity of a corporation which holds property in its possession, at the instance of defendants in an action for injuries thereto.—Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., Case No. 2,989.

Violations of a charter of incorporation cannot be collaterally drawn in question on a sci. fa. issued on behalf of the state to show cause why defendant's rights to certain land grants from the British crown should not be forfeited.—Vermont v. Society for Propagation of the Gospel, Case No. 16,919.

In a suit by a corporation, defendant cannot raise the objection that the corporation had forfeited its rights by nonuser before the suit was commenced.—Kanawha Coal Co. v. Kanawha & O. Coal Co., Case No. 7,606.

A person who has taken a loan from a corporation, made in violation of its charter, or his surety, cannot set up in defense the want of power in the company to make the loan.—Mutual Life Ins. Co. v. Wilcox, Case No. 9,980.

See, also, ante, § 11.

§ 54. —— Limitations.

Virginia limitations act of 1819 applies to corporations.—Bank of United States v. McKenzie, Case No. 927.

§ 55. —— Appearance.

A corporation does not waive an objection to jurisdiction by appearing and pleading, by attorney, to the jurisdiction.—Decker v. New York Belting & Packing Co., Case No. 3,727; Cadle v. Tracy, Id. 2,279.

A general appearance estops the corporation from afterwards insisting that the court never acquired jurisdiction over it, because process was not served in the district in which it was an inhabitant.—Kelsey v. Pennsylvania R. Co., Case No. 7,679.

§ 56. —— Pleading.

By pleading to the merits, defendant admits the capacity of the corporation plaintiff to sue.—Goodyear v. Blake, Case No. 5,560.

A corporation must answer under its common seal, and not on oath.—French v. First Nat. Bank, Case No. 5,099.

Where the officers of a corporation are not parties to a suit against it, they cannot be compelled to answer the interrogatories, but the bill may be amended to obtain a discovery from them.—French v. First Nat. Bank, Case No. 5,099.

The corporation is not required to answer interrogatories, where the bill requires its president, cashier, and agent to answer.—French v. First Nat. Bank, Case No. 5,099.

The general issue pleaded to a suit by a corporation admits corporate existence.—Dental Vulcanite Co. v. Wetherbee, Case No. 3,810.

A bill against a corporation and its officers, alleging malfeasance, etc., and praying dissolution, may be amended, as to the prayer, so as to prevent a continuance of the breach of trust, and to compel an account.—Hardon v. Newton, Case No. 6,054.

§ 57. —— Evidence.

Where the due organization of a company is disputed, the record of the organization, and not the oath of one of its officers, is the best evidence.—Warner v. Daniels, Case No. 17,181.

See, also, ante, § 10.

§ 58. —— Judgment.

A judgment against a corporation in a suit of which it had no notice is not binding on it in another state in which the corporation was domiciled.—Sumner v. Marcy, Case No. 13,609.

§ 59. —— Execution.

The preliminaries required by Act Pa. 1836, § 75, for a levy on corporate property, are still essential to the validity of a levy under Act Pa. 1870.—Fox v. Hempfield R. Co., Case No. 5,011.

§ 60. —— Review.

The order for an appeal by a corporation need not be under its corporate seal.—Washington v. Eaton, Case No. 17,228.

§ 61. —— Costs.

A New York corporation having its principal office in the Southern district of New York must give security for costs when it sues in the Northern district of New York.—Lyman Ventilating & Refrigerator Co. v. Southard, Case No. 8,633.

§ 62. Crimes.

A corporation is liable to indictment for the act of its officer or employé in issuing papers unstamped with intent to evade the stamp duty.—United States v. Baltimore & O. R. Co., Case No. 14,509.

VIII. INSOLVENCY AND RECEIVERS.

See, also, post, § 69.

Bankruptcy of corporation, see "Bankruptcy," §§ 12, 32, 44.

§ 63. What constitutes corporate insolvency.

Temporary embarrassment is not "insolvency," within Act N. J. April 15, 1846, § 2, prohibiting insolvent corporations from making contracts.—Miller v. Halsted, Case No. 9,572.

§ 64. Conveyances to officers or stockholders in payment of debts.

Deed by corporation to its directors is void as against creditors of corporation.—Cleveland v. La Crosse & M. R. Co., Case No. 2,887.

The directors of an insolvent corporation will not be allowed to secure a preference over other

creditors.—Bradley v. Converse, Case No. 1,776; Same v. Farwell, Id. 1,779.

§ 65. Enforcement of liabilities of officers and stockholders.

The ordering of an assessment against the stockholders of an insolvent corporation is not essential to the existence of their obligation to pay the capital.—Wilbur v. Stockholders, Case No. 17,636.

In the ordinary case of a solvent private corporation, there is no liability of the stockholders to pay the capital until an assessment, but, in the case of insolvency, payment is compellable at the suit of the creditors, though no assessment may have been made.—Wilbur v. Stockholders, Case No. 17,636.

§ 66. Actions by receiver.

A corporation *held* a necessary party to a suit by its receiver to compel satisfaction of a decree against persons holding possession of its property as security.—Brigham v. Luddington, Case No. 1,874.

§ 67. Payment and distribution.

A court of law cannot inquire into the right of a stockholder to a distributive share in the assets remaining after adjustment of the corporate affairs.—Brown v. Adams, Case No. 1,986.

IX. CONSOLIDATION.

§ 68. Assent of stockholders.

The failure of a director to object to the adoption by the board of a resolution of consolidation at a meeting at which he was present, where such resolution was merely preliminary to submitting the question to a vote of the stockholders, will not estop him from subsequently objecting to such consolidation.—Mowrey v. Indianapolis & C. R. Co., Case No. 9,891.

X. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 69. Insolvency or nonpayment of debts.

The fact that a corporation is insolvent will not authorize it to apply for a receiver to wind up its affairs.—Hugh v. McRae, Case No. 6,840.

§ 70. Suspension of business.

A corporation does not cease to exist by ceasing to do business and distributing its assets and debts to the stockholders.—Bradley v. McKee, Case No. 1,784.

Under a statute declaring that, if any corporation shall neglect to carry on its business for six months, its corporate powers shall cease, such neglect does not terminate the existence of the corporation as by lapse of time, but it is only a cause of forfeiture of which the state may take advantage.—Wallamet Falls Canal & Lock Co. v. Kittridge, Case No. 17,105.

§ 71. Dissensions as to management.

A plea, to a suit against the officers and the corporation for dissolution for malfeasance, that by the statutes of the state a court of equity could dissolve a corporation only under certain specified circumstances, which did not exist in this case, *held* good.—Hardon v. Newton, Case No. 6,054.

§ 72. Jurisdiction of proceedings.

The facts essential to the exercise of jurisdiction in proceedings for the voluntary dissolution of corporations, under 2 Rev. St. N. Y. 466, must appear upon the record of the court, to sustain a decree of dissolution.—In re Pensacola Lumber Co., Case No. 10,959.

§ 73. Proceedings for voluntary dissolution.

A vote of the stockholders authorizing a dissolution does not of itself dissolve the corporation, nor compel the directors to do so, but the act of dissolution must proceed from the directors who alone can exercise the corporate powers.—Wallamet Falls Canal & Lock Co. v. Kittridge, Case No. 17,105.

Proceedings for the voluntary dissolution of a corporation under 2 Rev. St. N. Y. pp. 467, 468, are invalid without the entry of the order to show cause.—Freeman's Nat. Bank v. Smith, Case No. 5,089.

§ 74. Proceedings to enforce dissolution.

A bankruptcy act does not furnish the sole remedy for winding up insolvent corporations.—Chandler v. Siddle, Case No. 2,594.

A franchise will not be forfeited on the application of individuals; the right belongs to the state alone.—Gaylord v. Ft. Wayne, M. & C. R. Co., Case No. 5,284.

But if a bill prays for a receiver and general relief, the court will retain the bill for that purpose.—Gaylord v. Ft. Wayne, M. & C. R. Co., Case No. 5,284.

§ 75. Collection of assets.

A vote of the directors declaring the corporation dissolved only operates to prevent it from engaging in new business, and the corporation continues to exist for the purpose of collecting and distributing its assets and winding up its affairs.—Wallamet Falls Canal & Lock Co. v. Kittredge, Cases Nos. 17,104, 17,105.

The authority of directors to dissolve the corporation given by the majority stockholders under a statutory power to authorize the dissolution of the corporation, and the settling of its business and disposition of its property, and dividing of its capital stock, carries with it the incidental power to collect and distribute its assets and wind up its affairs.—Wallamet Falls Canal & Lock Co. v. Kittredge, Cases Nos. 17,104, 17,105.

XI. FOREIGN CORPORATIONS.

§ 76. Status in general.

A corporate body created by a sister state can have no corporate existence beyond the limits of the territory of that state.—Day v. Newark India-Rubber Mfg. Co., Case No. 3,685.

§ 77. What are foreign corporations.

A foreign corporation becomes a domestic corporation by having its charter duplicated by the state legislature.—Blackburn v. Selma, M. & M. R. Co., Case No. 1,467.

Act Ala. Jan. 7, 1850, "To incorporate the Memphis and Charleston Railroad Company," domesticates such corporation.—Copeland v. Memphis & C. R. Co., Case No. 3,209.

§ 78. Application of constitutional provisions.

A state law imposing a special rate of interest upon judgments against foreign corporations is not repugnant to article 4, § 2, as a corporation is not a citizen within that section.—Berry v. Mobile Life Ins. Co., Case No. 1,358.

§ 79. Power to exclude, restrict, or regulate.

A state may impose such reasonable regulations as it sees fit as a condition of allowing foreign corporations to do business therein.—Lamb v. Lamb, Case No. 8,018.

A corporate body may exercise its functions in a foreign territory upon such conditions as the laws thereof prescribe.—Knott v. Southern Life Ins. Co., Case No. 7,894.

§ 80. Enabling acts in general.

A state may, without thereby creating a new corporation, authorize a corporation of another state to carry on business within its territory.—Copeland v. Memphis & C. R. Co., Case No. 3,209.

A corporation created by the state of Virginia, before the erection of the state of West Virginia, continued to be a corporation of the former state until its compliance with Act W. Va. Oct. 26, 1863.—Kanawha Coal Co. v. Kanawha & O. Coal Co., Case No. 7,606.

A statute provision requiring foreign corporations to file a copy of their charters within 30 days after commencing business, and providing a penalty against the officers for failure so to do, does not make such filing a condition to continuing business.—Northwestern Mut. Life Ins. Co. v. Overholt, Case No. 10,338.

§ 81. Designation of agent for service of process.

A state may require that a foreign corporation, as a condition of doing business in the state, shall designate an agent therein to receive service of process in suits founded upon its contracts. —French v. Lafayette Ins. Co., Case No. 5,102.

All acts of a foreign corporation done in Oregon, without first appointing a resident agent upon whom process may be served in actions against it, as required by law, are void.—Semple v. Bank of British Columbia, Case No. 12,659.

A foreign corporation failing to comply with a state statute providing that, before doing business in the state, it must appoint an agent upon whom process may be served, has no power to contract or sue in the state, and its acts therein are illegal and void.—In re Comstock, Case No. 3,078.

The doctrine of estoppel cannot be invoked against a person contracting with such corporation.—In re Comstock, Case No. 3,078.

Provisions of the Oregon Code in relation to foreign corporations.—Semple v. Bank of British Columbia, Case No. 12,659.

§ 82. Meeting of officers.

Minutes of the meeting of directors of a foreign corporation, held abroad, *held* inadmissible to charge a nonresident director, not present, with knowledge of what transpired at such meeting.—Emma Silver Min. Co. v. Park, Case No. 4,467.

§ 83. Acquiring, holding, and conveying property in general.

A foreign corporation has the right to hold and occupy, as lessee or otherwise, such property as is necessary or convenient for the transaction of its business.—Northern Transp. Co. v. Chicago, Case No. 10,324.

A corporation of another state may, on the ground of comity, hold lands taken in payment of, or as security for, a debt.—New York Dry Dock v. Hicks, Case No. 10,204.

A foreign corporation engaged in the business of reducing ores may purchase more land for the erection of its works than that required at the time, and may subsequently sell the parts not needed.—St. Louis Smelting & Refining Co. v. Kemp, Case No. 12,239a.

§ 84. Contracts.

The soliciting of subscriptions to the capital stock of a foreign corporation is not an act or agreement intended to be rendered inoperative by Act Ind. June 17, 1852, requiring certain acts as a condition of doing business in the state—Payson v. Withers, Case No. 10,864.

A contract of loan by a foreign corporation with an inhabitant of Oregon, made through a resident agent, subject to approval at the home office, is made in Oregon, and is void if the corporation has not complied with the state laws in relation to doing business therein.—Oregon & W. Trust Inv. Co. v. Rathburn, Case No. 10,554.

§ 85. Actions by or against.

A corporation of one state may maintain an action in the courts of another state.—Insurance Co. v. The C. D., Jr., Case No. 7,051; Clarke v. New Jersey Steam Nav. Co., Id. 2,859; National Park Bank v. Nichols, Id. 10,048; Society for Propagation of the Gospel v. Wheeler, Id. 13,156.

At common law the property of a foreign corporation cannot be attached to compel its appearance.—Clarke v. New Jersey Steam Nav. Co., Case No. 2,859.

Jurisdiction cannot be obtained of a foreign corporation by attaching goods in a store conducted by its agents within the district, and service of summons on its president within the district.—Day v. Newark India-Rubber Mfg. Co., Case No. 3,685.

The district courts as courts of admiralty may issue attachment against the property of foreign corporations found within their local jurisdiction.—Clarke v. New Jersey Steam Nav. Co., Case No. 2,859.

A state statute, requiring foreign corporations to file an agreement for accepting service within the state, applies to process from federal courts. —Knott v. Southern Life Ins. Co., Case No. 7,894; Schollenberger v. Forty-Five Foreign Insurance Companies, Id. 12,475a.

A corporation of one state doing business in another, under a statute requiring the appointment of an agent upon whom service may be made, may be "found" in the latter state, within the meaning of Rev. St. § 629.—Fonda v. British-American Assur. Co., Case No. 4,904; Knott v. Southern Life Ins. Co., Id. 7,894; Schollenberger v. Forty-Five Foreign Insurance Companies, Id. 12,475a; Stillwell v. Empire Fire Ins. Co., Id. 13,449; Williams v. Empire Transp. Co., Case No. 17,720. CONTRA, see Decker v. New York Belting & Packing Co., Case No. 3,727; Dallmeyer v. Farmers', Merchants' & Manufacturers' Fire Ins. Co., Id. 3,546; Day v. Newark India-Rubber Mfg. Co., Id. 3,685; Leonard v. Lycoming Fire Ins. Co., Id. 8,258. But, see Lee v. Ætna Ins. Co., Case No. 8,181; Pomeroy v. New York & N. H. R. Co., Id. 11,261; Southern & A. Tel. Co. v. New Orleans, M. & T. R. Co., Id. 13,185.

A foreign corporation doing business in a state is liable to be sued there in the federal court, though there be no express provision of statute in regard to service. Such corporation is to be "found" there within the meaning of the Revised Statutes.—Wilson Packing Co. v. Hunter, Case No. 17,852; Sayles v. Erie Ry. Co., Id. 12,418; Cummings v. Grand Trunk Ry. Co., Id. 3,475.

A Canadian railroad corporation must be considered as being within the state, and subject to the jurisdiction of the federal court at the suit of a citizen of the district, by operating a railroad therein under a lease ratified by the legislature.—Cummings v. Grand Trunk Ry. Co., Case No. 3,475.

In a suit for infringement of a patent against a foreign corporation, process may be served on an agent within the district, although the business transacted therein has no connection with the infringement.—Sayles v. Grand Trunk Ry. Co., Case No. 12,419.

A corporation of a foreign country, though having an office and transacting business in this country, will be considered an alien.—Petrocokino v. Stuart, Case No. 11,041.

In a bill against a foreign corporation by a judgment creditor for a sequestration of its property and the appointment of a receiver with power to collect unpaid subscriptions to stock, it is a sufficient statement of the amount of such unpaid subscriptions to state that they are more than sufficient to pay the judgment.—Winans v. McKean R. & Nav. Co., Case No. 17,862.

The fact that such corporation has no property in the district, and no property anywhere

but the demands for such unpaid subscriptions, is no objection to the jurisdiction of the court, and no defense to such suit.—Winans v. McKean R. & Nav. Co., Case No. 17,862.

Code Proc. N. Y. § 100, construed with reference to its applicability to foreign corporations.—Blossburg & C. R. Co. v. Tioga R. Co., Case No. 1,563.

CORRECTION.

Of deposition, see "Depositions," § 32.
Of irregularities at trial, see "Trial," § 25.
Of judgment, see "Judgment," §§ 25–34.
Of patent, see "Patents," § 95.
Of records, see "Courts," § 9.
Of survey, see "Public Lands," § 99.

COSTS.

§ 1, Nature and extent of right to costs—In general. § 2, —— What law governs. § 3, —— As dependent on amount of recovery or jurisdiction. § 4, —— On dismissal, continuance, or overruling demurrer. § 5, —— On removal of cause. § 6, —— After tender. § 7, Security for payment—When security may be required. § 8, —— Time of application. § 9, —— Sufficiency. § 10, —— Action or defense in forma pauperis. § 11, —— Cost bond. § 12, Amount in general. § 13, Items—Fee bill of 1853. § 14, —— Expenses of parties for travel and attendance. § 15, —— Witness fees and mileage. § 16, —— Attorneys' fees. § 17, —— Docket fees. § 18, —— Fees for depositions. § 19, —— Printing, copying, and translating. § 20, —— Telegraphing. § 21, —— Stenographer. § 22, —— Procuring bail. § 23, —— Discovery. § 24, —— Commissions of clerk and marshal. § 25, Taxation. § 26, On appeal and error. § 27, Payment and remedies for collection. § 28, Criminal prosecutions.

Effect of discharge in insolvency, see "Insolvency," § 15.
Element of damages, see "Damages," § 6.
Failure to give security or pay costs as ground of continuance, see "Continuance," § 11.
Liability of executor for costs, see "Executors and Administrators," § 62.
Priority, see "Bankruptcy," § 435.
Proof in bankruptcy, see "Bankruptcy," §§ 389–391.

In actions by or against particular classes of parties.

See "Corporations," § 61; "Executors and Administrators," § 54; "Municipal Corporations," § 44.

In particular actions or proceedings.

See "Bankruptcy," §§ 640–671; "Covenant, Action of," § 6; "Discovery," § 7; "Ejectment," § 16; "Libel and Slander," § 23; "Mandamus," § 8.
Accounting, see "Executors and Administrators," § 69.
Forfeiture proceedings, see "Internal Revenue," § 90.
For infringement of patent, see "Patents," §§ 120, 211, 265.
For penalties, see "Penalties," § 10.
In admiralty, see "Admiralty," §§ 127–152; "Collision," § 160; "Salvage," § 76; "Seamen," § 143.
Prize proceedings, see "War," § 67.
Proceedings to limit liability of vessel owners, see "Shipping," § 253.
To recover back duties or charges paid, see "Customs Duties," § 73.

§ 1. Nature and extent of right to costs—In general.

In suits at common law, costs can only be awarded as authorized by statute.—Coggill v. Lawrence, Case No. 2,957.

As to the allowance of costs in the federal courts prior to the fee bill of 1853, see Costs, Fees, and Compensations in Prize Cases, Case No. 18,283.

The common law gave costs in no case, and the statute of Gloucester gave them only where damages were recoverable before the statute.—Kneass v. Schuylkill Bank, Case No. 7,876.

Costs in equity are given to the prevailing party, except where such a course would be inequitable.—Hunter v. Marlboro, Case No. 6,908.

Costs are not usually allowed to the prevailing party where the district and circuit judges sitting together differ.—Veazie v. Williams, Case No. 16,907.

The right of the prevailing party to costs is recognized by the rules of the supreme court and acts of congress.—Hathaway v. Roach, Case No. 6,213.

The rules for the guidance of the court in allowing or disallowing costs in equity stated by Woodbury, J.—Hovey v. Stevens, Case No. 6,746.

Where an injunction is refused, but the plaintiff still has a right to proceed at law if the plaintiff stipulate not to proceed at law, costs will not be awarded to either party.—Webb v. Bowers, Case No. 17,319.

§ 2. —— What law governs.

Under Judiciary Act 1789, § 34, the rights of the parties to costs will be settled by the laws of the state, when not specially provided for by congress.—Hathaway v. Roach, Case No. 6,213.

§ 3. —— As dependent on amount of recovery or jurisdiction.

No costs allowed where recovery was less than $500.—Cottle v. Payne, Case No. 3,268; Curranee v. McQueen, Id. 3,488; Greene v. Bateman, Id. 5,762; Leeds v. Cameron, Id. 8,206.

Plaintiffs in a cause removed to the federal court *held* not entitled to costs, where the recovery was less than $500, but should not pay costs. Act March 3, 1875, § 6; Rev. St. § 968.—Brooks v. Phœnix Mut. Life Ins. Co., Case No. 1,960.

A small undisputed claim, which has never been demanded, cannot be tacked to a contested claim so as to recover costs on the latter.—The Swallow, Case No. 13,664.

If the court had jurisdiction of the cause when the action was commenced, the repeal of the law which gave the jurisdiction will not affect plaintiff's right to costs.—Walker v. Smith, Case No. 17,087.

§ 4. —— On dismissal, continuance, or overruling demurrer.

Not allowed if action is dismissed for want of jurisdiction.—Bank of Cumberland v. Willis, Case No. 885; Burnham v. Rangeley, Id. 2,177.

Costs in equity are in the sound discretion of the court; but in the ordinary course of practice, when a bill is dismissed, they are not awarded to plaintiff.—Brooks v. Byam, Case No. 1,949.

Defendant is not entitled to costs where a bill is dismissed upon the merits because plaintiff failed to show sufficient title, where a demurrer might have been put in.—Brooks v. Byam, Case No. 1,949.

The party obtaining a continuance must pay the costs of the term.—Patton v. Blackwell, Case No. 10,831.

In what cases costs may be taxed for motions to postpone the hearing of a cause called in its order on the calendar.—Manchester v. Milne, Case No. 9,007.

In what cases costs may be taxed upon motions to enlarge time to answer, for a final de-

cree, for costs, for a reference, etc.—Manchester v. Milne, Case No. 9,007.

Where a juror is withdrawn on motion of plaintiff and consent of defendant, who elects a continuance of the cause, he is not entitled to costs also.—Macomber v. Clarke, Case No. 8,918.

Respondent *held* entitled to costs where he was called to defend a suit because of an omission in the record by the clerk, which was corrected pending the suit.—Gilman v. Libbey, Case No. 5,445.

Costs must share the fate of the principal debt.—Emmons v. Sladdin, Case No. 4,470.

Where a demurrer to a bill is overruled in part and sustained in part, costs not allowed to either party.—McGuire v. Briscoe, Case No. 8,813a.

§ 5. —— On removal of cause.

A suit removed from the state court to the federal court comes into the latter court impressed with all the rights and liabilities of the parties as to costs which accrued or attached by the laws of the state, while the suit remained in the state courts.—Wolf v. Connecticut Mut. Life Ins. Co., Case No. 17,924.

The acts of congress in relation to costs in such cases apply only to costs accruing after the removal.—Wolf v. Connecticut Mut. Life Ins. Co., Case No. 17,924.

A party after the removal is not entitled to any costs, except such as are taxable under Rev. St. §§ 823, 824, though such items would have been taxable in his favor in the state court.—Clare v. National City Bank, Case No. 2,793.

Plaintiff, after removal of a cause from the state to the federal court, is entitled to costs if successful, if given by the state law, though the recovery be less than $500, which would have prevented his recovering costs under Rev. St. § 968, had the suit been originally begun in the federal court.—Ellis v. Jarvis, Case No. 4,403; Field v. Schell, Id. 4,771; Howard v. American Dairy & Commercial Co., Id. 6,753; Scripps v. Campbell, Id. 12,562. CONTRA, see Coggill v. Lawrence, Case No. 2,957.

§ 6. —— After tender.

Tender made before suit brought, and not repeated in court, does not bar costs.—Bounty v. Kerrin, Case No. 1,697a.

A tender after suit brought is only effectual to stop costs from the time it is made.—Leitch v. Union R. Transp. Co., Case No. 8,224.

An offer to pay wages at the owner's counting house, and a refusal to pay elsewhere, does not exonerate him from costs.—The Sarah Jane, Case No. 12,348.

A mere attempt to negotiate a compromise of a claim at an amount specified, unaccompanied with a tender or direct offer to pay such amount, does not operate as an equitable bar to costs.—The H. B. Foster, Case No. 6,290.

§ 7. Security for payment—When security may be required.

A corporation aggregate, whose president and treasurer reside in this district, cannot be compelled to give security for costs, as being nonresident plaintiffs.—Potomac Co. v. Gilman, Case No. 11,317.

The law of Maryland respecting security for costs and fees does not apply to suits in equity.—Ray v. Law, Case No. 11,591.

A resident of Alexandria suing in Washington must give security for costs.—Lovering v. Heard, Case No. 8,554.

If the plaintiff has not a domicile in the district, he may be ruled to give security for costs.—Duane v. Rind, Case No. 4,106.

Plaintiff will be required to give security where he is a nonresident, and the use plaintiff has removed from the district.—Roberts v. Reintzell, Case No. 11,911.

Defendant may require security for costs from a plaintiff who has removed from the district since the commencement of the action.—McCutchen v. Hilleary, Case No. 8,742.

Upon the death of the resident member of plaintiff firm, defendant may demand security for costs.—Lambert v. Smith, Case No. 8,027.

After rule obtained to give security for costs, nonresidence of plaintiff will be presumed at a subsequent term.—Furlong v. Coleman, Case No. 5,161.

A third person claiming property seized on execution has the burden of proof, where an interpleader is directed, and he cannot require the plaintiff in execution, though a nonresident, to give security for costs.—Gross & P. Mfg. Co. v. Gerhard, Case No. 5,843.

After the term at which a rule was laid upon the plaintiff to give security for fees, the clerk, upon a motion for judgment on the rule, need not prove the plaintiff to be a nonresident.—Devigny v. Moore, Case No. 3,838.

A corporation aggregate, whose president and treasurer reside within the District of Columbia, cannot be compelled to give security for costs as nonresidents.—Prince v. United States, Case No. 11,425.

A rule security for fees is not of itself a sufficient ground for a rule security for costs.—Brohawn v. Van Ness, Case No. 1,920.

On the death of plaintiff's surety for costs in sci. fa., pending the suit, new security will be required on motion, although the administrator of the former security has assets.—Duvall v. Wright, Case No. 4,212.

Where a person who has given security for costs as a nonresident has moved within the jurisdiction, the rule for security will be stricken off on motion.—Nicholls v. Johns, Case No. 10,232.

§ 8. —— Time of application.

Security for costs may be given at any time before judgment on the rule.—Reverez v. Camellos, Case No. 11,717.

Security for costs in the case of a nonresident plaintiff may be required at the trial term, in default of which a continuance will be granted.—Thomas v. Woodhouse, Case No. 13,917.

Defendant for whom suit was opened after hearing as a matter of favor cannot move for security for costs on the ground of nonresidence, appearing on the face of the bill.—Bliss v. Brooklyn, Case No. 1,545.

A complainant, residing in another state, but in the same circuit, cannot be required to furnish security for costs, except at the first term.—Foster v. Swasey, Case No. 4,984.

§ 9. —— Sufficiency.

Security for costs cannot be given in the clerk's office.—Offutt v. Parrott, Case No. 10,452.

The court will not permit the plaintiff, who is a trustee merely, to become non pros. where the cestui que trust offers security for costs.—Farmers' & Mechanics' Bank v. Gaither, Case No. 4,654.

§ 10. —— Action or defense in forma pauperis.

Party allowed to prosecute suit without giving security for costs, where he makes oath to his poverty, and an attorney certifies to merits. Form of such oath.—Bradford v. Bradford, Case No. 1,766.

§ 11. —— Cost bond.

A bond for "all costs that may accrue in this suit, and be adjudged against the plaintiff," is sufficient, under a rule requiring a bond "for all

costs for which the plaintiff may be liable in the suit."—Hoyt v. Byrd, Case No. 6,807.

A bond as security for costs is good without naming the obligee.—Buckingham v. Burgess, Case No. 2,088.

A bond for costs, which omits the name of the nonresident plaintiff about to institute suit, is defective, and the suit should be dismissed.—Williamson v. Buzzard, Case No. 17,751a.

Nor can bond be given after the institution of suit, so as to prevent dismissal.—Williamson v. Buzzard, Case No. 17,751a.

§ 12. Amount in general.

The entire costs of the case are taxed against the losing party.—Crabtree v. Neff, Case No. 3,315.

The supreme court has power to diminish any fees fixed by statute, but not to increase them.—In re Houghton, Case No. 6,729.

§ 13. Items—Fee bill of 1853.

No item of costs other than those specified in the fee bill in Act Feb. 26, 1853, can be taxed. Dedekam v. Vose, Case No. 3,731; Ethridge v. Jackson, Id. 4,541; Lyell v. Miller, Id. 8,620; Thorne v. The Victoria, Id. 13,988; United States v. One Package of Ready-Made Clothing, Id. 15,950.

§ 14. —— Expenses of parties for travel and attendance.

Plaintiffs are not entitled to traveling expenses and fees for testifying in their own case.—Warren v. Weaver, Case No. 17,203.

But, see Whipple v. Cumberland Cotton Mfg. Co., Case No. 17,515.

The expenses of plaintiff and his counsel in attending court at a distance, on a motion to modify a decree in equity, cannot be taxed as part of his costs on a decree in his favor on final hearing.—Hussey v. Bradley, Case No. 6,946a.

Travel and attendance of the successful party cannot be taxed in the federal circuit court, where not allowable in the state court.—Sebring v. Ward, Case No. 12,598.

Act March 1, 1793, allowing parties the same compensation for travel, attendance, and attorney's fees as is given in the state courts, *held* not now in force.—Hathaway v. Roach, Case No. 6,213.

Both before and since the act of February 26, 1853, in the First circuit the prevailing party has been allowed for travel and attendance.—Nichols v. Brunswick, Case No. 10,239.

§ 15. —— Witness fees and mileage.

Compensation of witnesses, see "Witnesses," §§ 10–17.

Fees paid witnesses who actually attend trial are taxable.—Beckwith v. Easton, Case No. 1,212.

Witness fees cannot be taxed in the federal courts for persons attending at the request of the party unless they were regularly subpœnaed.—Sawyer v. Aultman & T. Mfg. Co., Case No. 12,397; Spaulding v. Tucker, Id. 13,221; Dreskill v. Parish, Id. 4,075, 4,076; Woodruff v. Barney, Id. 17,986. CONTRA, see Cummings v. Akron Cement & Plaster Co., Case No. 3,473; Dennis v. Eddy, Id. 3,793.

Where the testimony of a witness residing in another state or country is necessary, his fees for actual travel and attendance from his place of residence are taxable.—Whipple v. Cumberland Cotton Mfg. Co., Case No. 17,515; Prouty v. Draper, Id. 11,447. CONTRA, see Russell v. Ashley, Case No. 12,150; Dreskill v. Parish, Id. 4,075, 4,076.

Travel fees for witnesses who live out of the district may be taxed to extent of 100 miles, but no more.—Beckwith v. Easton, Case No. 1,212; The Leo, Id. 8,252.

No per diem allowance is taxable for the attendance of witnesses whose testimony is afterwards abandoned or given up or stricken out or rejected by the master.—Troy Iron & Nail Factory v. Erastus Corning, Case No. 14,197.

Where the court was adjourned over for several weeks, and a continuance was subsequently granted defendant, on payment of costs, on grounds which did not exist at the opening of the term, *held*, that fees of plaintiff's witnesses for attendance at both the actual and adjourned day were recoverable.—Schott v. Benson, Case No. 12,479.

A party can tax for attendance of only three witnesses to one fact. Exceptions.—Bussard v. Catalino, Case No. 2,228.

Where, for the mutual convenience of the parties, it is agreed to take testimony at a certain place, reasonable compensation will be allowed for the traveling expenses of witnesses attending from without the jurisdiction, and the amount allowed by the fee bill was adopted as the proper measure.—Spaulding v. Tucker, Case No. 13,221.

The fees of a witness examined de bene esse, who also attends the trial and is examined, are taxable.—Beckwith v. Easton, Case No. 1,212.

§ 16. —— Attorneys' fees.

Costs can be taxed for only two counsel of the same party.—Ex parte Jaffray, Case No. 7,170.

Attorney's fees allowed to several defendants, whether the pleadings are joint or several.—Crosby v. Folger, Case No. 3,421.

A solicitor's fee for an overruled exception to a master's report is not allowed in the bill of costs.—Garretson v. Clark, Case No. 5,249.

§ 17. —— Docket fees.

When docket fee is taxable, and what is considered a "final hearing." Rev. St. § 824.—Goodyear Dental Vulcanite Co. v. Osgood, Case No. 5,594.

No docket fee is allowable on exceptions to a commissioner's report.—Beckwith v. Easton, Case No. 1,212.

It is proper to tax a docket fee where the case is one of a number stipulated to be heard together, the decree in one case to stand as the decree in all.—Goodyear Dental Vulcanite Co. v. Osgood, Case No. 5,594.

A docket fee of $20 is the highest compensation allowed to a solicitor, and it can be allowed but once.—Troy Iron & Nail Factory v. Erastus Corning, Case No. 14,197.

The docket fee of $10, and not that of $20, is taxable where a suit at law is tried by the court, a jury being waived. (Act 1853).—Jones v. Schell, Case No. 7,493.

A docket fee of $20 is not taxable on a reference in a suit in equity under an interlocutory order before final hearing. (Act Feb. 26, 1853).—Doughty v. West, Bradley & Cary Mfg. Co., Case No. 4,030.

§ 18. —— Fees for depositions.

The amount reasonably paid for the execution of a foreign commission to take testimony may be taxed as costs.—Sedgwick v. Grinnell, Case No. 12,613.

The fees of a magistrate in another state for taking a deposition under Act 1789, may be taxed in the bill of costs, in Virginia.—Fry v. Yeaton, Case No. 5,142.

The compensation allowed by law to a commissioner of the court will fix the amount of fees for the execution of a commission in a foreign country, unless it appear that the customary charge there is greater.—Sedgwick v. Grinnell, Case No. 12,613.

The solicitor's fee of $2.50 for each deposition taken and admitted as evidence relates to testimony taken out of court under authority which will entitle it to be read as evidence in court, and has no relation to oral evidence taken in court or before a master.—Troy Iron & Nail Factory v. Erastus Corning, Case No. 14,197.

In an equity case, where depositions are not admitted on final hearing, the solicitor's fee of $2.50 is not allowed. Act Feb. 26, 1853.—Stimpson v. Brooks, Case No. 13,454.

A court of chancery may include in its decree expenses incurred in obtaining necessary testimony other than such items as are mentioned in the fee bill of 1853.—Spaulding v. Tucker, Case No. 13,221.

Postage paid on a commission should be allowed, as part of the costs thereof.—Prouty v. Draper, Case No. 11,447.

The distinction between an affidavit and a deposition considered.—Stimpson v. Brooks, Case No. 13,454.

The officer taking depositions should certify each item of cost, and transmit the evidence of services rendered.—Russell v. Ashley, Case No. 12,150.

§ 19. —— Printing, copying, and translating.

The cost of printing papers which, by a rule of court, a party is required to have printed, can be taxed against the adverse party.—Dennis v. Eddy, Case No. 3,793; Neff v. Pennoyer, Id. 10,084.

The expense of printing testimony for the convenience of the court cannot be taxed as costs against the losing party.—Spaulding v. Tucker, Case No. 13,221.

The expense of printing the record and evidence in an equity suit is properly taxable as part of the costs. Second Additional Rule, May 25, 1842.—Jordan v. Agawam Woolen Co., Case No. 7,516.

The amount paid for copying papers to be used in the suit is not allowable.—Hussey v. Bradley, Case No. 6,946a.

Expenses of printing and translating testimony are not taxable by defendant, where the bill is dismissed.—Harding v. Altemus, Case No. 6,049.

§ 20. —— Telegraphing.

The amount paid for telegraphic dispatches is allowable, if shown by affidavit to have been properly and necessarily expended in the suit.—Hussey v. Bradley, Case No. 6,946a.

§ 21. —— Stenographer.

The expense of a stenographer is not taxable.—Ex parte Jaffray, Case No. 7,170.

§ 22. —— Procuring bail.

A charge by defendant, for services in putting in special bail a second time, is not taxable, where the second service was made necessary by the failure of the bail first put in to justify.—Ferrett v. Atwill, Case No. 4,747.

§ 23. —— Discovery.

Payment of costs of bill of discovery by defendants should be borne by them on their final defeat.—Bowne v. Brown, Case No. 1,743.

§ 24. —— Commissions of clerk and marshal.

In the federal courts in North Carolina, the marshal's and clerk's commissions on money received and paid out are part of the taxable costs.—Kitchen v. Woodfin, Case No. 7,855.

A paper is not "filed" until indorsed by the clerk.—Amy v. Shelby County, Case No. 345.

§ 25. Taxation.

A party is entitled to a detailed bill under oath of commissioner's fees which are to be taxed against him, showing the items, and that they are legally chargeable.—Beckwith v. Easton, Case No. 1,212.

A consent to a taxation of costs equitably made by the clerk cannot be withdrawn upon the coming in of the master's report.—Holbrook v. Small, Case No. 6,596.

Specific objections are necessary to reach charges for clerk's fees and affidavits on an appeal from taxation.—Dedekam v. Vose, Case No. 3,731.

The amount of the costs of a suit in New York may be proved by parol.—Woodward v. Hall, Case No. 18,005.

Taxation of costs reformed on motion.—Erwin v. Cummins, Case No. 4,525.

An irregularity in the taxation of costs may be corrected by the court, on motion, after final decree rendered.—Collins v. Hathaway, Case No. 3,014.

A retaxation will be allowed where, by mistake or other casualty, the original taxation was not opposed.—Collins v. Hathaway, Case No. 3,014.

The discretionary power of the court over the award of costs cannot be exercised on an appeal from taxation.—The Caithneshire, Case No. 2,294.

§ 26. On appeal and error.

Where both parties appeal, and the decree is affirmed, no costs of appeal will be allowed to either.—The Parkersburgh, Case No. 10,753.

Costs are not given upon reversal in supreme court where the bill is ordered to be dismissed.—Conway v. Alexander, Case No. 3,146.

Costs not allowed on reversal in circuit court for want of jurisdiction.—Agnew v. Dorman, Case No. 100.

Costs on appeal from a justice of the peace are in the court's discretion, where the judgment is affirmed.—Mead v. Scott, Case No. 9,368.

Same rule upon reversal of such judgment.—Ward v. Washington, Case No. 17,163.

On appeal in admiralty, see "Admiralty," § 149.

§ 27. Payment and remedies for collection.

Attachment will be granted against plaintiff and his sureties for costs for which he is liable.—Bowne v. Arbuncle, Case No. 1,742.

It is the duty of each party to pay his own costs as they arise in the course of proceedings. Its performance the court will compel by attachment, if necessary.—Hoyt v. Byrd, Case No. 6,807.

When a cause is continued at the costs of a party, no execution can issue for them. The proper remedy, if they are not paid, is an attachment for contempt.—Fenwick v. Voss, Case No. 4,736.

Where a cause has been continued at defendant's costs, an attachment will be granted against defendant for such costs, after judgment for plaintiff.—McGill v. Shehee, Case No. 8,797.

An attachment will not lie for nonpayment of costs of a continuance until after rule to show cause and personal service of the order to pay the costs, nor unless the bill of costs states the particulars.—Dyson v. White, Case No. 4,231.

A surety for fees and costs is not liable to attachment for not paying plaintiff's witnesses for their daily attendance.—Hyer v. Smith, Case No. 6,978.

It is in the discretion of the court to stay proceedings in a second suit until the costs of the first are paid, but stay will only be granted on the ground of vexation.—Cocke v. Henson, Case No. 2,929a.

§ 28. Criminal prosecutions.

Liability of the prosecutor for costs where defendant is acquitted.—United States v. Flanakin, Case No. 15,119a.

The prosecutor will be required to give security for costs where he has removed from the district, and has no property.—United States v. Dulany, Case No. 15,000.

CO-TENANCY.

See "Joint Tenancy"; "Tenancy in Common."

COUNTERCLAIM.

See "Set-Off and Counterclaim."

COUNTERFEITING.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 1, Power of congress to regulate. § 2, Character of thing counterfeited or manufactured. § 3, Likeness to genuine coin or note. § 4, Passing and uttering. § 5, Possession and manufacture of plates. § 6, Intent. § 7, Persons liable.

II. PROSECUTION AND PUNISHMENT.

§ 8, Indictment—Form, requisites, and sufficiency. § 9, —— Variance. § 10, Evidence —Admissibility. § 11, —— Presumptions and burden of proof. § 12, Trial.

See, also, "Forgery."

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 1. Power of congress to regulate.

Whether congress has power to provide for the punishment of the offense of passing counterfeit coin, quære.—United States v. ——, Case No. 14,414; Campbell v. United States, Id. 2,373.

§ 2. Character of thing counterfeited or manufactured.

It is a crime to manufacture a coin adapted to be used to circulate as money, though of original design.—Ex parte Holcomb, Case No. 6,598.

Where an original paper executed with printed signatures is not good under the statute, yet, where it purports to be a genuine certificate, it is a felony, under Act March 3, 1825, § 19, to counterfeit it.—United States v. Schoyer, Case No. 16,232a.

The certificate required to be given on the importation of distilled spirits (Act March 2, 1799, § 41) is an "official document granted by the collector," within Act 1825, § 19, relating to forging and counterfeiting.—United States v. Schoyer, Case No. 16,232a.

Act March 3, 1825, § 18, punishes counterfeiting the gold and silver coin of the United States, and also foreign gold and silver coin made current by the laws of the United States. —United States v. Brown, Case No. 14,667.

Counterfeiting an indorsement on a post note of the Bank of the United States *held* not an offense under section 18 of its charter.—United States v. Stewart, Case No. 16,402.

Forgery of the notes of a private unchartered bank and of chartered banks is punishable under Act Md. 1799, c. 75, § 1.—United States v. Winslow, Case No. 16,741.

§ 3. Likeness to genuine coin or note.

The base coin need not have been made in exact resemblance of the true coin to constitute the offense of counterfeiting, under Act 1825, c. 65, § 20. It is sufficient if the resemblance is strong enough to deceive persons exercising ordinary caution.—United States v. Aylward, Case No. 14,482.

Rev. St. § 5461, does not extend to the uttering of a token which does not purport to be an imitation, or in substitution, of any coin known to the law; and does not cover a piece of metal bearing the device of an Indian and the inscription "¼ dollar."—United States v. Bogart, Case No. 14,617.

When the purpose and act are otherwise guilty within the statute, the similitude suffices if, according to the mode of use apparently designed, the coin would have a probable tendency to mislead persons whom it might be intended in this manner to defraud into a belief of its genuineness.—United States v. Bricker, Case No. 14,642.

In determining whether defendant is guilty of passing counterfeit coin, the question is not whether the coin was such as would deceive a person of ordinary skill and caution, but whether it was capable of and designed to be used for deceiving the uncautious and unskillful. —United States v. Hargrave, Case No. 15,306.

It is a crime to photograph a United States treasury note, though the similarity between the photograph and the original be not such that it is calculated to deceive the public.—Ex parte Holcomb, Case No. 6,598.

§ 4. Passing and uttering.

Passing a paper is putting it off in payment or exchange. Uttering it is a declaration that it is good, with an intention to pass it, or an offer to pass it.—United States v. Mitchell, Case No. 15,787.

Passing a counterfeit note in the name of a fictitious person, an assumed name, or on a bank which never existed, is within the law. It is not necessary that the note, if genuine, would be obligatory on the parties whose names are counterfeited.—United States v. Mitchell, Case No. 15,787.

Passing or attempting to pass counterfeit money by an agent employed for that purpose by defendant is the same as if defendant had done it himself.—United States v. Morrow, Case No. 15,819.

Defendant may be convicted of uttering or passing spurious notes upon proof that he sold and delivered them as spurious, with intent that they should be passed upon the public as genuine. Act June 30, 1864, § 10.—United States v. Nelson, Case No. 15,861.

The delivery of counterfeit money to a person, to be passed off generally for the benefit of the prisoner, is not a passing "in payment," within Act Va. Dec. 19, 1792.—United States v. Venable, Case No. 16,615.

Possession of forged bank notes with intent to utter them as true is not an indictable offense.—United States v. Wright, Case No. 16,772.

§ 5. Possession and manufacture of plates.

Act June 30, 1864, § 12, is confined to the case of an unauthorized possession of genuine plates, and is not applicable to a case of the possession of counterfeit plates.—United States v. Addatte, Case No. 14,423.

An indictment will lie under Act June 30, 1864, § 11, for aiding and assisting in the making of a counterfeit plate from which national counterfeit bank notes could be printed.—United States v. Rossvally, Case No. 16,197.

§ 6. Intent.

On an indictment for counterfeiting notes of the Bank of the United States, an intent to defraud some corporation or person must be shown. —United States v. Moses, Case No. 15,825.

On an indictment for counterfeiting silver coin, etc., under 4 Stat. 121, an intention to pass such coin fraudulently as genuine must be proved.—United States v. King, Case No. 15,535.

Quære, whether an intent to defraud is a necessary ingredient of the offense of keeping in possession counterfeit money, with intent to sell the same.—United States v. Mank, Case No. 15,715a.

Where the spurious coin for any reason is not fitted to deceive persons of the most ordinary precaution and intelligence, the inference of a criminal intention in making it does not arise.—United States v. Burns, Case No. 14,691.

The law presumes the intention in passing counterfeit paper to be to defraud any person who may suffer a loss by receiving it as genuine.—United States v. Shellmire, Case No. 16,271.

Intoxication is no defense to an indictment for passing counterfeit notes, if defendant was possessed of his reason, and was capable of knowing whether the note he passed was good or bad.—United States v. Roudenbush, Case No. 16,198.

On an indictment for having in possession, with intent to utter, counterfeit treasury notes, accused may show that he received them accidentally, or in ordinary course of business.—United States v. Kenneally, Case No. 15,522.

§ 7. Persons liable.

One accused of passing or uttering counterfeit paper must be present when the act is done, privy to it, or aiding, consenting, or procuring it to be done. If done by consent, all are equally guilty.—United States v. Mitchell, Case No. 15,787.

A person who procures or facilitates the making of counterfeit coin in his house by harboring the guilty persons therein is guilty of assisting in making such coin. Act March 3, 1825, § 20.—United States v. Tarr, Case No. 16,434.

II. PROSECUTION AND PUNISHMENT.

§ 8. Indictment—Form, requisites, and sufficiency.

An indictment under Act March 3, 1825, § 21, which names the person intended to be defrauded by the passing of counterfeit coin, need not name the person to whom the coin was passed.—United States v. Bejandio, Case No. 14,561.

It is not a misjoinder to add to the counts charging the making of false coin a count for aiding and assisting in making such coins and one for procuring them to be made.—United States v. Burns, Case No. 14,691.

The offenses of passing counterfeit coin at different times and on different occasions may be joined in the same indictment.—United States v. O'Callahan, Case No. 15,910.

Contents and sufficiency of an indictment for uttering as true a forged note of the Bank of the United States after the expiration of the term for which the corporation was created.—United States v. Noble, Case No. 15,895.

An indictment for counterfeiting United States coin, under section 20 of the crimes act of 1825, need not aver an intent to pass the coin as true, nor an intent to defraud.—United States v. Peters, Case No. 16,035.

An indictment for circulating counterfeit coin need not charge the offense to have been committed in territory within the jurisdiction of the United States.—Campbell v. United States, Case No. 2,373.

The offense of attempting to pass a knowingly falsely altered national bank note (Rev. St. § 5145) is not a felony, and the indictment need not charge such offense to have been feloniously committed.—United States v. Shepherd, Case No. 16,274.

An indictment for the felonious possession of a forged national bank note, which sets out the note, need not aver the purport of the instrument.—United States v. Williams, Case No. 16,706.

An indictment for forging a treasury note need not, in terms, give it that name, where a copy is set out.—United States v. Trout, Case No. 16,542.

An indictment for forging a treasury note need not aver that it was made in resemblance of the genuine note.—United States v. Trout, Case No. 16,542.

An indictment for possessing forged treasury notes and postal currency, with intent to pass them, must profess to give, and must actually give, exact copies of them, or allege a reasonable excuse for not doing so.—United States v. Fisler, Case No. 15,105.

The charge that the prisoner had in possession "divers" such forged instruments is too indefinite.—United States v. Fisler, Case No. 15,105.

§ 9. —— Variance.

The notes stated in the indictment and given in evidence as counterfeited, and those alleged to be counterfeited, must be shown to be the same, but mere literal variances are not fatal.—United States v. Moses, Case No. 15,825; Same v. Roudenbush, Id. 16,198; Same v. Mason, Id. 15,736; Same v. Hall, Id. 15,283.

An incorrect description in respect to the bill number of a bill which defendant is indicted for uttering is a fatal variance.—United States v. Mason, Case No. 15,736.

Alleging the coins as 50-cent pieces and 25-cent pieces instead of the half dollar and quarter dollar, as named in the coinage act, is not a material variance—United States v. Burns, Case No. 14,691.

An indictment, in setting out counterfeit notes, did not exhibit any imprint of the seal of the treasury, while the notes put in evidence on the trial exhibited such imprint. *Held*, not a material variance.—United States v. Bennett. Case No. 14,572.

Circulating notes of a national banking association are properly admissible in evidence under an indictment for counterfeiting, setting them out at length, and calling them "national bank currency notes."—United States v. Bennett, Case No. 14,572.

§ 10. Evidence—Admissibility.

Where the prisoner is connected with others, evidence is admissible that different parts of the machine employed in counterfeiting were found in the possession of such other persons.—United States v. Craig, Case No. 14,883.

If there be a concert between two or more to pass counterfeit notes, or any joint or concurrent action in passing them, the act of one is evidence against the other.—United States v. Hinman, Case No. 15,370.

Good character may be shown as evidence that counterfeit notes found in defendant's possession were innocently received.—United States v. Kenneally, Case No. 15,522.

Failure of accused when arrested to make any explanation of how he got the counterfeit money, or to assert his innocence, is a circumstance which the jury may consider against him.—United States v. Kenneally, Case No. 15,522.

On the trial of an indictment for assisting in making counterfeit coin by harboring the guilty persons, a witness may testify that the machines found on the premises could not collectively be applied to other uses, though they might sepa-

rately be otherwise used.—United States v. Tarr, Case No. 16,434.

On an indictment for passing counterfeit coin, possession of counterfeit bank notes is not admissible to prove the scienter.—United States v. Goughnour, Case No. 15,238.

But evidence is admissible of the passing of similar counterfeit notes, or of passing notes of a different bank, at the same time, or of having them in possession.—United States v. Roudenbush, Case No. 16,198; Same v. Mitchell, Id. 15,787.

As to possession of coin of different denomination, see United States v. Goughnour, Case No. 15,238.

No notice is necessary to produce a paper in the hands of defendant, an accomplice, or a third person, who secretes it to protect defendant, or that evidence of its contents will be offered at the trial, though such paper is not the subject of the indictment.—United States v. Doebler, Case No. 14,977.

After evidence that a note of the description laid in the indictment has been forged and passed, evidence may be given of delivering or passing other counterfeited notes on the same bank before or after the passing the one in question, irrespective of time.—United States v. Doebler, Case No. 14,977.

Evidence is admissible that a parcel of counterfeit checks and drafts on other banks than that alleged in the indictment, and others printed on bank paper not filled up, were found in defendant's possession.—United States v. Noble, Case No. 15,895.

§ 11. —— Presumptions and burden of proof.

Possession of spurious coins, with tools and instruments for the manufacture thereof, warrants a prima facie presumption of guilt.—United States v. King, Case No. 15,535.

Proof that a quantity of spurious coin and instruments and appliances for making it were found in defendant's possession, where unexplained by evidence rebutting the presumption of guilt, is sufficient to sustain a conviction.—United States v. Burns, Case No. 14,691.

§ 12. Trial.

While counterfeiting a note of the Bank of the United States is made a felony, the prisoner is not entitled to a list of witnesses and jurors two days before pleading.—United States v. Williams, Case No. 16,709.

On a trial for passing counterfeit money, the jury should be satisfied that the resemblance of the forged to the genuine piece is such as might deceive one using ordinary caution.—United States v. Morrow, Case No. 15,819.

COUNTIES.

§ 1, Boundaries. § 2, County board. § 3, Officers. § 4, Bonds. § 5, Contracts. § 6, Claims against county, and payment thereof. § 7, Actions.

See, also, "Municipal Corporations."

County attorneys, see "District and Prosecuting Attorneys."

§ 1. Boundaries.

Proper boundaries of Cumberland county, in New Jersey, on the Delaware river.—Corfield v. Coryell, Case No. 3,230.

§ 2. County board.

A special meeting of the board of supervisors, held without observing the manner prescribed by statute for calling it, is not legal, and cannot initiate a proceeding to subscribe for railroad aid stock.—Goedgen v. Manitowoc County, Case No, 5,501.

Where an act is directed to be performed by the county commissioners, as the constituted authority of the county, a majority may act.—Howard v. Crawford County, Case No. 6,757.

County commissioners in Ohio may sue and are liable to be sued in relation to all matters which involve the exercise of their powers.—McLean v. Hamilton County, Case No. 8,881.

The board of county commissioners in Ohio is a quasi corporation only, and not liable in an action sounding in tort.—Jacobs v. Hamilton County, Case No. 7,161.

County commissioners, though not possessing in every respect the technical qualities of a corporation, are amenable to the process of the federal court within the state.—McLean v. Hamilton County, Case No. 8,881.

The refusal of county supervisors to put a judgment on the tax list renders them liable, in an action for damages, only for a counsel fee and costs,—and this even though a mandamus has issued.—Newark Sav. Inst. v. Panhorst, Case No. 10,142.

§ 3. Officers.

Discovery of fraud, in the meaning of the statute of limitations, is not to be imputed to a county simply because it was known to its officer who committed it.—O'Brien County v. Brown, Case No. 10,399.

§ 4. Bonds.

Counties in Iowa can issue bonds for borrowed money if authorized by a public vote.—Carpenter v. Buena Vista County, Case No. 2,429.

Where the county court is authorized to issue county warrants of a prescribed form for all sums of money found due from the county, it has no implied authority to fund outstanding warrants by the issue of negotiable bonds.—Whitwell v. Pulaski County, Case No. 17,605.

A county is directly liable to the holder of railway aid bonds where it covenants to pay the holder, though, as between the county and railroad company, the latter has agreed to pay.—McCoy v. Washington County, Case No. 8,731.

See, also, "Municipal Corporations," §§ 29–37; "Railroads," §§ 12–14.

§ 5. Contracts.

In Oregon, a county is a body politic, and may take a note or bond and mortgage and enforce same in courts.—Alexander v. Knox, Case No. 170.

A statute authorizing county supervisors to erect a courthouse, when there is money in the treasury, or when they may deem it expedient to levy a tax therefor, impliedly prohibits them from borrowing money which will be a charge on the county.—Kinsey v. Little River County, Case No. 7,829.

Money borrowed by a county, without authority, but used for its benefit, may be recovered by an action for money had and received.—Kinsey v. Little River County, Case No. 7,829.

A limitation in the revenue laws of the amount which may be annually levied for bridges and the support of paupers, does not limit the county's power to bind itself by contract for those purposes and issue warrants in excess of such limit.—Kinsey v. Pulaski County, Case No. 7,830.

§ 6. Claims against county, and payment thereof.

There is no appropriation of any part of a common fund until the commissioners, by their warrant on the treausrer, indicate the specific object to which it is to be applied.—Pollock v. Lawrence County, Case No. 11,255.

The act of county authorities in Arkansas in auditing a claim and issuing a warrant is not conclusive as a judicial determination upon the

county.—Shirk v. Pulaski County, Case No. 12,794.

The holders of a county warrant, issued for more than the sum actually due, will be treated as the equitable assignees of the original claims.—Shirk v. Pulaski County, Case No. 12,794.

County warrants are not commercial paper, but are subject to legal and equitable defenses in the hands of subsequent holders.—Shirk v. Pulaski County, Case No. 12,794; Kinsey v. Little River County, Id. 7,829.

A general warrant on the funds of the county for the payment of a judgment refused where a relator had compelled the levy of a special tax, which was in process of collection.—United States v. Greene County Court, Case No. 15,259.

After the issue of an execution against a county, under Act Pa. 1834, the commissioners cannot draw any warrant or make any payment until the judgment is satisfied.—Pollock v. Lawrence County, Case No. 11,255.

Payments of judgments on ordinary county warrants by Arkansas counties can only be enforced in the manner provided by the constitution and laws of the state.—United States v. Miller County, Case No. 15,776.

A relator whose judgment is based on county warrants, issued after the adoption of the present constitution of Arkansas, is not entitled to the levy of a tax in excess of the constitutional limit; otherwise as to judgments on warrants issued before such adoption.—United States v. Miller County, Case No. 15,776.

An order of the board of county supervisors, when in the form prescribed by law, properly signed and countersigned, will be presumed to be correct.—Lyell v. Lapeer County, Case No. 8,618.

An order by the supervisors upon the treasurer, in proper statutory form, is a county liability, and no presentment, demand, and notice of dishonor are necessary.—Lyell v. Lapeer County, Case No. 8,618.

Under a statute authorizing county commissioners to refer the claims of a person to arbitrators, *held*, that the commissioners had no authority to submit a part only of his claim without his consent.—Tobey v. County of Bristol, Case No. 14,065.

Judgment creditors of Missouri counties are entitled to the levy of a special tax to pay railroad aid bonds, if other means of payment are not provided.—United States v. Justices of Lincoln County Court, Case No. 15,503.

§ 7. Actions.

The service of process, in an action against a county, upon the chairman of the county board, where the statute requires it to be made upon the county judge, gives no jurisdiction.—Gross v. Sioux County, Case No. 5,842.

Where counties are, by statute, subject to suit, the judgment or decree to operate with like effect as suits between individuals (Act Mich. 1846), a bill in equity will lie to satisfy a judgment against the county by subjecting bonds and mortgages which cannot be reached by execution.—Lyell v. St. Clair County, Case No. 8,621.

Under such a statute, an execution will issue against a county.—Lyell v. St. Clair County, Case No. 8,621.

Procedure in a proceeding by a county to enforce security for a loan made by it.—Alexander v. Knox, Case No. 170.

A decree for the assessment and collection of a tax to pay judgments on county bonds will be enforced directly against the taxpayers, on bill filed by the judgment creditors, where the county officers are unable to collect such taxes at law.—Post v. Taylor County, Case No. 11,302.

COUNTY BOARD.

See "Counties," § 2.

COURT COMMISSIONERS.

See "United States Commissioners."

COURTS.

I. IN GENERAL.

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II. UNITED STATES COURTS.

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(D) Jurisdiction Dependent on Amount or Value in Controversy.

§ 64, In general. § 65, Necessity of averment. § 66, Computation.

(E) Procedure, and Adoption of Practice of State Courts.

§ 67, In general. § 68, Exceptions. § 69, Remedies given by state laws. § 70, Abolition of remedies by state laws. § 71, Effect of acts of congress. § 72, Adoption by court. § 73, Changes in practice. § 74, In equity.

(F) State Laws as Rules of Decision.

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(G) Circuit Courts.

§ 82, Source and limits of jurisdiction. § 83, Suits of "civil nature." § 84, Administration of state laws. § 85, Territorial limitations. § 86, Suits under laws, etc., of United States. § 87, Equity jurisdiction. § 88, Conflicts between circuits. § 89, Change of district. § 90, Particular circuits. § 91, Removal of causes. § 92, Showing jurisdiction.

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Jurisdiction of and proceedings relating to particular subjects.

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—— by or against assignee in bankruptcy, see "Bankruptcy," §§ 337–341.
—— by or against trustee, see "Trusts." § 30.
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—— for infringement of patents, see "Patents," § 218.
—— for salvage, see "Salvage," § 58.
—— for seamen's wages, see "Seamen," § 134.
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Jurisdiction of particular tribunals.

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Courts-martial, see "Army and Navy," § 17.
Justices' courts in civil cases, see "Justices of the Peace," §§ 3–7.

I. IN GENERAL.

§ 1. Raising question of jurisdiction.

It is only where the court is without power to pass upon the subject-matter of the complaint or to grant the relief sought that its jurisdiction may be challenged.—McMillin v. Barclay, Case No. 8,902.

The court will, of its own motion, refuse to proceed, where a want of jurisdiction appears at any time before trial.—Heriot v. Davis, Case No. 6,404.

The federal courts will dismiss a suit at any time when want of jurisdiction appears.—McCloskey v. Cobb, Case No. 8,702.

Defect of jurisdiction not patent on the record is available only by plea.—Fremont v. Merced Min. Co., Case No. 5,095.

A question of jurisdiction should not be disposed of on motion, but on hearing.—Cushing v. Laird, Case No. 3,508.

A motion or petition in the suit is the proper method to stay proceedings, where it is not properly prosecuted in the federal court. A formal bill is not necessary.—Fuentes v. Gaines, Case No. 5,145.

§ 2. Executive and political powers.

The executive power cannot be revised and corrected by the judicial.—Astrom v. Hammond, Case No. 596.

The federal courts will not review a decision of the head of a department on a matter referred to him by congress for determination.—United States v. Milwaukee & St. P. Ry. Co., Case No. 15,779.

Courts of justice may take jurisdiction of an action of ejectment for the recovery of land in the possession of an officer or agent of the government which claims title.—Lee v. Kaufman, Case No. 8,191.

Where a bridge is unlawful as obstructing a river, in violation of a treaty with a foreign country, it is an international question, to be determined by the executive and legislative departments.—In re Clinton Bridge, Case No. 2,900.

The federal courts have no authority to enjoin federal officers against performing any merely ministerial act.—McElrath v. McIntosh, Case No. 8,781.

Government departments or agents, seeking to execute a law in an unconstitutional manner, as by taking private property for public use without making compensation as provided by law, may be restrained.—Avery v. Fox, Case No. 674.

The federal circuit court has no jurisdiction of a suit in equity by a private person to interfere with or control the administration of the duties of the comptroller of the currency and of the treasurer of the United States in respect to bonds deposited with the treasurer to secure the redemption of national bank notes under Act June 3, 1864.—Van Antwerp v. Hulburd, Cases Nos. 16,826, 16,827.

The condition of peace or war, in a legal sense, must be determined by the political department of the government, and the courts are bound by that decision.—United States v. One Hundred and Twenty-Nine Packages, Case No. 15,941; Philips v. Hatch, Id. 11,094.

The courts cannot recognize the existence of a new foreign government until after its recognition by the legislative or executive departments.—United States v. Baker, Case No. 14,501.

In the case of a civil war in a foreign country, the old established government must be considered as the lawful organization until the executive publicly recognizes the new government.—The Hornet, Case No. 6,705.

The courts of the United States are bound by the decision of the executive of a question as to the existence or validity of an organization claiming to be the lawful government of a foreign country.—The Hornet, Case No. 6,705.

The courts must follow the decision of the political department of the government on the question whether the adoption of the constitution of Georgia of 1868 was an act of the people of the state.—Marsh v. Burroughs, Case No. 9,112.

§ 3. Change of limits of jurisdiction.

The division of a county subsequent to the levy of an attachment on land therein does not affect the lien or oust the court or sheriff of jurisdiction.—Tyrell's Heirs v. Rountree, Case No. 14,313.

The effect of redistricting the state of Pennsylvania on causes then pending on the dockets considered.—Rhoades v. Selin, Case No. 11,740.

§ 4. Court officers.

Every court has power to superintend the conduct of its officers, and see by what authority they act, and that its process shall not be vexatiously employed.—King of Spain v. Oliver, Case No. 7,814.

§ 5. Terms.

All motions, in a suit at common law, which are required, by the practice of the state courts of New York, to be made at a special term of a state court, may be made at a stated term of a federal court.—Emma Silver Min. Co. v. Park, Case No. 4,467.

A change of the time of holding courts does not work a discontinuance of causes therein pending.—Compton v. Palmer, Case No. 3,070a.

A change by statute of the time of holding courts does not affect the business therein, although no provision is made as to the decision of causes.—Boswell v. Newton, Case No. 1,683a.

§ 6. Rules of court.

The practice of the court may be established without the existence of a positive written rule.—United States v. Stevenson, Case No. 16,395.

In the absence of written rules, the court will deduce from prior decisions such rules as are applicable to the particular case.—Lamb v. Parkman, Case No. 8,019.

Under the judiciary act of 1789, and the act of 1792, the federal courts may make rules of practice according to their pleasure not repugnant to the laws of the United States. And a rule may be established by long course of practice, without adoption in writing.—Koning v. Bayard, Jr., Case No. 7,924.

Rules made by the circuit courts may be varied or dispensed with in special cases.—Wallace v. Clark, Case No. 17,098.

Rules of practice adopted by the court do not control its discretion so as to deprive it of power to secure the trial of causes on their merits, on proper showing.—Mutual Building Fund Soc. & Dollar Sav. Bank v. Bossieux, Case No. 9,977.

The act of August 23, 1842, authorizing the supreme court to frame rules of practice, is generally understood to give that court no power to repeal or modify existing regulations prescribed by congress.—The Kentucky, Case No. 7,717.

The rules established by the supreme court are rules of practice, not of decision.—The Selt, Case No. 12,649.

A rule established by the supreme court in pursuance of law becomes a part of the law itself.—Seymour v. Phillips & Colby Const. Co., Case No. 12,689.

The circuit courts have no authority to rescind a rule adopted by the supreme court to govern their equity practice.—Jenkins v. Greenwald, Case No. 7,270.

Rule 96 of the district court of the Southern district of New York of 1838 *held* to be abrogated by circuit court rules of 1845.—Manchester v. Milne, Case No. 9,007.

Rules of practice in admiralty, see "Admiralty," § 38.

§ 7. Conduct of business.

The court may discriminate as to the unlimited admission into the court room of persons whose presence as a class, for any reason, will endanger the security of the administration of justice, or prevent the police of the court.—United States v. Buck, Case No. 14,680.

Where there are no parties litigant before the court, original papers filed may be withdrawn without leaving copies.—Ex parte Tochman, Case No. 14,072.

§ 8. Rules of decision.

In the absence of constitutional and statutory provisions, the common law furnishes the rule as to the mode of procedure in criminal cases in the federal courts.—United States v. Block, Case No. 14,609; Same v. Hammond, Id. 15,294.

The general doctrine of the nonliability of the employer for an injury by a fellow servant, established by the English and American ports, will obtain in the federal courts.—Dillon v. Union Pac. R. Co., Case No. 3,916.

The rule of comity always observed by the justices of the supreme court in cases which admitted of being carried before the whole court was to conform to the opinions of each other, if any had been given.—Washburn v. Gould, Case No. 17,214.

The principles upon which the several circuit courts of the United States are bound by the decisions of each other examined and discussed.—Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603.

The rulings of one judge of a circuit court are not open for review to any other judge sitting in the same court in the same case.—Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., Case No. 2,990.

One circuit court which fully considers and deliberately decides a question will be followed by the other circuit courts.—Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603.

A judgment of a federal court is binding on other federal courts, although a plea to the jurisdiction might have been sustained, if taken, for irregularity of process.—Kerrison v. Stewart, Case No. 7,734.

An assertion of a rule of law by an appellate court, although obiter dictum, binds an inferior court.—Poag v. The McDonald, Case No. 11,238.

§ 9. Opinions and records.

Where the minutes of the court show that the judge delivered an opinion overruling exceptions, and confirming a survey of a Mexican grant, but no decree appeared to have been made or written opinion filed, *held*, that the cause was still pending, and a court succeeding to the jurisdiction might enter a decree, or, on proper showing, re-examine the case.—United States v. Garcia, Case No. 15,186.

Courts of record may at any time, and without notice, correct the mistakes and supply the omissions of their clerks or recording officers, so as to make the record conform to the truth of the case.—Gilman v. Libbey, Case No. 5,445.

They are the exclusive judges of the necessity and propriety of so doing, and of the sufficiency of the proofs offered to show the necessity of such action.—Gilman v. Libbey, Case No. 5,445.

§ 10. Courts of general original jurisdiction.

The grant of jurisdiction over a certain subject-matter to one court does not, of itself, imply that that jurisdiction is to be exclusive.—Gittings v. Crawford, Case No. 5,465.

While a court of chancery in another state than that in which land is situated cannot make a decree affecting the title, they may decree a conveyance where they have jurisdiction of the person of the owner, and enforce the same by attachment or otherwise.—Tardy v. Morgan, Case No. 13,752.

The court of common pleas in Ohio is a court of general jurisdiction.—Bank of United States v. Voorhees, Case No. 939.

The levy of a foreign attachment (in Ohio) gives jurisdiction.—Bank of United States v. Voorhees, Case No. 939.

§ 11. Courts of limited or inferior jurisdiction.

A statute conferring limited jurisdiction will be construed strictly as to the extent of jurisdiction, but liberally as to the mode of proceeding.—Russell v. Wheeler, Case No. 12,164a.

Courts of limited jurisdiction can only exercise their powers in the cases and in the mode prescribed by the legislature.—Hart v. Gray, Case No. 6,152.

The legislature which created a court of limited jurisdiction may alter or qualify the principle that its authority must appear on the face of its proceedings.—Kemp v. Kennedy, Case No. 7,686.

Where proceedings by a court are had under special authority, and not under its general jurisdiction, no presumptions will be indulged in favor of their regularity.—Tolmie v. Thompson, Case No. 14,080.

§ 12. Courts of probate jurisdiction.

The probate court in Rhode Island has exclusive jurisdiction of the probate of wills of land.—Mathewson v. Sprague, Case No. 9,278.

A county court in Oregon sitting as a probate court has jurisdiction to compel specific performance by an administrator of an intestate vendor.—Adams v. Lewis, Case No. 60.

The orphans' court of the District of Columbia has no jurisdiction, by virtue of Act Md. 1789, subc. 12, § 3, and Id. subc. 15, § 12, or otherwise, to inquire whether a father be a fit person to be intrusted with the personal custody and education of his children. Its jurisdiction, as to him, extends only to the due care and management of the infant's estate.—De Kraft v. Barney, Case No. 18,288.

Where the orphans' court in the District of Columbia passes upon the question which of two papers is the last will of deceased, and an issue from such court is pending in the circuit court, the orphans' court has no jurisdiction to pass upon the question whether another paper is the last will of testator.—Armstrong v. Johnson, Case No. 18,226.

§ 13. Courts of appellate jurisdiction.

The superior court of Arkansas since the act of October 22, 1828, has only appellate jurisdiction.—Clark v. Shelton, Case No. 2,833a.

II. UNITED STATES COURTS.

(A) JURISDICTION AND POWERS IN GENERAL.

Effect of pendency of suit in state court, see "Abatement and Revival," § 2.
In bankruptcy, see "Bankruptcy," §§ 337–339.
Objection to jurisdiction, see "Abatement and Revival," § 1.

§ 14. Derivation of powers.

The jurisdiction of federal courts is not derived from the common law.—Bains v. The James & Catherine, Case No. 756.

The jurisdiction of the supreme court is pointed out by the constitution; but the distribution of the powers of the inferior courts is regulated and governed by acts of congress.—Smith v. Jackson, Case No. 13,064.

The grant of powers to congress over certain subjects does not invest any particular courts with that authority until expressly conferred by congress, except in the case of jurisdiction expressly given to the supreme court.—United States v. New Bedford Bridge, Case No. 15,867.

The federal courts are of limited, though not inferior, jurisdiction, and cannot exercise any jurisdiction which is not expressly or by necessary implication conferred by law.—United States v. Ta-Wan-Ga-Ca, Case No. 16,435.

The jurisdiction of the courts of the United States is limited; and, the inferior courts can exercise it only in cases in which it is conferred by an act of congress.—Ex parte Cabrera, Case No. 2,278.

Jurisdiction of the federal courts is derived alone from the constitution and laws of the United States, and cannot be enlarged, diminished, or affected by state laws or regulations.—United States v. Drennen, Case No. 14,992; Gill v. The Continental, Id. 5,425; National Bank of Western Arkansas v. Sebastian County, Id. 10,040; Nazro v. Cragin, Id. 10,062; Livingston v. Jefferson, Id. 8,411.

All federal courts inferior to the supreme court exercise only such jurisdiction as is given by law; but, after the jurisdiction is designated, they take cognizance of all matters within its scope without special appointment of law.—In re Metzger, Case No. 9,511.

The powers of the federal courts, under the constitution and laws of the United States, are as distinct as the courts of distinct governments.—Ex parte Robinson, Case No. 11,935.

Where jurisdiction is not expressly conferred on the federal courts, the party may resort to the state court.—Harrison v. Hadley, Case No. 6,137.

The distinction between jurisdiction and its exercise pointed out.—In re Bogart, Case No. 1,596.

§ 15. Territorial extent.

The jurisdiction of the circuit and district courts is restricted to the territorial limits within which they are placed.—United States v. Alberty, Case No. 14,426.

In the case of a mortgage on a railroad running through several states, a federal court of one state may decree foreclosure and direct a sale of the entire road.—Randolph v. Wilmington & R. R. Co., Case No. 11,563.

§ 16. United States territory.

The United States have not sole and exclusive jurisdiction over land rented for a military camp, but only such jurisdiction as is necessary for military purposes.—United States v. Tierney, Case No. 16,517.

A reservation on a cession of "concurrent jurisdiction" to serve state process, civil and criminal, in the ceded place, does not exclude the exclusive legislation or exclusive jurisdiction of the United States over the ceded place.—United States v. Davis, Case No. 14,930.

§ 17. Suits by or against states or counties.

The circuit courts have not jurisdiction of suits brought by a state, against a citizen of the same or of another state.—Gale v. Babcock, Case No. 5,188; Wisconsin v. Duluth, Id. 17,902; North Carolina v. Trustees of University, Id. 10,318. CONTRA, see Georgia v. Atkins, Case No. 5,350.

The constitutional prohibition against suing a state will not authorize a court of equity to compel state officers to levy a tax to pay state bonds.—McCauley v. Kellogg, Case No. 8,688.

The restraint of jurisdiction over suits against a state or the government is limited to those suits in which a state or the government is a party on the record.—Tyler v. Walker, Case No. 14,311a.

The federal court may take jurisdiction where a state is a party in interest, but not a party to the record of a suit in relation to property of the state in the hands of its agent.—Swasey v. North Carolina R. Co., Case No. 13,679.

The mere fact that a state claims an interest in a subject in dispute in an action between private citizens does not deprive the federal courts of jurisdiction.—United States v. Bright, Case No. 14,647.

The federal circuit court may, in a proper case, enjoin agents or officers of the state, though the state is the real party in interest.—Murdock v. Woodson, Case No. 9,942.

An action in a federal court to compel state officers to comply with a contract of the state by the enforcement of its laws is in effect an action against the state, which is prohibited by the eleventh amendment of the federal constitution.—McCauley v. Kellogg, Case No. 8,688.

A bill by a holder of the consolidated bonds to enjoin the state officers from issuing consolidated bonds to the state's general creditors is not a suit against the state within the meaning of the eleventh amendment.—McComb v. Board of Liquidation, Case No. 8,707.

The circuit court has power to enjoin state officers from acting under a law impairing the obligation of a contract made with the state.—Bancroft v. Thayer, Case No. 835.

The United States circuit court has no jurisdiction of a writ of certiorari to a state court to remove proceedings by the state against a railroad company under Act Ill. May 2, 1873.—Illinois v. Chicago & A. R. Co., Case No. 7,006.

A proceeding under the right of eminent domain, to condemn land for a railroad, is not a case in which the state is a party, and the federal courts may have jurisdiction.—Warren v. Wisconsin Val. R. Co., Case No. 17,204.

A bill in equity to take property from a state, and subject it to payment of bonds alleged to have been indorsed by the state, though nominally against state officers, cannot be maintained in a federal court.—Cunningham v. Macon & B. R. Co., Case No. 3,483.

A bill in equity against "D., governor of Texas," to restrain him from issuing patents for lands included in a grant to plaintiff, revoked by the state, *held* not a suit against the state.—Gray v. Davis, Case No. 5,715.

A bill filed against the commissioner of the general land office of Texas to restrain him from allowing locations of land within the limits of a grant made to a party under whom complainant claimed, and which was afterwards confirmed by the state, is not a suit against the state.—Hancock v. Walsh, Case No. 6,012.

Suits involving questions of admiralty and maritime jurisdiction, brought in the federal district courts as courts of admiralty, are not within the exception in the grant of the judicial power to the United States of any suit "in law or equity" commenced or prosecuted against a state by a citizen of another state. Const. Amend. 11.—United States v. Bright, Case No. 14,647.

On a bill in the nature of a general creditors' bill, brought against a railroad company lying wholly within the Eastern district of Virginia, *held*, that the court could obtain jurisdiction of the District of Columbia, as a codefendant

claiming a lien.—Hay v. Alexandria & W. R. Co., Case No. 6,254a.

A county is not exempt from suit in the federal courts.—McCoy v. Washington County, Case No. 8,731.

A county cannot claim the immunity of not being sued under Const. Am. § 11, and a federal circuit court has jurisdiction of an action upon county orders when the sum in controversy and the citizenship of the parties are such as the statute requires.—Lyell v. Lapeer County, Case No. 8,618.

§ 18. Probate matters.

A federal court has no jurisdiction of a probate matter.—In re Frazer, Case No. 5,068.

§ 19. Supplemental and ancillary proceedings and relief.

The federal court has jurisdiction of all questions arising in the course of the levy and collection of a tax directed by it to be made by a municipality to enforce its judgment.—Brooks v. Memphis, Case No. 1,954.

The court has jurisdiction of all proceedings consequent upon the judgment to obtain satisfaction, for the suit is not terminated until satisfaction.—Campbell v. Hadley, Case No. 2,358.

A creditors' bill, filed to obtain satisfaction of a judgment at law rendered in the same court, is not an original action, irrespective of parties.—Babcock v. Millard, Case No. 699.

The federal circuit court has jurisdiction of a suit upon a supersedeas bond given in that court, independent of the citizenship of the parties.—Seymour v. Phillips & Colby Const. Co., Case No. 12,689.

A suit in equity to stay proceedings at law pending in a federal court may be maintained in such court without regard to the citizenship or alienage of the parties.—St. Luke's Hospital v. Barclay, Case No. 12,241.

§ 20. Admiralty and maritime jurisdiction.

Federal courts, in the exercise of admiralty and maritime jurisdiction, are governed by legislation of congress.—The Chusan, Case No. 2,717.

The civil jurisdiction of the federal courts in maritime causes of contract or tort embraces tide waters within the bays, inlets of the sea, and harbors along the seacoast of the country and in navigable rivers.—United States v. Wilson, Case No. 16,731.

Congress, by conferring admiralty and maritime jurisdiction on federal courts, has, by implication, adopted the maritime law.—The Chusan, Case No. 2,717.

As to the meaning of the words "admiralty" and "maritime," as used in the constitutional grant of judicial powers.—The Huntress, Case No. 6,914.

A federal court has no jurisdiction to enjoin the erection of a bridge, authorized by a state legislature, over a navigable river wholly within the state.—Milnor v. New Jersey R. Co., Case No. 9,620.

See, also, post, § 94.

§ 21. Equity jurisdiction and procedure.

The equity powers of the federal courts are such only as are conferred by act of congress and those judicial powers possessed and exercised by the high court of chancery in England at the time of the formation of our constitution.—Loring v. Marsh, Case No. 8,515; Lorman v. Clarke, Id. 8,516.

In the exercise of its equity jurisdiction, the federal circuit court, as to persons and matters within its jurisdiction, can afford relief where it can be afforded by the principles of the high court of chancery in England.—United States v. Parrott, Case No. 15,998.

The distinction between law and equity, as recognized in the jurisprudence of England, must be observed in the federal courts; but this relates only to the remedy, and not to the existence of rights.—Meade v. Beale, Case No. 9,371.

The general equity jurisdiction of the federal courts is derived from the laws of the United States, and it can neither be enlarged nor diminished by state laws.—Noyes v. Willard, Case No. 10,374; Lamson v. Mix, Id. 8,034; Lanmon v. Clark, Id. 8,071; Mayer v. Foulkrod, Id. 9,341; Breeden v. Lee, Id. 1,828.

A federal court in equity will enforce, at the suit of the beneficiary, a contract made for his benefit by another person, where, under the jurisprudence and laws of the state, want of privity is not an obstacle to such enforcement.—Benjamin v. Cavaroc, Case No. 1,300.

The equity practice of the federal courts, when not controlled by act of congress or the rules prescribed by the supreme court, is in general regulated by the chancery practice of the parent country.—Goodyear v. Providence Rubber Co., Case No. 5,583.

The practice of the English chancery court, and not that of the exchequer court, is the basis of the equity practice in the United States courts.—Smith v. Burnham, Case No. 13,018.

Equity practice in the federal courts is derived from the English high courts of chancery, and is not required to conform to the chancery practice of the state courts.—Lamson v. Mix, Case No. 8,034.

See, also, post, §§ 87, 95.

§ 22. Criminal jurisdiction.

The circuit and district courts of the United States can take cognizance of civil and criminal matters only so far as the power so to do is conferred upon them by statutes of the United States.—United States v. Alberty, Case No. 14,426.

A federal judge has no power to authorize the arrest of a citizen for breach of the peace or violation of the laws of a state.—In re Bergen, Case No. 1,338.

§ 23. Consent of parties.

The parties cannot by consent confer jurisdiction not shown in the proceedings.—Bobyshall v. Oppenheimer, Case No. 1,592.

§ 24. Showing jurisdiction.

The jurisdiction of the circuit and district courts of the United States must in all cases appear on the face of the pleading.—United States v. Alberty, Case No. 14,426.

§ 25. Change of conditions.

Jurisdiction once attached cannot be devested or impaired by matter occurring subsequently.—Greenwood v. Rector, Case No. 5,792.

§ 26. Exception to jurisdiction.

Exception to the jurisdiction of the court, in a civil action brought by a private suitor against an armed ship of a friendly power, is properly taken by suggestion filed in the name of the United States by the United States attorney.—The Pizarro v. Matthias, Case No. 11,199.

Defendant may at any time before trial object to the jurisdiction on motion, or by a plea, or on the general issue with notice to the adverse party.—Bobyshall v. Oppenheimer, Case No. 1,592.

§ 27. Power of judge.

Act May 15, 1820, § 4, prescribing the mode of relief against a treasury warrant of distress, confers a power upon the court, and not upon the judge as an individual.—Porter v. United States, Case No. 11,290.

§ 28. Decree on failure of jurisdiction.
Where a federal court has no jurisdiction of a case it has no power to make any order in it, except to dismiss it for want of jurisdiction.—Fisk v. Union Pac. R. Co., Case No. 4,827.

§ 29. State laws.
A person who has the right under an act of congress to sue in the federal court cannot be compelled by an act of the state legislature first to obtain leave of a state court.—Phelps v. O'Brien County, Case No. 11,078.

A state legislature cannot suspend process in the federal courts as to its citizens.—Babcock v. Weston, Case No. 703.

Federal courts have no jurisdiction, irrespective of citizenship of parties, of suits respecting violations of state laws and constitution.—Bertonneau v. Board of Directors of City Schools, Case No. 1,361.

(B) JURISDICTION DEPENDENT ON NATURE OF SUBJECT-MATTER.

§ 30. Constitutional questions.
A federal court can inquire only into the constitutional power of state legislatures, not as to the policy, justice, or wisdom of their acts.—Bennett v. Boggs, Case No. 1,319.

The circuit court has jurisdiction of a bill to restrain enforcement of an act repealing the charter of a lottery company and making it a penal offense to carry on the business, which charges that the repealing act impaired the obligations of a contract between the state and the company.—Louisiana State Lottery Co. v. Fitzpatrick, Case No. 8,541.

A federal court has jurisdiction of a suit to restrain state officers from executing an unconstitutional state statute in violation of a contract of the state with complainants.—McComb v. Board of Liquidation, Case No. 8,707.

§ 31. Suits arising under laws of United States—In general.
The constitutional provision that the judicial power shall extend to all cases arising under the laws of the United States is not a self-executing power, and does not vest the courts with jurisdiction without the action of congress for that purpose.—Roback v. Taylor, Case No. 11,877.

The fact that, upon the trial of an action arising out of contracts or dealings of the parties, a question may arise involving the construction of a federal law, will not give the court jurisdiction. Act March 3, 1875, § 1.—Dowell v. Griswold, Case No. 4,041.

§ 32. —— Revenue and customs laws.
The federal courts have no jurisdiction, on the ground of subject-matter, of a bill to restrain a collector of internal revenue from the collection of an alleged illegal income tax.—Roback v. Taylor, Case No. 11,877.

The federal circuit court has jurisdiction of an action against a collector of customs to recover back money paid as duties, and alleged to have been illegally exacted, irrespective of the citizenship of the parties.—Schmeider v. Barney, Case No. 12,462.

The repeal (Act July 13, 1866, § 68) of Act June 30, 1864, § 50, leaves the jurisdiction of the federal courts in cases arising under the revenue laws to stand on Act March 2, 1833, and that act does not confer jurisdiction in cases arising under the internal revenue laws.—Stevens v. Mack, Case No. 13,404.

§ 33. —— Public lands.
The federal court has jurisdiction of an action involving the title to land held under patents issued upon confirmed Mexican grants, and depending upon a controverted construction of such patents.—Hills v. Homton, Case No. 6,508.

§ 34. —— Copyrights and trade-marks.
Where the question of copyright is merely incidental to a dispute about a contract for the original composition of a literary work, a federal court will not entertain jurisdiction.—Haworth v. Nystrom, Case No. 6,251.

Where, in a suit for infringement of copyright, the parties are residents of the same state, and plaintiff fails to make out his title to the copyright, the court has no jurisdiction to restrain the use of the title of the work upon principles relating to the good will of trades.—Jollie v. Jaques, Case No. 7,437.

The circuit court has jurisdiction to restrain infringement of a registered trade-mark, though the parties are both residents of the state.—Duwell v. Bohmer, Case No. 4,213.

§ 35. —— Patents.
Jurisdiction of an action under the patent laws depends upon the subject-matter and not upon citizenship.—Allen v. Blunt, Case No. 215.

In an action under the patent laws neither plaintiff nor defendant need be an inhabitant of the state where brought. It is sufficient if the writ is served personally upon defendant in the district.—Allen v. Blunt, Case No. 215.

A federal court may by injunction protect the right of the patentee or his assignee from infringement, irrespective of the citizenship of the parties.—Brooks v. Stolley, Case No. 1,962.

The court has jurisdiction, on the ground of the subject-matter, of a suit by a licensee or grantee having an exclusive right to make and vend the invention against the patentee for an alleged infringement.—Stanley Rule & Level Co. v. Bailey, Case No. 13,287.

The parties to a contract respecting patent rights not provided for or regulated by act of congress stand upon the same ground as other litigants in respect to the jurisdiction of the court.—Blanchard v. Sprague, Case No. 1,516; Bloomer v. Gilpin, Id. 1,558.

The fact that the subject-matter of a contract is a patent right does not give the federal courts jurisdiction of a bill for specific performance.—Brooks v. Stolley, Case No. 1,962; Burr v. Gregory, Id. 2,191; Nesmith v. Calvert, Id. 10,123; Perry v. Littlefield, Id. 11,008.

The federal courts have no jurisdiction on the ground of the subject-matter of controversies involving the construction of contracts relating to patents, where the validity of the patent is not involved.—Consolidated Fruit-Jar Co. v. Whitney, Case No. 3,133; Randolph v. Robinson, Id. 11,561.

The court has no jurisdiction of a suit in equity for breach of a contract in relation to a patent and for an account, where neither party is a citizen of the state.—Goodyear v. Day, Case No. 5,568.

The federal court has no jurisdiction of a bill by a patentee for the specific performance of covenants by a licensee to keep correct accounts, and to permit examination of his books, and to enjoin the use of the patent until such performance.—Goodyear v. Union India Rubber Co., Case No. 5,586.

The federal court has no jurisdiction, on the ground of subject-matter, of a suit by the licensee of an exclusive territorial right to use a patented article, to enjoin a use by one to whom the patentee sold the patented article in violation of his contract.—Hill v. Whitcomb, Case No. 6,502.

The circuit court has no jurisdiction, on the ground of the subject-matter, of a suit to enforce a license granted under a patent, or a

suit to set it aside on the ground that the patent is void.—Merserole v. Union Paper Collar Co., Case No. 9,488.

The grant of jurisdiction in patent cases is as full in equity as it is at law.—Hoffheins v. Brandt, Case No. 6,575.

§ 36. —— National banks.

The circuit courts have jurisdiction of all actions brought by or against national banks without regard to citizenship or the amount involved.—Mitchell v. Walker, Case No. 9,670.

The national banks have a right to sue in the federal courts by virtue of the act under which they were created, and such right is not controlled by the judiciary act.—Commercial Nat. Bank v. Simmons, Case No. 3,062; First Nat. Bank v. Douglas County, Id. 4,809.

The limitation, in section 11 of the judiciary act, as to suit on assigned paper, does not apply to national banks.—Commercial Nat. Bank v. Simmons, Case No. 3,062.

§ 37. —— Union Pacific Railroad Company.

The federal courts have jurisdiction in actions by and against the Union Pacific Railroad Company whenever they would have jurisdiction of the same class of actions between other parties. 12 Stat. 489, § 1.—Smith v. Union Pac. R. Co., Case No. 13,121.

Union Pacific Railroad Company, under its charter, may sue and be sued in the circuit court of the United States for the district of Nebraska, without reference to citizenship.—Bauman v. Union Pac. R. Co., Case No. 1,117.

§ 38. —— Marshals' bonds.

The federal circuit courts have jurisdiction of suits on marshals' bonds without reference to the citizenship of the parties. — Wetmore v. Rice, Case No. 17,468; Adler v. Newcomb, Id. 83; United States v. Davidson, Id. 14,921.

§ 39. Rights not enforceable in state courts.

A prosecution for burglary is "a cause affecting" the owner of the building entered, within the meaning of Act April 9, 1866, § 3, giving the federal courts jurisdiction where the rights secured thereby cannot be enforced in the state courts.—United States v. Rhodes, Case No. 16,151.

The circuit court has jurisdiction of a prosecution for burglary, where the owner of the building entered is, on account of color, incompetent by the law of the state to testify in support of the indictment as a white person might, though the indictment does not aver the statute denying the right.—United States v. Rhodes, Case No. 16,151.

§ 40. Sufficiency of allegation.

A mere averment that the action arises out of a law of the United States is insufficient to confer jurisdiction; the facts showing it must be stated.—Dowell v. Griswold, Case No. 4,041.

(C) JURISDICTION DEPENDENT ON CITIZENSHIP, RESIDENCE, OR CHARACTER OF PARTIES.

§ 41. In general.

Unless a party has a right to sue in the local courts, he cannot sue in the federal courts.—Morgan v. New Orleans, M. & C. R. Co., Case No. 9,806.

In order to give jurisdiction to the federal circuit court, one party, plaintiff or defendant, must appear by the record to be a citizen of the United States.—Rateau v. Bernard, Case No. 11,579.

An American citizen will not be deprived of his right to sue in the federal court on the ground that he is not a citizen of any state, except on strong proof.—Rabaud v. D'Wolf, Case No. 11,519.

Where jurisdiction depends upon the parties, it is those named in the record, and not those interested.—Gill v. Stebbins, Case No. 5,431; United States v. Myers, Id. 15,844.

In a garnishment proceeding it must appear on the face of the pleading or by the record that the judgment creditor and garnishee are citizens of different states.—Tunstall v. Worthington, Case No. 14,239.

The residence of persons having an equitable interest in the subject-matter of a suit at law is immaterial, where the parties having the legal right are before the court.—Adams v. White, Case No. 68.

The circuit court has no power to administer common-law relief in a suit between citizens of the same state.—Boucicault v. Hart, Case No. 1,692.

§ 42. Diverse citizenship—In general.

The circuit court has no jurisdiction of suits on the ground of diversity of citizenship except where one of the parties is a citizen of the state where the suit is brought.—White v. Fenner, Case No. 17,547; Kelly v. Harding, Id. 7,670; Kitchen v. Strawbridge, Id. 7,854; Shute v. Davis, Id. 12,828; Moffat v. Soley, Id. 9,688.

The circuit court in New York has no jurisdiction of a suit by a citizen of New York and a citizen of Georgia against a citizen of Massachusetts.—Moffat v. Soley, Case No. 9,688.

The circuit court has jurisdiction where defendant is a citizen of the state in which the suit is brought, and plaintiff a citizen of another state, without reference to the division of the state into districts, where process has been served in the district in which suit is brought.—Vore v. Fowler, Case No. 17,003.

A controversy as to the custody of a child, between citizens of different states, is within the judicial power of the United States to determine by writ of habeas corpus.—Bennett v. Bennett, Case No. 1,318.

The circuit court has jurisdiction of an action of debt on a judgment obtained in a state court by a citizen of another state.—Barr v. Simpson, Case No. 1,038.

The test of jurisdiction is not citizenship at the time a contract is made or broken, but at the time the action is commenced.—Frank v. Chetwood, Case No. 5,051; Chamberlain v. Eckert, Id. 2,577.

Citizenship of one party in the District of Columbia cannot create a case of diverse citizenship.—Barney v. Baltimore, Case No. 1,029; Vasse v. Mifflin, Id. 16,895; Wescott v. Fairfield Tp., Id. 17,418.

A tenant in common of land, who is a citizen of another state, may bring ejectment in the circuit court for his portion, irrespective of the citizenship of his co-tenants.—Browne v. Browne, Case No. 2,035.

Nonresident stockholders of a resident corporation may sue in the circuit court to restrain the collection of an illegal taxation of their stock by the state, making the corporation defendant.—Paine v. Wright, Case No. 10,676.

§ 43. —— Residence and domicile.

"Citizenship," as used in the constitution in reference to federal jurisdiction, means merely residence. — Cooper v. Galbraith, Case No. 3,193.

To constitute a person a citizen of the state, so as to sue in the United States court, he must have a domicile in such state.—Case v. Clarke, Case No. 2,490.

In respect to jurisdiction of the federal courts, a person can be a citizen of but one

state, and that is determined by his domicile.—Butler v. Farnsworth, Case No. 2,240.

The citizenship of a defendant in ejectment, residing upon the land, and intending to remain permanently, cannot be alleged as of another state.—Bissell v. Horton, Case No. 1,448.

A bill filed in one state by a complainant residing in another will be dismissed, where respondent shows that he has his domicile in still another state.—Burnham v. Rangeley, Case No. 2,176.

One who leaves his domicile and goes to another state to obtain employment will not be considered a citizen of the latter state, so as to give the federal courts jurisdiction, in the absence of proof that he intended a permanent residence there.—Catlin v. Gladding, Case No. 2,520.

On removal by a citizen of one state to another state with a bona fide intention to reside there, he becomes instantly a citizen of that state, and may sue in the court of the United States as such.—Cooper v. Galbraith, Case No. 3,193.

The rules of law as to removal from one state to another, as affecting citizenship and the jurisdiction of the federal courts, stated in a charge to a jury.—Gardner v. Sharp, Case No. 5,236.

A resident of Pennsylvania cannot be sued as a citizen of Maryland, although he temporarily resided and exercised the rights of a citizen in Maryland until one year before the suit.—Knox v. Greenleaf, Case No. 7,908.

A person who still lives part of every year in his original home may claim his citizenship there though he has another home in another state.—Arnold v. Marshal of United States, Case No. 560.

A residence in a state, continuing for only a few months, in a business which might be abandoned at any time, where the person's family resided in his native state, in which he spent a considerable part of his time, *held* not to constitute a domicile, for the purpose of jurisdiction of the federal courts.—Prentiss v. Barton, Case No. 11,384.

It is not a fraud on the law to remove from one state to another for the purpose of acquiring a right to sue in the federal court, where there is no intention to return.—Catlett v. Pacific Ins. Co., Case No. 2,517; Briggs v. French, Id. 1,871.

A partnership continues after dissolution for the purpose of liquidation and partition of its assets, and all the partners can be legally sued in the domicile of the firm for such purposes.—Goodrich v. Hunton, Case No. 5,544.

§ 44. —— Several plaintiffs or defendants.

The federal court has no jurisdiction on the ground of diverse citizenship, unless all the persons on one side of the controversy are citizens of different states from all the persons on the other side.—Teal v. Walker, Case No. 13,812; Ketchum v. Farmers' Loan & Trust Co., Id. 7,736; Bissell v. Horton, Id. 1,448.

Federal jurisdiction is not lost in a suit between citizens of different states, merely because there may be found in it, as necessary parties, one or more defendants of the same state with the plaintiffs or some of the plaintiffs.—National Union Bank v. Dodge, Case No. 10,053.

The joinder of those parties whose citizenship would oust the jurisdiction will be dispensed with, where it can be done without prejudice to their rights.—Harrison v. Urann, Case No. 6,146.

The court may grant a motion to strike out the name of one of defendants where its jurisdiction might otherwise be ousted.—Greeley v. Smith, Case No. 5,747.

The vendee of plaintiff in an action to recover possession of real property is not a party thereto, and his citizenship in no way affects the question of jurisdiction.—Elliot v. Teal, Case No. 4,389.

On a bill brought by plaintiff for himself and all others who may be interested, the citizenship of the latter need not be alleged.—Vallette v. Whitewater Canal Co., Case No. 16,820.

The circuit court has jurisdiction in equity in the district of Maine, over a respondent, a citizen of New Hampshire, found in its district, and there served with process, when all the orators are citizens of other states, and all the other respondents are citizens of Maine.—Wiggins v. European & N. A. Ry. Co., Case No. 17,626.

In a suit by a citizen of another state against a corporation of the state, service of process, within the state, on a joint defendant, who is a citizen of a third state, gives the court jurisdiction over him.—Mowrey v. Indianapolis & C. R. Co., Case No. 9,891.

The right of a stockholder to sue in the federal courts to restrain the corporation and its officers from illegal acts cannot be defeated by the fact that part of defendants are interested with them.—Pond v. Vermont Val. R. Co., Case No. 11,265.

If the jurisdiction of the court could be ousted by making all the parties concerned in interest plaintiffs, those who are citizens of the same state with the real defendants may refuse to join in the suit, and may be made defendants.—Wisner v. Ogden, Case No. 17,914.

Joining an alien with a citizen will not affect the jurisdiction, especially if the alien is not a material party.—Rateau v. Bernard, Case No. 11,579.

In a suit in equity brought by aliens against citizens of the district, a person not stated to be a citizen of the state cannot be made a defendant on his application, because the jurisdiction of the court would thereby be ousted.—Drake v. Goodridge, Case No. 4,062.

Where a necessary party defendant, not brought in, is a citizen of the same state with plaintiff, the court cannot take jurisdiction on the ground of diversity of citizenship.—Brigham v. Luddington, Case No. 1,874.

The fact that one defendant might have pleaded to the jurisdiction is not available to the other defendant, where the former is not served with process.—Craig v. Cummings, Case No. 3,331.

A person sued by the payee on a partnership note in the federal court cannot object that the nonresident plaintiff and his co-defendant, not served with process, are citizens of the same state.—Doremas v. Bennet, Case No. 4,001.

Where the writ is returned non est, etc., as to a defendant whose citizenship is not averred, his joinder will not oust the court of jurisdiction.—Morrison v. Bennet, Case No. 9,843.

The citizenship of a person not served with process, who is a joint promisor, must appear in the declaration.—Bargh v. Page, Case No. 980.

If a joint promisor, not served with process, be a citizen of the same state with plaintiff, the court has no jurisdiction.—Bargh v. Page, Case No. 980.

Where the interest of the parties is joint, to sustain the jurisdiction, each of the plaintiffs must be competent to sue each of the defendants in the federal courts.—Tuckerman v. Bigelow, Case No. 14,228.

An action cannot be maintained in the circuit court against joint contractors, where one of them resides in the same state with plaintiff.—Lovejoy v. Washburne, Case No. 8,550.

If one is not served with process he may enter his appearance and join with the other in a plea to the jurisdiction, and the suit will be dismissed for want of jurisdiction.—Lovejoy v. Washburne, Case No. 8,550.

§ 45. —— Severable controversy.

The case will proceed against the person appearing and notified, without prejudice to the others, where their interests can be severed and tried separately.—Heriot v. Davis, Case No. 6,404.

A bill charging one of several defendants with failure to perform his contract to transfer a patent, and alleging that the other defendants, knowing this fact, bought machines of him, states a severable cause of action and is maintainable against him, where there is diversity of citizenship, though some of the other defendants are citizens of the same state with plaintiff.—Nesmith v. Calvert, Case No. 10,123.

§ 46. —— Nominal parties.

Where the real parties in the record are not citizens of different states, the court has no jurisdiction.—Dodge v. Perkins, Case No. 3,954.

Persons who are only nominally interested in the controversy cannot confer jurisdiction or take it away.—Girardey v. Moore, Case No. 5,462.

A defendant, to give jurisdiction on the ground of residence in a certain district, must be a real, and not merely a nominal, party to the suit. Act Feb. 10, 1855, § 9.—Sackett's Harbor Bank v. Barry, Case No. 12,204.

The court will not be deprived of its jurisdiction arising from the citizenship or alienage of parties by the joining of a mere nominal party, who does not possess the requisite character.—Ward v. Arredondo, Case No. 17,148.

§ 47. —— Actions by persons acting in fiduciary or representative capacity.

The fact that intestate was a citizen of another state will not give the administrator, who is a citizen of the same state with defendant, the right to sue in the federal court.—Dodge v. Perkins, Case No. 3,954.

A federal court has no jurisdiction of a bill of revivor against an administrator with the will annexed of the original respondent, where such administrator was appointed in another state.—Mellus v. Thompson, Case No. 9,405.

An administrator may sue in the circuit court for the district of New Hampshire as a citizen of Maine, if he takes out letters of administration in New Hampshire.—Carter v. Treadwell, Case No. 2,480.

The circuit court of a state in which testator left real and personal property, and in which administration was granted, has jurisdiction of a bill for an account of trust funds received by testator for complainant, although testator died in another state, in which his will was proved.—Walker v. Beal, Case No. 17,065.

The circuit court of the United States has jurisdiction of a suit in chancery commenced on behalf of an infant who is a citizen of another state against a citizen of the state where the suit is brought, although the next friend of the infant complainant be a citizen of the same state with the defendant.—Williams v. Ritchey, Case No. 17,734.

The circuit court of the state in which a corporation is domiciled has jurisdiction of a suit by its receiver, a citizen of another state, against citizens of the district.—Gray v. Davis, Case No. 5,715.

A citizen of Massachusetts, appointed a receiver of an Ohio corporation by the United States circuit court in the latter state, may sue in said court for the recovery of the assets of such corporation wrongfully withheld.—Farlow v. Lea, Case No. 4,649.

A receiver appointed on the voluntary dissolution of a bank, suing in a federal court, must show that such court could have taken jurisdiction as between defendants and the bank.—Bradford v. Jenks, Case No. 1,769.

Such receiver cannot sue as the bearer on a note payable to the bank or bearer.—Bradford v. Jenks, Case No. 1,769.

The fact that a corporation is not suable in a circuit court will not prevent its agents being sued therein.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

§ 48. —— Actions by assignees in general.

The provision of section 11 of the judiciary Act of 1789, in relation to suits by assignees, is inapplicable to a conveyance of land between citizens of different states.—Briggs v. French, Case No. 1,871.

An executor or administrator is not an "assignee," within the meaning of such section.—Mayer v. Foulkrod, Case No. 9,341.

Such section is inapplicable to the assignment of a mortgage, and an assignee thereof may file a bill of foreclosure in the federal court without regard to the citizenship of his assignor.—Dundas v. Bowler, Case No. 4,140; Seckel v. Backhaus, Id. 12,599. CONTRA, see Hill v. Winne, Case No. 6,503.

An assignee of a right to an account of the proceeds of sales of mortgaged property cannot maintain a suit in the circuit court of the United States, in a case where his assignors were not competent, on the ground of citizenship, to sue the defendants.—Wilkinson v. Wilkinson, Case No. 17,677.

The rule that a promissory note payable to bearer is excepted from the prohibition of section 11 of the judiciary act does not apply to an accompanying mortgage.—Hill v. Winne, Case No. 6,503.

An alien assignee of a judgment obtained by a nonresident can maintain a suit thereon in the federal court, though his immediate assignor was a citizen of the same state with defendant.—Wilson v. Fisher, Case No. 17,803.

An assignee of a chose in action, not founded on contract may sue without showing that the citizenship of his assignor is such as would give the circuit court jurisdiction had such assignor sued. Act March 3, 1875.—Van Bokkelen v. Cook, Case No. 16,831.

A suit against a bank to recover for neglecting to protest drafts forwarded by a correspondent bank, brought by an assignee of the right of action, is not a suit to recover the contents of a chose in action in favor of an assignee. Act 1789, § 11.—Barney v. Globe Bank, Case No. 1,031.

The words in section 11 of the judiciary act of 1789, "unless a suit might have been prosecuted * * * if no assignment had been made," refer to the time when the suit was commenced, and the citizenship of plaintiff and his assignor must be stated as of such time, and not as of the date of the assignment.—Chamberlain v. Eckert, Case No. 2,577; Thaxter v. Hatch, Id. 13,866; Brainard v. Williams, Id. 1,804. CONTRA, see Rogers v. Linn, Case No. 12,015.

Under Act 1789, § 11, the assignee of a chose in action may sue in the federal court if the assignor might at the time suit was brought have there prosecuted the suit if no assignment had been made; and this, although the assignor

was, at the time the assignment was made, a citizen of the same state with the maker.—White v. Leahy, Case No. 17,551.

A corporation of one state sold coal in another state by its agents resident there, who took a note payable to them "as agents," and indorsed it to the president of the corporation, who resided and had an office in a third state. *Held*, than an action would lie by the president in a federal court where the complaint contained the common counts as well as a special count on the note.—Heckscher v. Binney, Case No. 6,316.

An assignee of a chose in action may sue, if the original holder could have done so, although some intermediate holder was a citizen of the same state with defendant.—Milledollar v. Bell, Case No. 9,549.

A federal court has jurisdiction where a declaration for money had and received describes the parties as citizens of different states, and plaintiff proves his case by a note to a third person, who is a citizen of the state with him.—Brown v. Noyes, Case No. 2,023.

The fact that the original ground of suit in a state court between citizens of different states was a negotiable chose in action (Act 1789, c. 20, § 11) will not prevent the federal court taking jurisdiction of a bill in equity in favor of the assignee of the judgment, who is a citizen of the same state with plaintiff.—Dexter v. Smith, Case No. 3,866.

A receiver appointed on a voluntary dissolution of a bank (in Michigan) stands in the relation of the assignee of an insolvent debtor.—Bradford v. Jenks, Case No. 1,769.

§ 49. —— Assignees or indorsees of notes, bonds, etc.

The restriction contained in section 11 (Act 1789, c. 20) does not apply to suits brought by the United States on bonds.—United States v. Greene, Case No. 15,258.

An instrument not negotiable by the law merchant, although made negotiable by local statute, is not within the exception (Act March 3, 1875) authorizing suits by assignees.—Beverly v. Davidson County, Case No. 1,377.

A federal court has no jurisdiction in a suit by an indorsee of a note against the indorser and maker, where the maker and indorser, at the time of the assignment, both resided in the state where the note is sued on. It is immaterial that the indorser was an accommodation indorser.—Shuford v. Cain, Case No. 12,823; Small v. King, Id. 12,960.

The declaration in an action by the assignee of a promissory note must show that the assignor had a right to sue in the federal court.—Fletcher v. Turner, Case No. 4,867; Fry v. Rousseau, Id. 5,141.

The assignee of a promissory note may sue on it in the federal court if the assignor might have done so at the time the suit was commenced.—Chamberlain v. Eckert, Case No. 2,577.

The indorsement of a writing obligatory is regarded as a new contract, and the indorsee, being a citizen of another state, may sue his immediate indorser in the federal court irrespective of the citizenship of the maker and payee.—Campbell v. Jordan, Case No. 2,362; Codwise v. Gleason, Id. 2,938; Gaylord v. Johnson, Id. 5,285; Dennison v. Larned, Id. 3,798.

But as against remote indorsers, except in the case of a foreign bill of exchange, plaintiff must show that the intermediate indorsers could have sustained an action in the federal court.—Campbell v. Jordan, Case No. 2,362.

Where a note is indorsed by the payee "to bearer" before the note is put in circulation, a holder who is a citizen of a different state from such indorser may sue him in a federal court, though he was a citizen of the same state as the maker.—Codman v. Vermont & C. R. Co., Case No. 2,936.

The indorsee or holder of a note, payable to a certain person "or bearer," may sue thereon in the federal court, if a citizen of another state, regardless of the citizenship of the payee named.—Bullard v. Bell, Case No. 2,121; Wood v. Dummer, Id. 17,944; Sackett v. Davis, Id. 12,203; Halsted v. Lyon, Id. 5,968; Varner v. West, Id. 16,885.

A note made payable to the maker's own order, and by him indorsed, passes by delivery, as if made payable to bearer, and an action may be maintained thereon in the federal court, where the holder and maker reside in different states.—Towne v. Smith, Case No. 14,115.

The federal court *held* to have no jurisdiction of an action by an assignee of a note not made payable at a bank, where, under the state law in such case, the maker is entitled to assert, against any indorsee, any equity available against the payee.—Gregg v. Weston, Case No. 5,800.

The rule that the holder of a negotiable note may sue thereon, although he has no interest therein, is not applicable when the question of jurisdiction is to be determined.—Hawley v. Kepp, Case No. 6,249.

The federal court has no jurisdiction of an action against the maker of a promissory note made payable to one who indorsed the same for his accommodation, where such facts appear from the complaint, unless it appear that the indorser is a citizen of a state other than that of defendant's residence.—Noell v. Mitchell, Case No. 10,287.

A holder of county railway aid bonds may sue the county in a federal court, where the covenant is to pay the holder, although the bonds were originally issued to a railroad company in the same state with the county.—McCoy v. Washington County, Case No. 8,731. CONTRA, see Clarke v. Janesville, Case No. 2,854.

The bonds of a corporation, payable to bearer, are commercial paper passing by delivery, and do not fall within the prohibition of section 11, Act 1789.—Bradly v. Marine & R. Phosphate Min. & Mfg. Co., Case No. 1,789.

Coupons payable to bearer are promissory notes, within Act March 3, 1875, § 1, and the holder is not an assignee, but acquires his title by delivery.—Perrine v. Thompson, Case No. 10,997; Cooper v. Same, Id. 3,202.

Interest coupons, though payable to bearer, cannot be sued on in the federal court unless the bonds to which they were attached were suable in such court.—Clarke v. Janesville, Case No. 2,854.

The circuit court has no jurisdiction, under Act 1789, § 11, of an action brought by an assignee on a bond which is filled up and declared upon as payable to order.—White v. Vermont & M. R. Co., Case No. 17,559.

In order to give jurisdiction to the circuit court of an action of an assignee of a bond under seal made equally negotiable with a promissory note under the local law, it must appear that the title, being made capable of passing by delivery, did so pass from the first taker after the act went into operation.—White v. Vermont & M. R. Co., Case No. 17,559.

The assignee of a bail bond is not such an assignee of a chose in action as is contemplated by section 11 of the Judiciary Act.—Bobyshall v. Oppenheimer, Case No. 1,592.

§ 50. —— Corporations.

The fact that defendant corporation was organized under a federal law is not enough to give the federal court jurisdiction.—Magee v. Union Pac. R. Co., Case No. 8,945.

A corporation is not within the meaning of the constitutional provision giving jurisdiction in cases of diversity of citizenship.—Bank of United States v. Deveaux, Case No. 916.

For the purposes of federal jurisdiction, a corporation is conclusively considered as if it were a citizen of the state which created it.—Williams v. Missouri, K. & T. Ry. Co., Case No. 17,728.

In the case of a corporation party, the court will conclusively regard all the shareholders as citizens of the state which created the corporation.—St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co., Case No. 12,237; Greeley v. Smith, Id. 5,747; National Park Bank v. Nichols, Id. 10,048. CONTRA, see Bank of Cumberland v. Willis, Case No. 885; Kirkpatrick v. White, Id. 7,850; Wilson v. City Bank, Id. 17,797.

A corporation organized in one state is not suable as a citizen of another state, under whose laws it has purchased, and is operating a line of railway therein.—Williams v. Missouri, K. & T. Ry. Co., Case No. 17,728.

The consolidation of railroad corporations of different states under the laws of those states will not prevent one of the corporations from bringing suit against the other in the federal court, as corporations of different states.—St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co., Case No. 12,237.

The fact that a corporation holds charters from other states will not prevent the circuit court of the state where it was created taking jurisdiction of a suit against it by nonresidents.—Minot v. Philadelphia, W. & B. R. Co., Case No. 9,645.

If a company be incorporated by two states, a citizen of one of the states may sue it in a United States court in the other state in which it is incorporated.—Wheeling v. Baltimore, Case No. 17,502.

Where the plaintiff is a citizen of another state, a corporation created by such state cannot be made a defendant, unless it also becomes incorporated in the state where the suit is brought.—Vose v. Reed, Case No. 17,011.

A corporation authorized by the statute of a state, doing business there, and reciting in its contracts that it is chartered by the state, is estopped to deny, when sued in the federal courts, that it is duly organized under the state laws.—Blackburn v. Selma, M. & M. R. Co., Case No. 1,467.

In a suit brought by or against a corporation in the federal court, the state in which the corporation is created and established should be averred.—Greeley v. Smith, Case No. 5,747.

Where a corporation of another state sues in a federal court, an allegation of its citizenship is not necessary.—New York & E. R. R. v. Shepard, Case No. 10,198.

§ 51. —— Joint-stock associations.

A joint-stock association organized under the laws of New York may be sued in the federal court by a citizen of another state without regard to the citizenship of its individual members.—Maltz v. American Exp. Co., Case No. 9,002.

The averment that complainant is a joint stock association, formed in the state of New York, under the laws of such state, neither imports that it is a corporation created by another state, nor that its members are citizens of another state.—Dinsmore v. Philadelphia & R. R. Co., Case No. 3,921.

§ 52. —— Transfers for purposes of suit.

It is no objection that plaintiff acquired title to enable him to sue in the federal courts if the transaction is real, and not colorable.—Blackburn v. Selma, M. & M. R. Co., Case No. 1,467; Osborne v. Brooklyn City R. Co., Id. 10,597; Newby v. Oregon Cent. Ry. Co., Id. 10,145; Hawley v. Kepp, Id. 6,249; De Laveaga v. Williams, Id. 3,759.

Where plaintiff has the legal title to coupons, he can sue upon them, although he bought them merely with the object of bringing suit upon them in the federal court, and intending to pay over a portion of the recovery to some other person.—Perrine v. Thompson, Case No. 10,997.

Conveyances made merely for the purpose of giving federal courts jurisdiction are ineffectual for that purpose.—Barney v. Baltimore, Case No. 1,029; Hurst v. McNeil, Id. 6,936; Maxfield v. Levy, Id. 9,321; Welles v. Newberry, Id. 17,378.

Where a conveyance of land appears to be only colorable with a view to give jurisdiction, the writ will be dismissed on motion or on a plea.—Starling v. Hawks, Case No. 13,311.

Where it appears that both parties have an option to rescind within a stipulated time, and that the suit is prosecuted under the direction and at the expense of the grantor, the conveyance will be held to be colorable only.—Starling v. Hawks, Case No. 13,311.

A deed which is not intended to give, and which does not give, jurisdiction to the court, cannot be said to be given in fraud of the law, merely because it changes the nature of the suit.—Brown v. Arbunkle, Case No. 1,990.

The title of one owning shares in a body of land, the legal title to which, originally in three trustees, was conveyed to him, under a six years' lease, with covenant to sue to recover the same, is sufficient to give the circuit court jurisdiction.—Browne v. Browne, Case No. 2,035.

A conveyance made to enable a party to maintain suit in a federal court cannot be questioned by one not claiming under either party.—Briggs v. French, Case No. 1,871.

§ 53. —— Supplemental and ancillary suits, proceedings, and relief.

The federal court will retain jurisdiction of action, once acquired, to give remedy to all intervening and conflicting rights.—Barth v. Makeever, Case No. 1,069.

Where a suit is auxiliary to one previously commenced and still pending between citizens of different states, it is no objection to the jurisdiction that the parties are citizens of the same state.—Stone v. Bishop, Case No. 13,482.

The fact that the parties plaintiff and defendant to a cross bill, or some of them, are citizens of the same state, will not prevent its being sustained in the federal court, where necessary to prevent injustice; and defendants, as parties to the original bill, are subject to the jurisdiction of the court.—Schenck v. Peay, Case No. 12,450.

Where all the defendants are citizens of the state, one cannot file a cross bill against the others as to matters not set up in the original bill, in which the original complainants have no interest.—Putnam v. New Albany, Case No. 11,481.

The federal court has jurisdiction of a bill filed by defendant in a judgment rendered therein against an assignee of plaintiff, to set aside such judgment for fraud, though both parties are citizens of the same state.—O'Brien County v. Brown, Case No. 10,399.

A bill in equity to enjoin a judgment of the circuit court, brought in such court, is not an original suit (Act 1789, § 11); and it is immaterial that the original plaintiff is a resident and citizen of another state.—Dunlap v. Stetson, Case No. 4,164.

A bill to enjoin a judgment in the circuit court is not considered an original bill between

the same parties, as at law, but as growing out of, and as auxiliary to, the suit at law.—Williams v. Byrne, Case No. 17,718.

There is no jurisdiction to entertain a bill to enjoin a judgment at law in the circuit court, brought by a citizen of Tennessee, not a party to the judgment, against a citizen of Mississippi, the plaintiff in the judgment.—Williams v. Byrne, Case No. 17,718.

But if other parties are introduced, and different interests involved, it is to that extent an original bill, and the jurisdiction of the court must then depend on the citizenship of the parties, and one of the parties must be a citizen of the state where the suit is brought.—Williams v. Byrne, Case No. 17,718.

The circuit court has jurisdiction of a bill in equity by a judgment creditor against citizens of different states, to set aside conveyances by the judgment debtor as in fraud of creditors, although the ground of the judgment was a negotiable chose in action, on which a suit could not have been maintained in such court.—Bean v. Smith, Case No. 1,174.

A bill will lie in the federal court to compel satisfaction from the debtors of a corporation of a judgment obtained against it in a state court, where the citizenship of the parties is such as to confer jurisdiction under the judiciary act.—Putnam v. New Albany, Case No. 11,481.

The circuit court of the United States cannot entertain a bill of revivor where the parties are citizens of the same state, though the original parties were citizens of different states.—Clarke v. Mathewson, Case No. 2,857.

The fact that the administrator of the deceased plaintiff in a cause revived in the federal court under the local law is a citizen of the same state with defendant will not oust the court of jurisdiction.—Hatfield v. Bushnell, Case No. 6,211.

§ 54. —— Intervention.

A person having an interest, though not a party to the suit, may intervene to assert his rights, without reference to the citizenship of the parties.—Osborn v. Michigan Air Line R. Co., Case No. 10,594.

Where jurisdiction is acquired by the federal court solely by reason of citizenship, the court will allow third persons to intervene, if necessary to protect their rights, without regard to their citizenship.—Conwell v. White Water Val. Canal Co., Case No. 3,148.

§ 55. —— Effect of change in relation or condition.

Change of status of parties pending suit does not affect jurisdiction of federal court.—Culver v. Woodruff County, Case No. 3,469.

Where the jurisdiction of the federal courts has once attached, a change in the relation or condition of the parties in the progress of the cause will not oust such jurisdiction.—United States v. Myers, Case No. 15,844.

The rule that jurisdiction once acquired by virtue of the citizenship of the parties cannot be ousted by a change of residence applies only where jurisdiction has vested by a suit.—Thaxter v. Hatch, Case No. 13,866.

A creditors' bill for discovery is a continuation of the suit at law, and a change of residence of the complainant does not oust the jurisdiction.—Hatch v. Dorr, Case No. 6,206.

§ 56. Foreign states.

The constitution gives jurisdiction to the federal courts in cases where foreign nations are parties, and this jurisdiction is vested by statute in the circuit court.—King of Spain v. Oliver, Case No. 7,814.

§ 57. Citizens or residents of foreign states.

A mere "declaration of intention" by an alien to become a citizen is not sufficient to prevent his being a "foreign citizen or subject" within the constitutional provision giving jurisdiction to the federal courts.—Baird v. Byrne, Case No. 757.

Bona fide alien creditors of corporation may maintain bill in equity in federal court to hold its assignees accountable for improper conduct, and for appointment of receiver.—Bell v. Ohio Life Ins. Co., Case No. 1,261.

A native-born American citizen carrying on trade in a foreign country, where he is domiciled, can maintain a suit as an alien against a citizen of the state of his birth in a federal court in said state.—Wildes v. Parker, Case No. 17,652.

The mere allegation that a party is an alien is not sufficient to give jurisdiction. There must be an allegation that he is a subject or citizen of some one foreign state.—Wilson v. City Bank, Case No. 17,797.

An alien holding land under a special law of a state may sustain a suit in the circuit court relating to such land.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

A federal court has no jurisdiction merely because one party is a United States consul at a foreign port.—Milward v. McSaul, Case No. 9,624.

The federal circuit court has jurisdiction of an original civil suit in which plaintiff is a citizen and defendant an alien and resident foreign consul, duly admitted as such by the president.—St. Luke's Hospital v. Barclay, Case No. 12,241.

The federal circuit court has no jurisdiction of a suit between two aliens. To give jurisdiction, one of the parties must be a citizen of a state.—Petrocokino v. Stuart, Case No. 11,041; Prentiss v. Brennan, Id. 11,385; Hinckley v. Byrne, Id. 6,510; Walton v. McNeil, Id. 17,134.

In a suit by an alien, defendant must be described as a citizen of some particular state.—Picquet v. Swan, Case No. 11,134.

A nonresident citizen of the United States, having no local habitation, cannot be sued in the circuit court by an alien, although he has attachable property within the district, if he is not found therein.—Picquet v. Swan, Case No. 11,134.

An alien may sue in a federal court for the construction of a will, and, as incidental thereto, the settlement and distribution of the estate.—Parkes v. Aldridge, Case No. 10,755.

In a suit in the federal court brought by aliens, for the construction of a will, an injunction was issued to restrain the executor from distributing the estate.—Parkes v. Aldridge, Case No. 10,755.

The federal court has jurisdiction between a citizen of a state and an alien, without reference to which of them is plaintiff or defendant.—Hinckley v. Byrne, Case No. 6,510.

Jurisdiction as to resident defendants in suit by aliens is not affected by nonresidence of others.—Bell v. Ohio Life Ins. Co., Case No. 1,261.

An Indian residing within the United States is not a "foreign citizen or subject" (Const. art. 3, § 2), and cannot upon such ground maintain a suit in the circuit court.—Karrahoo v. Adams, Case No. 7,614.

§ 58. Necessity of suing in district of residence.

The circuit and district courts of the United States cannot send their process into another

district, except where specially authorized by law.—Ex parte Graham, Case No. 5,657.

Defendant must either be an inhabitant of, or be found within, the district in which the suit was commenced at the time of serving the writ.—Picquet v. Swan, Case No. 11,134; Hollingsworth v. Adams, Id. 6,611.

Defendant in a case arising under the patent laws must be an inhabitant of the district in which the suit is brought, or be found within it at the time of serving the original process.—Day v. Newark India-Rubber Mfg. Co., Case No. 3,685.

A federal circuit court has no jurisdiction over a defendant served with process while temporarily in a district in which he does not reside.—Smith v. Tuttle, Case No. 13,120.

The requirement that a civil suit against an inhabitant of the United States must be brought in the district of which he is an inhabitant, or in which he is found when the writ is served, cannot be changed by state law. Act 1789, § 11.—Pomeroy v. New York & N. H. R. Co., Case No. 11,261.

The supreme court acquired no power to change, by its rules, the jurisdiction of the federal courts in respect to nonresidents of the district, by virtue either of the act of 1792 or that of 1842.—New England Ins. Co. v. Detroit & C. Steam Nav. Co., Case No. 10,154.

Neither under the bankrupt act of 1867 nor by Act June 1, 1872, § 6, in respect to attachment of property, can a civil suit be brought by original process in the federal court in any other district than that of which defendant is an inhabitant, or in which he is served with process.—Nazro v. Cragin, Case No. 10,062.

A defendant corporation "is found" within the district where sued if it does business there by authority of law.—Blackburn v. Selma, M. & M. R. Co., Case No. 1,467.

Where a state contains more than one district, and the suit is not of a local nature, the suit must be brought in the district in which one or more of the defendants resides.—Seidenbach v. Hollowell, Case No. 12,635.

The marshal's return should show affirmatively that the subpœna was served on defendant within the district in which the suit was brought in order to confer jurisdiction, where the bill alleged that defendant was a resident of another state.—Thayer v. Wales, Case No. 13,872.

Congress has power to confer jurisdiction on the federal courts of suits brought against defendants nonresident in the districts where the suits are brought.—United States v. Ottman, Case No. 15,977.

Such jurisdiction has been conferred as to suits against nonresidents commenced in the state courts by attachment, and removed to the federal courts, by Act March 3, 1875, §§ 2, 4.—United States v. Ottman, Case No. 15,977.

§ 59. Compelling appearance by attachment.

The federal circuit court has no jurisdiction on the ground of subject-matter of a suit against a person not a resident in the district, and not personally served with process, and not appearing therein, though an attachment has been made of his property.—Saddler v. Hudson, Case No. 12,206.

United States courts, under Rev. St. § 915, have no authority to institute suits of foreign attachment.—Chittenden v. Darden, Case No. 2,688.

Under the judiciary act of 1875, a federal court has no jurisdiction to attach property of a citizen of another state who is not found in the jurisdiction.—Mauldin v. Carll, Case No. 9,307.

Whether the circuit court can obtain jurisdiction of a suit against a citizen of another state residing in a foreign country by process of foreign attachment, where defendant is not found in the district, quære.—Toland v. Sprague, Case No. 14,076.

Jurisdiction of an inhabitant of the district cannot be acquired by an attachment of his property.—Sadlier v. Fallen, Case No. 12,210.

Jurisdiction obtained by attachment in admiralty, see "Admiralty," §§ 58–61.

§ 60. Allegations in pleadings—Necessity.

The citizenship of the party, which is to give jurisdiction to the court, must be specially averred.—Leavitt v. Cowles, Case No. 8,171.

Averment of citizenship is necessary to give jurisdiction to the federal court, and must be proved under the general issue.—Catlett v. Pacific Ins. Co., Case No. 2,517.

In all bills in equity the citizenship should appear on the face of the bill, to entitle the court to take jurisdiction.—Dodge v. Perkins, Case No. 3,954.

To give jurisdiction on the ground of diversity of citizenship it must appear affirmatively that complainants are not citizens of the same state with defendants.—Merserole v. Union Paper Collar Co., Case No. 9,488.

To give jurisdiction, the citizenship of all of defendants must be stated, as well as that of complainants.—Findlay's Ex'rs v. Bank of United States, Case No. 4,791.

An allegation in the complaint of residence of the parties in a particular district is not necessary to give jurisdiction.—Teese v. Phelps, Case No. 13,818.

An omission to allege sufficiently that defendant is a citizen of a different state from that of plaintiff is amendable.—Kelsey v. Pennsylvania R. Co., Case No. 7,679.

Where the citizenship of the parties, as shown by the declaration, confers jurisdiction, it is not necessary to aver on the record that a nonresident of the district was served in the district.—McCloskey v. Cobb, Case No. 8,702.

To give the court jurisdiction, the record must show jurisdiction, and all the parties must be capable of suing.—Anderson v. Jackson, Case No. 357.

§ 61. —— Sufficiency.

As a person may reside in one state and be a citizen in another, an averment of residence alone is not sufficient to show jurisdiction.—Evans v. Davenport, Case No. 4,558; Catlett v. Pacific Ins. Co., Id. 2,517.

An allegation that plaintiff is a subject of a foreign power does not confer jurisdiction, as he may still be a naturalized citizen.—Michaelson v. Denison, Case No. 9,523. CONTRA, see Milne v. Huber, Case No. 9,617.

If a party is described as a citizen of the Southern district of New York, he is sufficiently described as a citizen of the state of New York.—Edwards v. Nichols, Case No. 4,296.

A description of defendant as "of the town and county of W., in the Connecticut district, * * * a citizen of the United States, and sheriff of said W. county," is equivalent to describing him as a citizen of Connecticut.—Duryee v. Webb, Case No. 4,198.

An averment that a party is a citizen of the "southern district" of a certain state is a sufficient averment of citizenship.—Berlin v. Jones, Case No. 1,343.

An averment of citizenship equivalent in import to a direct allegation is sufficient to give jurisdiction.—Bayerque v. Haley, Case No. 1,135.

The citizenship of a corporate party need not appear in the caption of the petition. It is suffi-

cient when the facts are averred in the body thereof.—Mexico Southern Bank v. Reed, Case No. 9,514.

In a suit by a national bank, an allegation that plaintiff is a citizen of the state of Illinois, and located and residing and doing business in the city of Chicago, in said state, and that defendant is a citizen of New York, is sufficient to give jurisdiction to the federal court in New York.—Manufacturers' Nat. Bank v. Baack, Case No. 9,052.

A bill in equity describing complainants and part of respondents as of one state, and the respondents on whom service is made, and who appear, as of the state where the suit is brought, is not demurrable for want of jurisdiction.—Heriot v. Davis, Case No. 6,404.

In an action by a Canadian corporation in the circuit court of the United States in Michigan, *held*, that service upon defendant as a citizen of Michigan, in which state he was found, when in fact he was a citizen of Illinois, is good.—Commercial Bank of Commerce v. Green, Case No. 3,059.

§ 62. —— Objections, how raised.

An insufficient allegation of citizenship is good ground of demurrer.—Ketchum v. Driggs, Case No. 7,735.

The want of an averment of citizenship, if not made in the bill or declaration, or where falsely alleged, is available only where raised by pleading.—Hilliard v. Brevoort, Case No. 6,505.

Defendant may take advantage of plaintiff's omission to state that he is a citizen or subject of a foreign state, by motion in arrest of judgment.—Shedden v. Custis, Case No. 12,736.

Where neither party is a citizen of the state, but defendant served therein does not plead the matter in abatement, he cannot subsequently set it up.—Searles v. Jacksonville, P. & M. R. Co., Case No. 12,586.

Citizenship, where it gives jurisdiction, is a preliminary inquiry; and, if it be properly averred in a bill in equity, the denial of the fact must be made by way of plea.—Dodge v. Perkins, Case No. 3,954.

Where the bill avers the citizenship of a defendant, the court will not, on affidavit, and on the hearing of an application for an injunction, dispose of the objection that defendant is an alien, except in a clear case.—Rateau v. Bernard, Case No. 11,579.

A plea of the general issue waives proof of jurisdiction of the person if served within the state.—Blachly v. Davis, Case No. 1,456.

After a trial on the merits, and a verdict or judgment given, defendant is estopped to controvert the fact of citizenship, as laid in the declaration.—Bobyshall v. Oppenheimer, Case No. 1,592.

The citizenship alleged in the declaration need not be proved unless specially denied by plea.—Evans v. Davenport, Case No. 4,558.

A motion to dismiss is the proper remedy when it appears that the real plaintiff in interest is a citizen of the same state with defendant.—Maxfield v. Levy, Case No. 9,321.

§ 63. Voluntary appearance or waiver of objection.

The voluntary appearance of nonresident defendants who are citizens of the same state with complainants will not give the court jurisdiction.—Parsons v. Howard, Case No. 10,777; Lockhart v. Horn, Id. 8,445.

But in such case, where the citizenship is disclosed by the bill, complainants may dismiss the bill as to the obnoxious defendants.—Lockhart v. Horn, Case No. 8,445.

When diversity of citizenship is wanting, consent can give no jurisdiction, and a consent decree will be set aside on a bill of review.—Ketchum v. Farmers' Loan & Trust Co., Case No. 7,736.

The circuit court has jurisdiction of a suit by a nonresident, where some of defendants reside in the state where the suit is brought, and other defendants reside in other states, where the latter appear and submit to the jurisdiction. Act Feb. 28, 1839, § 1.—Pond v. Vermont Val. R. Co., Case No. 11,265.

The defendant may waive the privilege not to be sued out of the state where he resides, by a voluntary appearance.—Harrison v. Rowan, Case No. 6,140; McLean v. Lafayette Bank, Id. 8,888.

Under the act of 1839, a party defendant who does not reside in the district may voluntarily become a party to the suit without ousting the jurisdiction of the court.—Taylor v. Cook, Case No. 13,789; Kerp v. Michigan L. S. R. Co., Id. 7,727.

A foreign corporation, by filing an answer, waives the right to be sued only in the district of the state creating it, and jurisdiction is not limited to its property situated within the district.—Blackburn v. Selma, M. & M. R. Co., Case No. 1,467.

One defendant cannot object as to jurisdiction over another defendant, who admits that his citizenship is rightfully described to give jurisdiction.—Harrison v. Urann, Case No. 6,146.

(D) JURISDICTION DEPENDENT ON AMOUNT OR VALUE IN CONTROVERSY.

See, also, "Removal of Causes," §§ 25, 26.

§ 64. In general.

Jurisdiction on ground of diverse citizenship will not be taken of a suit by a nonresident taxpayer to enjoin the issue of county bonds unless complainant's liability is shown to exceed $500.—Adams v. Douglas County, Case No. 52.

The circuit court has jurisdiction of a creditor's bill brought by the United States, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500. Act Sept. 24, 1789, § 11.—United States v. Stiner, Case No. 16,404.

Suits may be brought in the circuit courts of the United States, by assignees in bankruptcy, without reference to the amount or value in controversy.—Payson v. Coffin, Case No. 10,858.

§ 65. Necessity of averment.

Action of ejectment dismissed at the trial because there was no averment as to the value of the matter in dispute.—Lanning v. Dolph, Case No. 8,073.

Defendant in ejectment cannot prove the value of the land to defeat jurisdiction, where the value is not averred in the declaration. The issue should be taken by plea, but a plea will not be admitted at the trial.—Lanning v. Dolph, Case No. 8,073.

An allegation in a suit to enjoin a county tax that complainant sues "on behalf of all others similarly situated" will not give jurisdiction where it does not appear that complainant's liability exceeds $500.—Adams v. Douglas County, Case No. 52.

§ 66. Computation.

Where the jurisdiction depends upon the amount involved, it is to be determined by the amount of damages laid in the declaration and not the amount of recovery.—Victor Sewing Mach. Co. v. Mingus, Case No. 16,936; Hulsecamp v. Teel, Id. 6,862; Muns v. De

Nemours, Id. 9,931; Murphy v. Howard, Id. 9,949a; Sherman v. Clark, Id. 12,763.

The limit of jurisdiction as to the amount involved is to be determined by the amount laid in the declaration, and, when it consists of the common counts, by the amount in the bill of particulars.—Healy v. Prevost, Case No. 6,297.

The amount stated in the body of the complaint, and not that in the prayer for judgment, will determine the amount in dispute in action on money demand.—Culver v. Crawford County, Case No. 3,468.

The damages laid in the writ, and in the plaintiff's affidavit, are equally conclusive, as to the amount in controversy, for the purposes of jurisdiction.—Muns v. De Nemours, Case No. 9,931.

The circuit court has jurisdiction in covenant where the damages laid exceed $500, though the penalty named in the contract is less than $500.—Martin v. Taylor, Case No. 9,166.

The court has jurisdiction in debt on a bond for the penalty of $1,000, though it appears that less than the jurisdictional amount is claimed.—Postmaster General v. Cross, Case No. 11,306.

The amount in dispute is the sum of the claims in all the counts upon causes of action which are properly joined.—Judson v. Macon County, Case No. 7,568.

If nonresident taxpayers, citizens of different states, join in a bill to enjoin the enforcement of an illegal tax, it seems that there must be in dispute as to each complainant more than $500.—King v. Wilson, Case No. 7,810.

In ejectment, the estate is the matter in dispute, and its value must appear in the declaration or by proof. Act 1789, § 11.—Crawford v. Burnham, Case No. 3,366.

(E) PROCEDURE, AND ADOPTION OF PRACTICE OF STATE COURTS.

Adoption of state practice as to drawing and selecting jurors, see "Grand Jury," § 1; "Jury," § 6.

In actions by United States, see "United States," § 29.

§ 67. In general.

The forms of process and procedure of the federal courts in actions at common law within the 13 original states are the same as those employed therein May 8, 1792, except so far as the federal courts may have prescribed alterations.—United States v. Stevenson, Case No. 16,395.

The practice of the state courts is not controlling on the federal courts, unless adopted by some law of the United States, or rule of court made in pursuance of an act of congress.—Pomeroy v. Manin, Case No. 11,260.

The common-law practice of the state courts is not followed in the federal courts, except as it existed at the passage of the act of 1789, and as adopted by rule since.—Brewster v. Gelston, Case No. 1,853.

Under Act June 1, 1872, § 5, the provisions of the state statutes as to pleading and practice in purely legal actions are in the main applicable to such actions in the circuit court of the United States.—Weed Sewing Mach. Co. v. Wicks, Case No. 17,348.

In the absence of provisions of positive statute, the state practice prevails in common-law cases. Rev. St. §§ 646, 914, 915.—Bills v. New Orleans, St. L. & C. R. Co., Case No. 1,409.

The federal courts will follow the decisions of the state courts on questions of pleading. Act June 1, 1872.—Taylor v. Brigham, Case No. 13,781.

A pleading in a suit at law which is not authorized in a like suit in the state court will be set aside on motion. Rev. St. § 914.—Lewis v. Gould, Case No. 8,324.

Rev. St. § 914, applies only to such procedure as is established by the statutes of the several states, and not to that established by judicial construction of common-law remedies.—Sanford v. Portsmouth, Case No. 12,315.

The federal court, in granting writs of mandamus for the purpose of compelling a municipal corporation to levy a tax, will conform as much as possible to the state practice in similar cases.—Wisdom v. Memphis, Case No. 17,903.

The common-law forms of pleading are no longer necessary in the federal courts in New York state.—Lewis v. Gould, Case No. 8,324.

The state practice is applicable to suits at law in the district court of the Southern district of New York.—United States v. Tracy, Case No. 16,536.

§ 68. Exceptions.

The state rules of practice are not binding upon the courts of the United States held within the state.—Golden v. Prince, Case No. 5,509.

The federal courts are not implicitly bound by the practice and decisions of the state courts with regard to amendments.—Tobey v. Claflin, Case No. 14,066.

Rule of state court requiring term notice, not adopted by the federal court, is not obligatory on it.—Bayard v. Mandeville, Case No. 1,132.

A provision in a state attachment act that a motion to discharge property attached may be made in vacation is not applicable to the federal courts.—Claflin v. Steinberg, Case No. 2,777.

The examination of an adverse party as a witness, before trial, as provided by state law, not followed by federal court.—Beardsley v. Littell, Case No. 1,185.

State insolvent laws cannot affect proceedings in federal courts unless they are adopted as rules of proceeding.—Beers v. Haughton, Case No. 1,230.

Copies of accounts certified by notary public, though admissible by law in state court, *held* inadmissible in federal court.—Bell v. Davidson, Case No. 1,248.

A state statute authorizing the official acts of notaries to be given in evidence is not binding upon the federal court.—Craig v. Brown, Case No. 3,330.

State statutes authorizing and regulating references have no application to federal courts.—Denny v. Brown, Case No. 3,805.

The taking of a bail bond for appearance to answer to suit is governed by the rules of practice in the federal courts, and not by those of the state courts.—Lane v. Townsend, Case No. 8,054.

State statutes govern in the federal courts when they fix the right or title in litigation, but are not allowed to interfere with the processes or modes of procedure of the federal courts.—New England Screw Co. v. Bliven, Case No. 10,156.

The circuit court, under section 4 of the judiciary act, has power to devise the process for bringing any person before it who has committed an offense of which it has cognizance, without reference to the process given by the state law.—United States v. Burr, Case No. 14,694.

§ 69. Remedies given by state laws.

The circuit courts adopt the local remedies of the respective states.—Strachen v. Clyburn, Case No. 13,520.

The rule that remedies given by state laws may be pursued in federal courts sitting in the state applies to an action for partition.—Ex parte Biddle, Case No. 1,391.

Proceedings supplementary to execution, substituted by state law for proceedings by creditors' bill, cannot be resorted to in a federal court.—Byrd v. Badger, Case No. 2,266.

The new form of ejectment provided by state statute must be pursued in the federal court.—Fraser v. Weller, Case No. 5,064.

A state statute allowing defendant in ejectment a new trial on payment of costs is binding in the federal court.—Hiller v. Shattuck, Case No. 6,504.

The circuit court in Pennsylvania has power to issue writs of foreign attachment under the state laws.—Guillou v. Fontain, Case No. 5,861.

The circuit courts of the United States give effect to the attachment laws of the state, and are bound by the construction placed thereon by the supreme court of the state.—Lehman v. Berdin, Case No. 8,215.

An attachment issued by a federal court under a state law, not adopted by congress or by rule of court, cannot be sustained.—Binns v. Williams, Case No. 1,423.

In proceedings under state statute, the court will not follow it in matters of form where it is impracticable.—Dunn v. Games, Case No. 4,177.

Congress may clothe the federal courts with authority to proceed for the condemnation of property in conformity with a particular state statute.—United States v. Block 121, Case No. 14,610.

See, also, post, § 75.

§ 70. Abolition of remedies by state laws.

A state statute prohibiting the sale on execution of an equity of redemption does not become a rule of practice of the federal court until adopted.—Campbell v. McManus, Case No. 2,364.

§ 71. Effect of acts of congress.

The acts of congress adopting the state practice do not adopt future regulations.—Binns v. Williams, Case No. 1,423; Lane v. Townsend, Id. 8,054; Catherwood v. Gapete, Id. 2,513; Yaw v. Mead, Id. 18,129.

The words "forms of mesne process, and modes of proceeding," used in the act of 1828, embrace, not only process, but the whole course of the proceedings in an action.—Ely v. Hanks, Case No. 4,430.

Act May 19, 1828, § 1, does not apply within states which were members of the Union before September 29, 1789.—United States v. Stevenson, Case No. 16,395.

Act June 1, 1872, abrogated all rules of the federal courts inconsistent with the state practice in common-law cases, and required the federal district and circuit courts to conform to the state practice in common-law cases, when practicable.—Republic Ins. Co. v. Williams, Case No. 11,707.

The regularity of proceedings will be decided by the state laws and the decisions of the state courts.—Republic Ins. Co. v. Williams, Case No. 11,707.

The act of June 1, 1872, adopting state practice, etc., does not authorize the commencement of an action at law in the circuit court by a summons in the name of plaintiff's attorney, according to the New York procedure.—Martin v. Criscuola, Case No. 9,159.

A state statute providing a mode of procedure for condemnation of land by the United States (Act Ohio Feb. 15, 1873) is made applicable to such proceedings in a federal court by Act June 1, 1872, adopting the practice, etc., of the state courts.—United States v. Inlots, Case No. 15,441.

The rules of practice in state courts adopted by legislative act are rules of practice in the federal courts, by force of Rev. St. § 914, and the federal judges are deprived of discretion over them.—Mutual Building Fund Society & Dollar Sav. Bank v. Bossieux, Case No. 9,977.

Rev. St. § 914, providing that the practice, pleadings, and forms and mode of proceedings in the federal courts shall conform to those of the state courts, does not apply to the service of process.—Leonard v. Lycoming Fire Ins. Co., Case No. 8,258. CONTRA, see Perkins v. Watertown, Case No. 10,991.

Original process, directed to the marshal, cannot be served by a private person, although such mode of service is authorized in the state courts.—Schwabacker v. Reilly, Case No. 12,501.

A summons in a common-law action in the federal circuit court in New York must be signed by the clerk, and be under the seal of the court, notwithstanding Rev. St. § 911.—Peaslee v. Haberstro, Case No. 10,884.

The state laws in relation to the examination of an adverse party before trial, and the production of books and papers, do not obtain in the federal courts, congress having specially legislated on such subjects.—Easton v. Hodges, Case No. 4,258.

§ 72. Adoption by court.

The federal courts may in their discretion adopt any part or all of the remedies provided by the state legislature.—Dobbin v. Allegheny, Case No. 3,941.

A federal court may adopt, as the practice of the court, the provisions of a state statute relating to proceedings by attachment, as well in respect to debts to become due as to those already due.—Ely v. Hanks, Case No. 4,430.

The Indiana statute requiring that the general issue which denies the execution of an instrument sued on must be sworn to is adopted as a rule of practice by the federal circuit court.—McClintick v. Cummins, Case No. 8,698.

The jurisdiction of the federal court is not exhausted by the rendition of a judgment. It may enforce its collection, and for this purpose adopt the process of the state courts.—Pollock v. Lawrence County, Case No. 11,255.

The adoption of a state statute, as part of the final process of the federal court to enforce judgments against counties, *held* valid.—Dobbin v. Allegheny, Case No. 3,941.

A modification of a state law of practice followed for a long time will be considered as adopted by usage if not conflicting with the acts of congress.—Curtis v. Central Railway, Case No. 3,501.

State insolvent laws may be adopted by a rule of court.—Beers v. Haughton, Case No. 1,230.

§ 73. Changes in practice.

The federal courts do not follow changes in the practice of the state court.—In re Craig, Case No. 3,325.

§ 74. In equity.

The adoption of state practice does not authorize the blending of legal and equitable remedies in one suit.—Butler v. Young, Case No. 2,245.

The practice and jurisdiction of the federal circuit court as a court of equity cannot be controlled by the practice of the state courts.—United States v. Parrott, Case No. 15,999.

The commingling of law and equity in one proceeding, allowed in the courts of Georgia, is unknown in the federal courts held in that state. These sit distinctly as courts of law or

as courts of equity.—Shuford v. Cain, Case No. 12,823.

Chancery jurisdiction or rules of practice are not derived from state authority, and a state statute regulating the procedure on a bill of foreclosure does not apply to the federal courts.—Dow v. Chamberlin, Case No. 4,037.

The Pennsylvania practice as to special verdicts where the claims are equitable is inapplicable to the federal courts.—Conn v. Penn, Case No. 3,104.

Federal courts will enforce a new remedy, given by state statute, which is appropriate to the exercise of chancery jurisdiction.—Lanmon v. Clark, Case No. 8,071.

Upon a creditors' bill, a federal court may avail itself of regulations provided by state statute which facilitate the progress of the cause and the attainment of equitable relief.—Lanmon v. Clark, Case No. 8,071.

A local law authorizing a bill of discovery after return of execution nulla bona to subject the debtor's choses in action and equitable credits to the payment of the judgment may be enforced by the exercise of the chancery powers of the circuit court.—Lorman v. Clarke, Case No. 8,516.

See, also, post, § 78.

(F) STATE LAWS AS RULES OF DECISION.

Adoption of state laws on the subject of imprisonment for debt, see "Execution," § 24.
Application of state statutes of limitation, see "Limitation of Actions," § 5.
Effect given to state insolvency laws, see "Insolvency," § 4.
Enforcement of state laws as to exemptions, see "Exemptions."
—— in admiralty, see "Admiralty." § 93.
State statutes as to continuance of actions, see "Abatement and Revival," § 6.

§ 75. Enforcement of state statute.

The laws of the several states affecting substantial rights constitutionally passed since 1789, are binding on the courts of the United States held therein.—Golden v. Prince, Case No. 5,509.

The federal court, in an action at law, is governed by state laws so far as they relate to substantial rights.—Curtis v. Smith, Case No. 3,505.

State laws are applicable as rules of decision in trials at common law only where it is not otherwise provided by federal enactment. Rev. St. § 721.—Stanton v. Wilkeson, Case No. 13,299.

State laws as to rights furnish rules of decision for the federal courts; otherwise as to remedies.—Campbell v. Claudius, Case No. 2,356.

The question of the rate of interest and damages on nonpayment of a bill of exchange will not be determined by the local law.—Ex parte Heidelback, Case No. 6,322.

No state law can, proprio vigore, affect the process of federal courts.—Catherwood v. Gapete, Case No. 2,513.

The authority to stay proceedings against an insolvent debtor given to the supreme court of a state, *held*, cannot be exercised by a federal court.—In re Hopkins, Case No. 6,683.

A federal court may enforce rights under state statutes as well as under acts of congress in any proceeding at common law.—Clark v. Sohier, Case No. 2,835.

The courts of the United States take cognizance of cases to enforce remedies given by a state statute, where the plaintiff who sues is a citizen of another state.—Goshorn v. Alexander, Case No. 5,630.

A federal court will not compel by injunction the officers of a state to execute the state laws.—McCauley v. Kellogg, Case No. 8,688.

A new right originated by a local law or usage may be enforced by the federal courts sitting within the state, by the exercise of a common law or chancery power, as the case may require.—Lorman v. Clarke, Case No. 8,516.

The circuit court of the United States has no power to enjoin a nuisance existing under a local law, which does not amount to a national nuisance.—Griffing v. Gibb, Case No. 5,819.

Equivalent provisions cannot be substituted by the court for positive statutory provisions.—Bonnell v. Weaver, Case No. 1,630.

The court will follow the ruling of the district court of another state as to the construction of a state statute.—White v. The Cynthia, Case No. 17,546a.

State statutes prescribing rules of evidence in civil cases in trials at common law are rules of decision in similar cases in the federal courts, under the judiciary act of 1789, § 34, whether enacted before or after such act.—Fowler v. Hecker, Case No. 5,001; United States v. Dunham, Id. 15,006.

A state law allowing a party to be examined as a witness on his own behalf is binding on the federal court as a rule of decision. Act Sept 24, 1789, § 34.—Dibblee v. Furniss, Case No. 3,888.

A state law compelling parties to testify is enforceable in the federal court.—Berry v. Fletcher, Case No. 1,356.

State laws in force prior to Dec. 1, 1873, are rules of decision in federal courts as to the competency of witnesses. Rev. St. § 858.—In re Bean, Case No. 1,166.

Parties who are competent witnesses in the state courts are also competent in the federal courts, under Act July, 1862.—Scammon v. Hobson, Case No. 12,434.

The mode indicated by the state statute as a judicial process for setting off dower will be pursued in the federal court.—Johnston v. Vandyke, Case No. 7,426.

The validity of assignments for creditors with preferences will be determined in the federal courts by the law of the state.—Parker v. Phetteplace, Case No. 10,746.

The federal courts follow the state law and the precedents of the state courts in deciding questions as to the validity of transfers of property as against creditors.—Heydock v. Stanhope, Case No. 6,445.

Contracts in evasion or fraud of the laws of any state are invalid in the federal court.—Green v. Collins, Case No. 5,755.

The courts of the United States can take jurisdiction where property has been fraudulently conveyed to defeat creditors, and proceed under a state statute, where a judgment has been obtained, and execution has been returned nulla bona.—Wilkinson v. Yale, Case No. 17,678.

A suit on a bond given in the federal court will be sustained in such court if the state court would be compelled under the statutes to sustain the same suit.—Deakin v. Lea, Case No. 3,695.

The Rhode Island statute respecting the redemption of mortgages *held* properly followed by the circuit court of the United States, sitting in equity.—Dexter v. Arnold, Case No. 3,859.

On questions touching the tenure of real estate the federal courts are governed by the laws of the country where such real estate is situated.—In re Zug, Case No. 18,222; Newman v. Keffer, Id. 10,177.

The federal circuit court will take notice of and enforce a state statute prohibiting a charter from taking effect except on compliance with certain conditions, in the same manner that the state courts would do.—Union Horse Shoe Works v. Lewis, Case No. 14,365.

A federal court, when determining the rights of parties under a state law, will never, in a doubtful case, adjudge the statute to be in conflict with the state constitution, unless sustained by some distinct adjudication of the highest court of the state.—Fish v. Fond Du Lac, Case No. 4,813a.

See, also, ante, § 69.

§ 76. Construction by legislative or executive department.

A construction by the legislative and executive departments of a state of its constitutional provisions in respect to taxation will be followed by the federal courts, unless manifestly erroneous.—Brooks v. Memphis, Case No. 1,954.

Where objections have not previously been raised as to the legality of a tax, the federal court will not delay judgment to await a decision by the state court.—Brooks v. Memphis, Case No. 1,954.

§ 77. In criminal cases.

The laws of the several states cannot be regarded as rules of decision in trials for offenses against the United States.—United States v. Burr, Case No. 14,694.

The federal criminal laws are to be enforced by the federal judiciary without any regard to the criminal laws of the state in which the court is sitting, or the nature of the crime under the state laws.—Charge to Grand Jury, Case No. 18,250.

Criminal proceedings in the federal courts are not governed by the laws of the several states, except as provided by act of congress.—United States v. Shepard, Case No. 16,273.

§ 78. In equity.

State laws do not constitute a rule of decision to United States courts sitting as courts of equity.—Burt v. Keyes, Case No. 2,212.

The federal courts are not concluded in a matter of general equity jurisdiction by a decision of the state court.—Flagg v. Mann, Case No. 4,847.

The equity jurisdiction and jurisprudence administered in the federal courts are not regulated by the local jurisprudence.—Fletcher v. Morey, Case No. 4,864.

A state statute prescribing a limitation as to a suit in equity to affect a title to land (Civ. Code Or. § 378) is not binding upon the federal court. Rev. St. § 721.—Hall v. Russell, Case No. 5,943.

The claim law of Georgia, so far as the same applies to real estate, provides for equitable relief, and therefore cannot be administered in the federal courts.—Hall v. Yahoola River Min. Co., Case No. 5,955.

The Pennsylvania doctrine that the assignee of a bond and mortgage takes subject to all existing legal and equitable defenses does not apply to a suit in equity in the federal court.—McFarlane v. Griffith, Case No. 8,790.

The statute of New Hampshire relating to actions by an administrator does not govern the federal courts in equity.—Carter v. Treadwell, Case No. 2,480.

The remedy given by the state law on the administration bond will not prevent the federal courts taking jurisdiction in equity in favor of the legatees and distributees for their portion of the decedent's estate.—Pratt v. Northam, Case No. 11,376.

The federal circuit court has jurisdiction to declare void a fraudulent assignment, notwithstanding special provisions of a state statute directing procedure in such cases.—Burt v. Keyes, Case No. 2,212.

Though under the state law there must be a judicial decree before land can be sold for taxes, a nonresident may sue in the federal court to restrain the collection of an illegal tax.—Oliver v. Omaha, Case No. 10,499.

Changes and alterations made in the state fee bills after 1842 are not followed by the federal courts in equity.—Wade v. Mathews, Case No. 17,029.

See, also, ante, § 74.

§ 79. Following state decisions—In general.

The federal courts are not bound by the decision of the highest court of the state that mandamus is the only proper remedy upon municipal bonds.—Sanford v. Portsmouth, Case No. 12,315.

The federal circuit courts will follow the decision of the highest state court as to the admissibility of evidence and the force and effect of deeds defectively acknowledged.—Wright v. Taylor, Case No. 18,096.

State decisions in relation to charges to the jury are not binding on federal courts.—Hankin v. Squires, Case No. 6,025.

The federal courts will follow the decisions of the state in respect to the validity of a bequest to charitable uses.—Meade v. Beale, Case No. 9,371.

The federal courts are not bound in the interpretation of deeds by the decisions of the state courts.—Thomas v. Hatch, Case No. 13,899.

On questions relating to real estate, the federal courts will uniformly follow the latest decision of the state courts.—Smith v. Houtz, Case No. 13,062; Same v. Shriver, Id. 13,108; Newman v. Keffer, Id. 10,177; Hiller v. Shattuck, Id. 6,504; In re Zug, Id. 18,222.

An adjudication of bankruptcy having been held by the courts of Indiana to have the same effect upon the wife's claim to dower as a judicial sale of the husband's real estate, the federal courts will follow that rule in regard to land in that state.—Warford v. Noble, Case No. 17,175.

Federal courts will follow the latest state decision as to the liability of lands to taxation for municipal purposes. — Kountze v. Omaha, Case No. 7,928.

Decisions by the Indiana supreme court, that the fee to the bed of a canal, constructed by the state, is vested in the state by condemnation proceedings, and that the commissioners to assess damages had authority to consider benefits, will be followed by the federal courts.—Kennedy v. Indianapolis, Case No. 7,703.

§ 80. —— Questions of commercial and general nature.

On questions of commercial law, the federal courts are not bound by the decisions of the state courts.—Schenck v. Marshall County, Case No. 12,449; Gloucester Ins. Co. v. Younger, Id. 5,487; Williams v. Suffolk Ins. Co., Id. 17,738; Bradley v. Lill, Id. 1,783; Jewett v. Hone, Id. 7,311; Meade v. Beale, Id. 9,371.

State court decisions on questions of general jurisprudence are not binding upon the federal court.—Branch v. Macon & B. R. Co., Case No. 1,808; Mohr v. Manierre, Id. 9,695; Galpin v. Page, Id. 5,206; Riley v. Anderson, Id. 11,835; Robinson v. Commonwealth Ins. Co., Id. 11,949.

Decisions of a state court on the liability of parties to negotiable paper are not controlling on the federal courts.—Riley v. Anderson, Case No. 11,835.

State court decisions are not controlling on a question as to the general power of brokers in dealing with their principal's property.—Bragg v. Meyer, Case No. 1,801.

Decision of state court as to character of negotiable paper does not constitute a rule of decision for federal courts.—Austen v. Miller, Case No. 661.

§ 81. —— Construction of state constitution or statute.

The federal courts will follow the construction given by the state courts to the state statutes.—Coates v. Muse, Case No. 2,917; Springer v. Foster, Id. 13,266; Blossburg & C. R. Co. v. Tioga R. Co., Id. 1,563; Boyle v. Arledge, Id. 1,758; Bank of United States v. Longworth, Id. 923; Barker v. Jackson, Id. 989; Van Bokelen v. Brooklyn City R. Co., Id. 16,830.

The courts of the United States uniformly adopt the construction of a state statute which has been settled by the decisions of the highest courts of the state.—Coolidge v. Curtis, Case No. 3,184; Thompson v. Phillips, Id. 13,974; Olcott v. Fond Du Lac County, Id. 10,479; Paine v. Wright, Id. 10,676; Merrill v. Portland, Id. 9,470; Illius v. New York & N. H. R. Co., Id. 7,010; Goodrich v. Chicago, Id. 5,542; Evans v. Pittsburgh, Id. 4,568; Woolsey v. Dodge, Id. 18,032; Wick v. The Samuel Strong, Id. 17,607.

The federal courts are not bound to follow the construction put upon a state statute by an inferior state court.—Patapsco Guano Co. v. Morrison, Case No. 10,792.

The construction by a state court of its statute of limitations, as applicable to judgments of other states, is binding on the federal court in an action therein on such a judgment.—Randolph v. King, Case No. 11,560.

A construction given by a state court to the act of limitations of the state will be enforced by the United States bankruptcy court.—Capelle v. Trinity M. E. Church, Case No. 2,392.

The right to sue and the liability to be sued of county commissioners arising under the local law constitute a rule of decision for the federal courts.—McLean v. Hamilton County, Case No. 8,881.

The decision of a state court that a railroad was not built as authorized by its charter is binding on federal courts within the state, though no judgment or decree was rendered.—Cleveland, P. & A. R. Co. v. Franklin Canal Co., Case No. 2,890.

The decisions of the state courts that its statutes compelling a holder of a note to sue the principal within a certain time after notice, as a condition of holding the indorser or surety liable, are binding on the federal court.—Davie v. Hatcher, Case No. 3,610.

The creation of liens or titles, by proceedings under state insolvent laws, are governed by such laws, and the construction of the laws by the state court will be followed by the federal court.—Perry Mfg. Co. v. Brown, Case No. 11,015.

In an action on railroad aid bonds, the federal court will follow the decision of the highest court of the state construing the statute under which they were issued.—First Nat. Bank v. Arlington, Case No. 4,806; Same v. Bennington, Id. 4,807.

A decision of a state supreme court, upholding the constitutionality of a state statute authorizing a county to subscribe to railroads, will be followed by the federal courts.—McCoy v. Washington County, Case No. 8,731.

A decision by the highest court of a state, that a foreclosure of the mortgage under a law of the state was bona fide, and made in conformity thereto, is binding on the federal court.—Sullivan v. Portland & K. R. Co., Case No. 13,596.

A decision of the highest court of a state, holding an act of its legislature unconstitutional, is binding on the federal court only where it is based upon special provisions of the state constitution.—Talcott v. Pine Grove, Case No. 13,735.

The decision of the state court that a tax paid under a void law cannot be recovered back where there was a natural obligation to pay it is not binding on the federal court, where the law conflicts with the federal constitution.—John Kyle Steamboat Co. v. New Orleans, Case No. 7,354.

The construction of a state statute by the highest court of the state is controlling on the federal court, where not in conflict with the constitution of the United States.—Griffing v. Gibb, Case No. 5,819; Hawes v. Contra Costa Water Co., Id. 6,235.

The decisions of the supreme court of a state construing its state constitution and laws in relation to securities given by municipalities to aid railway companies, are not necessarily binding on the federal courts.—Thomas v. Scotland County, Case No. 13,909.

The federal court refused to follow a decision of the highest court of the state, holding laws authorizing municipal aid to railroads to be unconstitutional, where opposed to repeated decisions on other laws involving the same principle, and to the unanimous decisions of courts of other states in analogous cases.—Talcott v. Pine Grove, Case No. 13,735.

A proper decision of the court on the construction of a state statute will control until the court has authentic evidence of a different interpretation by the highest court of the state.—Richardson v. Curtis, Case No. 11,781.

In a case of conflict of state decisions in the construction of a state statute, the last decision of the highest court will control.—Dike v. Kuhns, Case No. 3,907.

A reversal of a previous ruling by a court of last resort construing the law is retroactive except as to executed contracts.—In re Dunham, Case No. 4,146.

The federal courts are bound to follow the latest decision of the state court, though it renders invalid a contract valid under the decisions of state court when made.—Mitchell v. Lippincott, Case No. 9,665.

A federal court will follow the latest decision of the highest state court as to the construction of a state statute, or its validity under the state constitution, although the prior state decision was the other way, where the case involves no contract made on the faith of such prior decision.—King v. Wilson, Case No. 7,810.

The federal courts will follow the latest decision of the state court construing a state statute, where they have not previously adopted another construction.—Loring v. Marsh, Cases Nos. 8,514, 8,515.

The federal court will adhere to its prior decision construing a state statute, notwithstanding a subsequently conflicting decision by the state court, where there is nothing to prevent a review of the case by the supreme court.—Perrine v. Thompson, Case No. 10,997.

A federal court will follow a state decision as to the validity or construction of a state statute not in conflict with the constitution or laws of the United States, though such decision is contrary to a prior decision of the federal court itself.—Nessmith v. Shelden, Case No. 10,125.

A decision of the state court construing a state statute where the case is pending on appeal

in the supreme court of the United States will not be considered as one of authority.—Foote v. Linck, Case No. 4,913.

The circuit court of the United States must follow the decision of the supreme court of the United States declaring a state statute constitutional, rather than a later decision of the supreme court of the state declaring the statute unconstitutional.—Foote v. Johnson County, Case No. 4,912.

The court will follow the construction of a state statute as given by the supreme court of the United States, rather than a later construction given by the highest court of the state.—Neal v. Green, Case No. 10,065. CONTRA, see The Princess Alexandra, Case No. 11,430; Leslie v. Urbana, Id. 8,276.

The decision of the supreme court of the United States declaring a state statute valid under the state constitution will control the federal circuit court, as against a later decision by the supreme court of the state to the contrary.—Westermann v. Cape Girardeau County, Case No. 17,432.

(G) CIRCUIT COURTS.

Jurisdiction in bankruptcy, see "Bankruptcy," §§ 338, 339.

§ 82. Source and limits of jurisdiction.

The circuit court can exercise jurisdiction, in a case falling within the constitutional grant of judicial power to the United States, only where an act of congress has expressly conferred jurisdiction.—Harrison v. Hadley, Case No. 6,137; Bank of United States v. Roberts, Id. 934; Hubbard v. Northern R. Co., Id. 6,818; Moffat v. Soley, Id. 9,688.

The circuit courts cannot take cognizance of "cases arising under the laws of the United States," jurisdiction of which is not conferred by an act of congress.—Livingston v. Van Ingen, Case No. 8,420.

The circuit courts have no supervising power over the district courts except as given by statute.—Smith v. Jackson, Case No. 13,064.

Powers not judicial, exercised by the chancellor in England as the representative of the king's prerogative, are not possessed by the circuit courts.—Loring v. Marsh, Case No. 8,515.

Quære, whether the circuit court has jurisdiction of common-law offenses against the United States.—United States v. Coolidge, Case No. 14,857.

The circuit courts of the United States have no original jurisdiction in admiralty.—Jansen v. Vrow Christina Magdalena, Case No. 7,216.

The circuit court has no cognizance of causes of admiralty and maritime jurisdiction in the district court save by appeal.—McLellan v. United States, Case No. 8,895.

The proceedings on bonds for value or stipulations in admiralty are incident to the principal cause, and the circuit court has no jurisdiction except on appeal from the final decree.—The Hollen, Case No. 6,608.

A circuit court has jurisdiction to review a judgment of the supreme court reversing a judgment of the circuit court, on proof that both judgments were obtained by fraud.—Clark v. Hackett, Case No. 2,823.

§ 83. Suits of "civil nature."

A proceeding under an act of congress to condemn land for public use is a suit of a civil nature at common law, in the meaning of the judiciary acts.—United States v. Inlots, Case No. 15,441; Same v. Block 121, Id. 14,610.

The clause quoted does not restrict the jurisdiction to old and settled forms, but includes all suits in which legal rights are to be ascertained and determined.—United States v. Block 121, Case No. 14,610.

Since the Illinois statute of February 16, 1874, the United States circuit courts in that state have, in proper case, jurisdiction of actions of forcible entry and detainer.—Wheeler v. Bates, Case No. 17,492.

Such action is a "suit of a civil nature," within the meaning of the act of congress of 1789 (1 Stat. 73).—Wheeler v. Bates, Case No. 17,492.

§ 84. Administration of state laws.

The circuit court may remove a cloud on title as defined by state laws.—Bayerque v. Cohen, Case No. 1,134.

The circuit court, in aid of its general chancery powers, may enforce a right given by a state law.—Bayerque v. Cohen, Case No. 1,134.

Where there is no adequate remedy at law under a local statute, the circuit court will give relief in equity.—Lorman v. Clarke, Case No. 8,516.

The federal circuit court has jurisdiction to aid in enforcing the judgment of a state court.—Wilson v. City Bank, Case No. 17,797.

See, also, ante, §§ 67–81.

§ 85. Territorial limitations.

Act April 3, 1818, § 6, declaring that the original jurisdiction of the circuit court for the Southern district of New York shall be confined to causes arising within said district, does not exclude jurisdiction of causes arising out of the state.—Wheeler v. McCormick, Case No. 17,498.

The circuit court for the district of Connecticut has jurisdiction of an action for the damage caused by a diversion of a stream in Connecticut, so that it ceased to flow to plaintiff's mill in Massachusetts.—Foot v. Edwards, Case No. 4,908.

A citizen of Pennsylvania may maintain a suit in the federal circuit court in New Jersey against a corporation of the latter state for injuries to lands lying in the former state by a canal located in New Jersey.—Rundle v. Delaware & R. Canal, Case No. 12,139.

Whether a court can enjoin a nuisance consisting of odors generated by a factory situated outside the territorial jurisdiction, and carried by the air to a residence within the jurisdiction, where the parties are properly before the court, quære.—Keyser v. Coe, Case No. 7,750.

A federal circuit court cannot take cognizance of a trespass committed on lands lying without the judicial district of the court, although the trespasser is a resident of and is found within the district, such action being local.—Livingston v. Jefferson, Case No. 8,411.

The circuit court in Indiana has no jurisdiction over a corporation of Michigan, and the circuit court in the latter state would have no jurisdiction to restrain a right respecting a title to land set up under authority of the state of Indiana.—Northern Indiana R. Co. v. Michigan Cent. R. Co., Case No. 10,321.

In a case of asserted fraud or constructive trusts created by operation of law, jurisdiction does not depend upon the location of lands affected by the decree.—Briggs v. French, Case No. 1,870.

Jurisdiction to enforce a mortgage on lands purchased by the United States merely to secure a debt depends upon the locality of the land.—Elliot v. Van Voorst, Case No. 4,390.

The circuit court has jurisdiction of a suit in equity to enforce the right of redemption from the lien of a trust deed of lands lying in another state.—Kanawha Coal Co. v. Kanawha & O. Coal Co., Case No. 7,606.

The circuit court for the Southern district of New York has no original jurisdiction of a suit

for the infringement of a patent which occurred within the Northern district of New York.—Hodge v. Hudson River R. Co., Case No. 6,559.

The objection that the cause of action arose in another district is waived when not raised in the answer.—Black v. Thorne, Case No. 1,465.

The circuit court of the district of Arkansas, in the absence of any statute attaching the Indian country west of Arkansas thereto, has no jurisdiction over such country, and cannot punish offenses committed therein.—United States v. Alberty, Case No. 14,426.

Where there are several defendants residing in different districts of same state the court acquires jurisdiction where each is served in his own district. Act May 4, 1858.—Babbitt v. Burgess, Case No. 693.

The district court of the Northern district of New York is placed in the same relation to the circuit court as that of the Southern district, and an appeal lies from it to the circuit court of the Southern district to the same extent. Act April 9, 1814.—Porter v. United States, Case No. 11,290.

§ 86. Suits under laws, etc., of United States.

The circuit courts have no original jurisdiction of a proceeding for the forfeiture of a vessel for an offense.—Ketland v. The Cassius, Case No. 7,743.

Prior to Act Feb. 15, 1819, the circuit courts had no jurisdiction of a bill to restrain the infringement of a patent where both parties were citizens of the same state.—Livingston v. Van Ingen, Case No. 8,420.

The federal circuit court has no jurisdiction to restrain prosecution of a suit in the district court on a redelivery bond given under Act May 28, 1830, § 4, or to determine in advance the amount legally recoverable thereon.—Powell v. Redfield, Case No. 11,359.

An action will lie in the circuit court of the United States on the bond of a deputy collector of internal revenue, for embezzlement of taxes collected by him. Act July 13, 1866, § 67.—Crawford v. Johnson, Case No. 3,369.

Upon an indictment for removing whisky from a distillery, and sending it to another state, under a false inspector's brand, without paying the tax, the court of the latter state has jurisdiction, where the whisky was not taken from the possession of the railroad company by which it was shipped, before arrival at its destination.—United States v. Sperry, Case No. 16,369.

§ 87. Equity jurisdiction.

Where congress has given an action at law in the circuit courts in certain cases, they do not thereby acquire jurisdiction so as to entertain in those cases a bill in equity not relating to an action at law.—Livingston v. Van Ingen, Case No. 8,420.

An equitable right cannot be enforced in a common-law form, and as a legal right on the equity side of the federal circuit court.—Loring v. Downer, Case No. 8,513.

The equitable jurisdiction of the circuit court is not limited by the equitable powers of the state court.—Randolph v. Wilmington & R. R. Co., Case No. 11,563.

The equity powers of the circuit courts are the same in those states where no courts having chancery powers exist as in other states.—Lorman v. Clarke, Case No. 8,516.

The circuit court has power to prohibit a nonresident plaintiff from prosecuting an action against a resident defendant.—City Bank of New York v. Skelton, Case No. 2,740.

See, also, ante, § 21.

§ 88. Conflicts between circuits.

The circuit court in one state, in a suit for infringement of patents, cannot restrain plaintiff's suing in other jurisdictions for the same infringements.—Rumford Chemical Works v. Hecker, Case No. 12,132.

The court will not appoint a receiver of a railroad corporation where another circuit court having jurisdiction has appointed receivers.—Alabama & C. R. Co. v. Jones, Case No. 127.

§ 89. Change of district.

Pending causes are not affected by act transferring counties from one judicial district to another, where act is silent as to such causes.—Culver v. Woodruff County, Case No. 3,469.

§ 90. Particular circuits.

The organization of the circuit court for the district of Missouri is peculiar, and is provided for by Act Cong. March 3, 1857.—In re Circuit Court, Case No. 2,728.

§ 91. Removal of causes.

There is no authority for removing civil causes, irregularly brought in the circuit court, to a district court invested with circuit court powers.—Kerrison v. Stewart, Case No. 7,734.

When a suit is removed from a circuit court of one circuit to the circuit court in another circuit, the latter court has the same power over the parties which the first court would have had.—United States v. Lee County, Case No. 15,589.

§ 92. Showing jurisdiction.

The jurisdiction of the circuit court must appear affirmatively by the record. The want of jurisdiction need not be pleaded.—Kelly v. Harding, Case No. 7,670.

(H) DISTRICT COURTS.

Jurisdiction in bankruptcy, see "Bankruptcy," § 337.

§ 93. Jurisdiction—Territorial extent.

The jurisdiction of the United States court for the district of South Carolina extends throughout the entire state.—United States v. Butler, Case No. 14,700.

The jurisdiction of the district courts extends to a marine league from the coasts or shores extending to low-water mark. Shoals covered with water are not a part of the coast or shore.—Soult v. L'Africaine, Case No. 13,179.

The boundary line of the Southern district of New York is coterminous with that of the state at the creation of the district, unaffected by the subsequent agreement between New York and New Jersey as to their boundary line.—United States v. The Julia Lawrence, Case No. 15,502.

A seizure on waters of New York Bay below low-water mark on the Jersey shore is within the jurisdiction of the district court for the Southern district of New York.—United States v. The Julia Lawrence, Case No. 15,502.

The district court for the Southern district of New York has jurisdiction in rem over a vessel fastened to a dock in Jersey City, outside low-water mark, west of Manhattan Island and south of the mouth of Spuyten Duyvell creek.—The L. W. Eaton, Case No. 8,612.

A vessel in a basin at Jersey City moored to piles 40 feet from the dock is within the jurisdiction of the district court for the Southern district of New York.—The Argo, Case No. 515.

A district court of the Southern district of Ohio has jurisdiction of a seizure on the Ohio side of the Ohio river at high-water mark.—The Cheeseman v. Two Ferry-Boats, Case No. 2,633.

The district court of the Eastern district of New York has jurisdiction of a case of collision at sea, though the vessel proceeded against was

attached in the waters of the county of New York.—The Pennsylvania, Case No. 10,950.

The court of the district in which the offending vessel is arrested has jurisdiction of a libel for collision which occurred within the territorial limits of another district.—Town v. Western Metropolis, Case No. 14,114.

The district court for the district of Oregon has concurrent jurisdiction over Columbia river.—The Annie M. Smull, Case No. 423.

The district court in admiralty may order the restoration of property, the right to the possession of which is in the marshal of the adjoining district.—The Joseph Gorham, Case No. 7,537.

The district court in one state has no jurisdiction in personam against a citizen of another state, not served with process in the former state.—Wilson v. Graham, Case No. 17,804.

Under Act May 23, 1872, the district court, sitting at Cleveland, has no jurisdiction to perform a judicial act in respect to a cause pending in the court at Toledo.—Williams v. The Sea Gull, Case No. 17,736.

§ 94. —— Admiralty and maritime.

Causes within the admiralty jurisdiction are within the jurisdiction of the district courts by virtue of the delegation of authority "in all civil causes of admiralty and maritime jurisdiction."—De Lovio v. Boit, Case No. 3,776.

The district courts have jurisdiction of all cases of a maritime nature, whether they be particularly of admiralty cognizance or not. They are governed by the principles of maritime law recognized in the maritime nations of continental Europe.—Kynoch v. The S. C. Ives, Case No. 7,958.

The district courts of the United States, as courts of admiralty, have jurisdiction over policies of marine insurance.—Hale v. Washington Ins. Co., Case No. 5,916.

The jurisdiction of the district court in admiralty in cases of marine insurance is not exclusive.—New England Mut. Marine Ins. Co. v. Dunham, Case No. 10,155.

See, also, ante, § 20.

§ 95. —— Equity.

The district court, sitting in equity, has power to restrain the enforcement of a decree made by the same court sitting in admiralty.—Dutcher v. Woodhull, Case No. 4,204.

§ 96. —— Penalties and forfeitures.

The district court has exclusive jurisdiction, under Judiciary Act 1789, § 9, of a libel for forfeiture against a vessel for carrying away timber reserved for naval purposes which has been cut from public lands, in violation of Act March 2, 1831.—United States v. The Helena, Case No. 15,341.

§ 97. —— Seizures.

Jurisdiction of a seizure on the high seas belongs to the court of the district into which the property is brought.—The Abby, Case No. 14.

A vessel lying, when seized, a half mile from shore off Colloden Point, Long Island, though in Long Island Sound, is on the high seas, and the court into whose district she is first carried has jurisdiction.—Gedney v. L'Amistad, Case No. 5,294a.

The fact that persons were temporarily on shore at the time does not affect the jurisdiction.—Gedney v. L'Amistad, Case No. 5,294a.

The district court of the district within which a seizure for violation of customs laws is made has exclusive original jurisdiction.—The Abby, Case No. 14.

The district court has no jurisdiction in cases of libel for seizures made in another district from that where the proceedings are instituted.—The Little Ann, Case No. 8,397.

§ 98. —— Prize.

The general jurisdiction of the district courts includes prize cases.—The Amy Warwick, Case No. 341.

Where the subject of litigation depends upon the question of prize or no prize, it is completely and exclusively within the cognizance of the district court.—United States v. Bright, Case No. 14,647.

§ 99. —— Crimes.

The district court for the district of Oregon has jurisdiction to try a person charged with the commission of a crime in Alaska, where such person is found in the district of Oregon, or first brought there.—United States v. Carr, Case No. 14,730.

The jurisdiction of the district court for the district of Oregon over offenses committed in Alaska does not extend to the crime of distilling spirits therein without paying a tax therefor. Act July 27, 1868, § 7.—United States v. Seveloff, Case No. 16,252.

A district court has no jurisdiction by habeas corpus over a political prisoner removed from its district before the petition is filed, nor will it compel such prisoner to be brought within the district that relief may be granted.—In re Bickley, Case No. 1,387.

§ 100. —— Suits by United States.

Under Act 1789, § 9, the district courts have cognizance of all suits at common law brought by the United States, where the matter in dispute amounts to $100, exclusive of costs.—United States v. Bougher, Case No. 14,627.

§ 101. —— Consuls.

Act Sept. 24, 1789, § 9, giving the district courts jurisdiction in civil cases against consuls and vice consuls, is not in conflict with Const. art. 3, giving the supreme court original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls.—Gittings v. Crawford, Case No. 5,465.

Where jurisdiction depends upon the fact that one of the defendants is a foreign consul, and he is held not liable, judgment cannot be rendered against the others.—Bixby v. Janssen, Case No. 1,452.

See, also, "Ambassadors and Consuls," § 6.

§ 102. —— Consent to jurisdiction.

Consent of the parties cannot confer jurisdiction on the district court.—McKim v. Kelsey, Case No. 8,861.

§ 103. Judges.

A district court invested with circuit court powers (Rev. St. § 571) is not constituted a circuit court, and neither the circuit justice nor the circuit judge can sit therein.—Kerrison v. Stewart, Case No. 7,734.

(I) TERRITORIAL AND PROVISIONAL COURTS.

§ 104. In general.

Territorial courts are "courts of the United States," as that designation is applied in section 33 of the judiciary act.—United States v. Haskins, Case No. 15,322.

A territorial court, being a court of the United States, is to be regarded as co-ordinate with the courts organized under the constitution.—In re Osterhaus, Case No. 10,609.

Effect of Colorado enabling act upon the territorial courts, and causes pending therein.—Ames v. Colorado Cent. R. Co., Case No. 324.

Causes of a federal character pending in supreme court of territory of Colorado at time of admission as state may be heard and decided in federal courts.—Bates v. Payson, Case No. 1,103.

The legal status of Florida under the treaty of cession and subsequent acts and the conflicting jurisdiction between federal and territorial courts.—American Ins. Co. v. Canter, Case No. 302a.

The territory of Nebraska, under the organic act, may provide for personal service upon nonresidents out of the district, or for constructive service by publication in suits relating to property in the district, notwithstanding section 11 of the judiciary act, requiring personal service in the district.—Salisbury v. Sands, Case No. 12,251.

The superior court of the territory of Arkansas can only entertain a writ of error issued to, or an appeal from, a court of record.—Searcy v. Hogan, Case No. 12,584a.

The legislature of the territory of Arkansas had power to prescribe the conditions upon which an appeal might be taken to the superior court.—Janes v. Buzzard, Case No. 7,206b.

Powers of the circuit courts in the territory of Arkansas.—Roshell v. Maxwell, Case No. 12,066a.

(J) COURTS OF DISTRICT OF COLUMBIA.

§ 105. Circuit court—In general.

The circuit court of the District of Columbia has jurisdiction in all cases arising under the constitution, laws, and treaties of the United States if either party reside or be found in the District.—United States v. Kendall, Case No. 15,517.

It has all the federal jurisdiction of a United States circuit court, and all the jurisdiction of a state court.—United States v. Kendall, Case No. 15,517.

The circuit court of the District of Columbia has all the powers which were vested in the circuit court of the United States on February 27, 1801, and may send attachments into any other district for witnesses in criminal cases.—United States v. Williams, Case No. 16,712.

The jurisdiction of the circuit court of the District of Columbia is co-extensive with the Union, and its coercive power extends to witnesses in Missouri, or any of the states.—United States v. Thomas, Case No. 16,476.

The jurisdiction of the circuit court of the District of Columbia is not limited to such causes of federal jurisdiction as may be tried in a circuit court of the United States sitting in a state.—United States v. Williams, Case No. 16,712.

Unless some party defendant against whom an effectual decree can be made be found within the District of Columbia, the circuit court, as a court of equity, has no jurisdiction of the cause.—Vasse v. Comegyss, Case No. 16,894.

The circuit court of the District of Columbia can discharge an apprentice on account of the cruelty of the master, and bind him out to another.—Cannon v. Davis, Case No. 2,385.

The circuit court of the District of Columbia has no jurisdiction on an issue sent up by the orphans' court as to the authority of rival counsel.—Fendall v. Tochman, Case No. 4,726.

Jurisdiction of circuit court of District of Columbia on fi. fa. issued by order of justice of peace.—Goulding v. Fenwick, Case No. 5,641.

The circuit court for the District of Columbia has no jurisdiction of a bill to open an executor's account settled more than 12 years before in the orphans' court.—Lupton v. Janney, Case No. 8,607.

At a special criminal session, the circuit court of the District of Columbia cannot try a case pending at the preceding stated session.—Memorandum, Case No. 9,411.

Suit for specific performance of contract for sale of land in District of Columbia, instituted in state court prior to Act Feb. 27, 1801, may thereafter proceed to final decree.—Bank of United States v. Van Ness, Case No. 938.

Circuit court sitting in Alexandria has only the powers of a county court of Virginia in relation to ferries.—In re Berry, Case No. 1,354.

§ 106. —— Jurisdictional amount.

The circuit court of the District of Columbia has jurisdiction in trespass, although the damages do not amount to $20.—Goddard v. Davis, Case No. 5,491.

The circuit court of the District of Columbia has no jurisdiction of an attachment for a sum less than $20.—Rutter v. Merchant, Case No. 12,179.

The circuit court of the District of Columbia has no jurisdiction where two separate causes of action, amounting together to more than $20, are joined in one declaration, where neither amounts to $20.—Ridgway v. Pancost, Case No. 11,818.

Where the verdict in an action in the circuit court of the District of Columbia is for a sum less than the jurisdictional amount the judgment will be arrested.—McLaughlin v. Stelle, Case No. 8,873.

In an action of debt on a sealed note in the circuit court of the District of Columbia, if the verdict be reduced below $20 by payments proved at the trial, judgment of non pros. must be entered.—Smith v. Queen, Case No. 13,096.

If the verdict be for less than $20, in assumpsit, a nonsuit must be entered.—Currey v. Fletcher, Case No. 3,490.

If verdict reduced below $20 by account in bar in circuit court of District of Columbia, there must be judgment of non pros.—Beale v. Voss, Case No. 1,160.

It is no ground of arrest of judgment in the circuit court of the District of Columbia that the sum sued for has been reduced by offsets to a sum below the jurisdiction.—McKnight v. Ramsay, Case No. 8,868.

An action of debt on a promissory note for $214, reduced by payments to $8.94, will lie in the circuit court for the District of Columbia.—Hays v. Bell, Case No. 6,270.

If, in a suit in Alexandria the debt be reduced below $50, by offsets, the plaintiff may have judgment for the sum found by the verdict.—Hellrigle v. Dulany, Case No. 6,343.

§ 107. Levy court.

Right of the levy court of Washington, D. C., to statutory or discretionary fines, and its duties in relation to the district jail.—Levy Court of Washington County v. Ringgold, Case No. 8,305.

§ 108. Orphans' court.

The orphans' court of the District of Columbia may adopt the practice of the court of chancery as to the manner of issuing commissions, or it may establish rules of practice for itself in this respect.—Walsh v. Walsh, Case No. 17,117.

III. CONCURRENT AND CONFLICTING JURISDICTION AND COMITY.

Conflict of jurisdiction between state and federal courts in admiralty, see "Admiralty," §§ 1, 3.
—— in bankruptcy, see "Bankruptcy," §§ 212, 213.
Effect of decisions by other courts, see "Patents," §§ 246, 261.
Removal of causes from state courts, see "Removal of Causes," §§ 39, 46.

§ 109. Concurrent jurisdiction of state and federal court—In general.

The jurisdiction of the state courts over federal causes is confined to civil actions, for civil demands, or to enforce penal statutes, and does not extend to offenses against the United States.—Stearns v. United States, Case No. 13,341.

In all cases where the state courts had jurisdiction originally over the subject-matter, they will retain a concurrent jurisdiction with the federal courts until congress, by express provision, revokes and extinguishes the same.—Stearns v. United States, Case No. 13,341.

The federal circuit court has concurrent jurisdiction with a state probate court to decree an account in favor of distributees.—Mallett v. Dexter, Case No. 8,988.

The circuit courts possess full jurisdiction in equity in all cases of fraud, including fraud in obtaining judgments and decrees in other courts, excepting fraud in obtaining a will of real and personal estate, and have concurrent jurisdiction with the state courts in all such cases.—Gould v. Gould, Case No. 5,637.

There is no concurrent jurisdiction in rem in admiralty cases between the courts of the United States and of the several states.—Ashbrook v. The Golden Gate, Case No. 574; The Isabella, Id. 7,100.

The admiralty and maritime jurisdiction of the federal courts is exclusive of the state courts save as to the common-law remedy, which is by action, and not by proceeding in rem.—Ashbrook v. The Golden Gate, Case No. 574.

A creditor cannot proceed against a vessel both in the state and federal courts on the same claim.—Fisher v. The Plymouth, Case No. 4,822.

The courts of the United States within a state have equal and concurrent power with the courts of the state to render judgments, and carry them into execution.—Georgia v. Atlantic & G. R. Co., Case No. 5,351.

Where both state and federal courts have concurrent jurisdiction to enforce a right given by a state law, the procedure must be according to that of the court in which the suit is instituted.—Davis v. New Brig, Case No. 3,643.

Comparative jurisdictions of state and federal courts of suit to foreclose railroad mortgage bonds.—Brooks v. Vermont Cent. R. Co., Case No. 1,964.

Federal courts may exercise jurisdiction as to accounts of executors, etc., if jurisdiction of state court has not attached.—Allen v. Allen's Ex'r, Case No. 211.

In cases of concurrent jurisdiction of the state court and the federal circuit court, the latter has no discretionary authority to stay or control the suit, or to refuse jurisdiction to prevent a collision between the two courts.—Wadleigh v. Veazie, Case No. 17,031.

§ 110. —— Priority of jurisdiction.

Where the federal and state courts have concurrent jurisdiction, the court which first acquires jurisdiction may proceed to final adjudication, and cannot be interfered with by the other.—Bell v. Ohio Life & Trust Co., Case No. 1,260; Board of Foreign Missions of The Presbyterian Church v. McMaster, Id. 1,586; Ex parte Sifford, Id. 12,848; Ex parte Robinson, Id. 11,935; Ruggles v. Simonton, Id. 12,120; Parsons v. Lyman, Id. 10,780; Mallett v. Dexter, Id. 8,988; Haines v. Carpenter, Id. 5,905; Crane v. McCoy, Id. 3,354; Campbell v. Emerson, Id. 2,357; Burt v. Keyes, Id. 2,212.

The court which first takes cognizance of the controversy is entitled to retain jurisdiction, and to take possession and control of the subject-matter.—Union Trust Co. v. Rockford, R. I. & St. L. R. Co., Case No. 14,401; Gaylord v. Ft. Wayne, M. & C. R. Co., Id. 5,284.

It is not necessary that the court first taking jurisdiction shall take possession of the property.—Union Trust Co. v. Rockford, R. I. & St. L. R. Co., Case No. 14,401.

Priority of jurisdiction is determined by date of service of process, and not commencement of suit.—Bell v. Ohio Life & Trust Co., Case No. 1,260.

The time of the appointment of a receiver for an insolvent corporation, and not the commencement of suit therefor, determines priority of jurisdiction.—Bell v. Ohio Life Ins. Co., Case No. 1,261; Blake v. Alabama & C. R. Co., Id. 1,493.

The fact that the allegations of the bill were imperfect, and a demurrer was sustained, with leave to amend, does not change the fact of jurisdiction.—Gaylord v. Ft. Wayne, M. & C. R. Co., Case No. 5,284.

The court obtains jurisdiction on the filing of a bill of all matter cognate to the litigation.—Shoemaker v. French, Case No. 12,800.

§ 111. —— Proceedings in same or different rights.

An administrator in the process of accounting before a probate court cannot be compelled to account in a federal court by a bill in equity.—Mallett v. Dexter, Case No. 8,988.

Nonresident legatees, having been made parties, by order of publication, to a suit in the state court for the settlement of an estate, and having knowledge thereof, cannot sue in the federal court to have the estate administered.—Reid v. Kerfoot, Case No. 11,668.

The pendency in the state court of a suit to determine priority between two liens will not prevent the federal court from assuming jurisdiction on a general creditors' bill to determine priorities as between all lien holders.—Hay v. Alexandria & W. R. Co., Case No. 6,254a.

The pendency of a general creditors' bill in a state court, accompanied by the usual orders of injunction, where the suit is merely for obtaining judgment, will not prevent a creditor who is not a party from suing defendant in the federal court.—Parsons v. Greenville & C. R. Co., Case No. 10,776.

A garnishment sued out in a state court after the institution of a suit against the garnishee in the federal court cannot be pleaded as a defense.—Greenwood v. Rector, Case No. 5,792.

Ejectment pending in a state court against one cotenant will not bar a suit to quiet title, brought against the plaintiff in a federal court, by a nonresident cotenant.—Errett v. Crane, Case No. 4,523.

The circuit court cannot discharge from criminal process, issued under authority of the state, an attaché of a foreign legation, though privileged from civil and criminal process, nor can it quash the proceedings.—Ex parte Cabrera, Case No. 2,278.

A court of equity in foreclosing a consolidated mortgage by a consolidated corporation of different states has exclusive jurisdiction over all the property in all the states.—Blackburn v. Selma, M. & M. R. Co., Case No. 1,467.

A federal court cannot restrain prosecution of a suit pending in a state court, but may act upon the parties who are suitors in the federal court in relation to the same subject-matter.—City Bank of New York v. Skelton, Case No. 2,739.

The federal circuit court cannot stay a suit in equity brought therein, or refuse jurisdiction, on the ground of the pendency of a prior suit in

the state court between the same parties for the same cause.—Loring v. Marsh, Case No. 8,514.

Plaintiff owning first mortgage bonds, sued in the federal court to foreclose the mortgage and remove the trustees, alleging that one was seeking to foreclose in a state court under a claimed preference mortgage, in which proceedings the other trustee was receiver. *Held*, that the court would not stay the suit until the proceedings in the state court were determined.—Mercantile Trust Co. v. Lamoille Val. R. Co., Case No. 9,432.

§ 112. Supplemental or ancillary proceedings.

A federal court cannot allow the amendment of an execution issued out of a state court, especially where the state supreme court has refused to allow such amendment.—Kent v. Roberts, Case No. 7,715.

An action will lie in the federal court against the principal and surety jointly on a supersedeas bond given on appeal in the state court, on affirmance of the judgment.—Dawson v. Rankin, Case No. 3,671.

A federal court will not enjoin railroad receivers appointed by a state court from illegally discriminating among shippers. Redress should be applied for in the appointing court.—McCoy v. Marietta & C. R. Co., Case No. 8,730b.

§ 113. Enjoining, vacating, or nullifying decision or proceedings of state court.

Federal courts are prohibited by Rev. St. § 720, except in certain cases in bankruptcy, from enjoining proceedings in any court of a state.—Chaffin v. St. Louis, Case No. 2,572; City Bank of New York v. Skelton, Id. 2,740.

Act March 2, 1793, § 5, providing that an injunction shall not be granted to stay proceedings in any court of a state, applies only to proceedings commenced in a state court before proceedings are commenced in the federal court, and the federal court may stay proceedings in the state court which have not been commenced before the jurisdiction of the federal court attached.—Louisiana State Lottery Co. v. Fitzpatrick, Case No. 8,541; Fisk v. Union Pac. R. Co., Id. 4,830.

The circuit court will not stay proceedings in a state court which are null and void; and it is forbidden by Act March 2, 1793, § 5, to stay valid proceedings in a state court.—Fisk v. Union Pac. R. Co., Case No. 4,827.

The circuit court of the United States cannot issue an injunction to stay proceedings in a state court which has sustained a law in violation of Const. U. S. Amend. art. 14, and has attempted to enforce it.—Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., Case No. 8,408.

An action of trespass in a state court against the marshal, for seizing goods of one person under an execution against another, cannot be enjoined in a federal court.—Evans v. Pack, Case No. 4,566.

Query, whether a federal court is not forbidden by Act March 2, 1793, § 5, from granting an injunction to stay an execution sale in a state court of vessels on which the government has mortgage liens for advances made to build them.—United States v. Collins, Case No. 14,834.

The federal courts have no jurisdiction to restrain a sheriff from selling under an execution issued from a state court.—Ruggles v. Simonton, Case No. 12,120.

A federal court in equity may enjoin, at the suit of a nonresident, the levy upon his land of a state court execution against another.—Breeden v. Lee, Case No. 1,828; Cropper v. Coburn, Id. 3,416. CONTRA, see Daly v. Sheriff, Case No. 3,553.

The sale of mortgaged property under foreclosure in a state court will not be enjoined at the instance of prior mortgagees not parties in the state court.—Carlisle v. Bundy, Case No. 2,410.

Whether sheriff's sale is a proceeding in court under Act March 2, 1793, c. 22, § 5, quære.—Du Pont v. Boshong, Case No. 4,184.

The United States court has jurisdiction as a court of equity, concurrent with the orphans' court, to compel an executor to settle his accounts and give security, but it cannot interfere with a suit already begun in the orphans' court for the same purpose.—Parkes v. Aldridge, Case No. 10,755.

A federal court or judge cannot discharge a person in custody under process for contempt issued by a state court in a suit pending therein, though, under the acts of congress, the state court has no jurisdiction of the subject-matter.—Ex parte Forbes, Case No. 4,921.

§ 114. Habeas corpus proceedings—In general.

Neither the state nor the federal courts have power to take from the custody of each other persons confined under their lawful authority.—United States v. Rector, Case No. 16,132; Norris v. Newton, Id. 10,307; Ex parte Sifford, Id. 12,848.

A state court may issue the writ to inquire into the cause of detention of a person held under authority of the United States, and may discharge him where he is illegally held.—In re Reynolds, Case No. 11,721. CONTRA, see Richards v. Randolph, Case No. 11,772.

A federal judge has no power to issue habeas corpus for one imprisoned under a state indictment for murder.—Ex parte McCann, Case No. 8,679.

A writ issued by a state court must be discharged where it appears by the return that petitioner is held by respondent under color of authority from the United States.—In re Farrand, Case No. 4,678.

The state court in such case cannot determine the question whether the authority is valid.—In re Farrand, Case No. 4,678.

Where it appears on the writ of habeas corpus that the imprisonment is under the authority of an act of congress, the jurisdiction of the state court is at an end.—Ex parte Robinson, Case No. 11,934.

A marshal having custody of a prisoner under authority of the United States is not bound to surrender him to a state officer having a writ issued under the Ohio statute of 1856.—Ex parte Sifford, Case No. 12,848.

A marshal should obey a writ of habeas corpus issued by a state court in good faith to a state officer, requiring the marshal to bring before the state court a prisoner in his charge, with the cause of detention, as he does not thereby part with the custody of the prisoner.—Ex parte Sifford, Case No. 12,848.

The person is in the custody of the court from the time of the service on the marshal of a writ of habeas corpus, and, until the proceedings thereon are terminated, he cannot lawfully be arrested on a warrant in extradition proceedings.—In re Farez, Case No. 4,644.

A federal court has jurisdiction where the petition alleges illegal restraint under color of federal authority, although certiorari proceedings are pending in a state court to review a decision dismissing a writ of habeas corpus issued on the prisoner's petition.—In re Leary, Case No. 8,162.

The federal circuit court cannot issue the writ for the purpose of surrendering, in discharge of bail, a principal confined merely under process

of a state court, but in such case the court may respite the recognizance.—United States v. French, Case No. 15,165.

A federal court may issue a writ of habeas corpus where a person is indicted and imprisoned under a state law, which is void under the federal constitution.—Ex parte McCready, Case No. 8,732.

One imprisoned for violating a law of his state relating to marriage cannot be released by a federal court on habeas corpus, on the ground that such law violates the constitution of the United States.—Ex parte Kinney, Case No. 7,825.

The writ will issue where colored prisoners have been tried capitally before a state court by a jury exclusively white, in contravention of Rev. St. § 641.—Ex parte Reynolds, Case No. 11,720.

Federal courts have jurisdiction to issue habeas corpus for parties held, under state laws, for acts done under requisitions by the executive of one state upon the executive of another state.—United States v. McClay, Case No. 15,660.

An agent of a state arrested in a suit for malicious prosecution for obtaining from the governor of another state, on the presentation of an authenticated indictment, a mandate for the arrest of a fugitive from justice, under which a person is arrested, is entitled to his discharge on habeas corpus by a federal court.—In re Titus, Case No. 14,062.

The federal court may issue the writ in the case of an arrest and imprisonment by state authorities of a person accused of a crime committed in one of the places mentioned in Rev. St. § 711.—Ex parte Tatem, Case No. 13,759.

A person imprisoned on conviction in the state court of an offense exclusively cognizable in the federal courts will be discharged on a writ issued from a federal court.—Ex parte Bridges, Case No. 1,862.

The court, in such case, may recommit him to await the action of the federal grand jury.—Ex parte Bridges, Case No. 1,862.

§ 115. —— Persons arrested under process of state court for acts done under federal authority.

The writ may issue to relieve an officer of the federal government who has been imprisoned under state authority for the performance of his duty.—Ex parte Robinson, Case No. 11,935.

The writ will issue on petition by a federal officer arrested by the state authorities, alleging that he is held in custody for an act done under authority of the United States.—Ramsey v. Jailer of Warren County, Case No. 11,547.

A person indicted in a state court for an act done in pursuance of and warranted by federal authority will be discharged on habeas corpus by a federal court or judge.—In re Bull, Case No. 2,119.

A person under arrest by state officers for an act done under process of a federal court or in executing a federal law may be discharged on habeas corpus.—Ex parte Thompson, Case No. 13,934.

A federal court may issue a writ of habeas corpus in favor of petitioners imprisoned for contempt by a state court for acts committed in the performance of duties created by laws of the United States.—Case of Electoral College, Case No. 4,336.

Where it clearly appears from the record that the state court exceeded its powers in committing such petitioners, the federal court may discharge them from imprisonment.—Case of Electoral College, Case No. 4,336.

The federal court may issue the writ to produce a federal officer arrested and imprisoned under a state process for his conduct in executing a federal process, and to inquire into the cause of commitment, and, if illegal, order a complete discharge.—Ex parte Jenkins, Case No. 7,259.

On a question of conflict between state and federal process, counsel, not authorized by the state or its proper officers, have no right to appear in defense of the state process.—Ex parte Jenkins, Case No. 7,259.

Where the indictment does not show that the alleged offense was committed by the officer while acting under a federal process or law, the court will admit evidence to sustain the allegations in the petition that the acts alleged were done in proper execution of a federal process.—Ex parte Jenkins, Case No. 7,259.

The writ will issue by a federal judge where a marshal is imprisoned under a state court process for not producing persons on a writ issued by such judge, and he will be discharged where it appears that such persons were legally in his custody, pursuant to the provisions of an act of congress.—Ex parte Robinson, Case No. 11,934.

A person committed by a state court on charges of altering a bench warrant, attempting to kidnap, and false imprisonment,—all arising out of his arresting a person on process of a federal court, which had been altered by insertion of the name of the person arrested,—may, on a proper showing, be released by a federal district judge. Act March 2, 1833.—United States v. Harris, Case No. 15,313.

Where an internal revenue officer is held under an indictment in a state court for an offense committed under color of the laws of United States, a petition for a writ must be brought under the seventh section of the act of March 2, 1833.—Ex parte Carson, Case No. 2,459.

Where, on habeas corpus to procure the discharge of a federal officer arrested by state authorities for malicious shooting, the evidence does not show that the shooting was done to enable him to execute a federal process in his hands, he will be remanded into custody.—In re United States, Case No. 14,412.

An officer of the United States army, imprisoned for contempt in failing to make a sworn return to a writ of habeas corpus issued by a state court to produce an enlisted soldier, may be released on habeas corpus issued by a federal court.—In re Neill, Case No. 10,089.

A soldier in the regular service, convicted in a state court, and sent to state prison, for murder, in firing upon and killing a bushwhacker while acting under orders of his superior officer, will be discharged on habeas corpus issued by a federal court.—In re Hurst, Case No. 6,926.

The decision of the federal court on a petition by a federal officer, alleging that he is held in custody by the state authorities for an act done under authority of the United States, is binding on the state courts.—Ramsey v. Jailer of Warren County, Case No. 11,547.

§ 116. Power of state court as regards federal courts in general.

The federal courts are supreme when acting within their sphere, and in case of conflict the state courts must give way.—United States v. Lee County, Case No. 15,589.

State courts have no right to interfere with the process of the federal courts to enforce their judgments on county bonds.—United States v. Lee County, Case No. 15,589.

The execution of writs of mandamus issued by the federal circuit court cannot be interfer-

ed with by the process or judgments of the state courts, and such interference is illegal and void.—United States v. Silverman, Case No. 16,288.

The state court can make no order or decree which shall interfere directly or indirectly with a mandamus issued from the federal court.—Apperson v. City of Memphis, Case No. 497.

The federal court may so control its process as not to violate local laws.—Apperson v. City of Memphis, Case No. 497.

A county judge who has levied a tax to pay a judgment against the county, in obedience to a writ of mandamus issued by a federal circuit court, is guilty of a contempt where he annuls the levy in obedience to a subsequent order of the state court.—United States v. Silverman, Case No. 16,288.

A state has no constitutional power to direct its governor to employ force to resist the execution of a decree of the federal court, though such decree is deemed to have been beyond its jurisdiction to make.—United States v. Bright, Case No. 14,647.

A summary application by motion is the proper proceeding, where a state court seeks to control the execution of process out of a federal court.—Brooks v. Memphis, Case No. 1,954.

§ 117. Conclusiveness of state court decision.

The state courts have exclusive jurisdiction over the probate of wills, and their action is conclusive.—Langdon v. Goddard, Case No. 8,060.

A decree admitting a will to probate and record, made by a probate court, given plenary powers as to contest, cannot be set aside by the circuit court of the United States, on a bill filed by testator's heirs at law.—Ellis v. Davis, Case No. 4,402.

The federal court cannot examine an order of the Pennsylvania orphans' court directing a sale of realty to pay intestate's debts.—Allen v. Lyons, Case No. 227.

§ 118. Property in custodia legis.

In the case of two suits between different parties having different purposes in view, commenced in courts of co-ordinate jurisdiction, where possession of property which is the subject of the suit is necessary to the relief asked in each case, that court which first seizes the property acquires jurisdiction over it, to the exclusion of the other, no matter when the suits were commenced, or process in personam was served.—Wilmer v. Atlanta & R. Air Line Ry. Co., Case No. 17,775.

The court, on a bill filed by railroad bondholders to construe a trust deed and to compel trustees to take possession, or for the appointment of a receiver, on service of a subpœna and a restraining order, obtains constructive possession of the trust property, and possession taken under process of another court in subsequent proceedings is in contempt of the former, though the latter court first obtains actual possession.—Wilmer v. Atlanta & R. Air Line Ry. Co., Case No. 17,775.

A federal court will not stay proceedings in a cause of which it has jurisdiction, and in which the complainant is entitled to some relief, although the subject-matter of the controversy is in the hands of a receiver of a state court; but the federal court will do nothing to disturb the receiver's possession.—Mercantile Trust Co. v. La Moille Val. R. Co., Case No. 9,432.

Where the state supreme court has taken judicial control of the property and franchises of a corporation, and ordered their sale, they cannot be taken in execution by process of a federal court.—Fox v. Hempfield R. Co., Case No. 5,011.

An attempt to disturb by proceedings in the state court the possession of a receiver previously appointed by the federal court is a contempt of such court.—De Visser v. Blackstone, Case No. 3,840.

After a state court has taken jurisdiction under the state statute of a petition to dissolve a corporation, and appointed a receiver, a federal court cannot take jurisdiction of a bill requiring the receiver to account.—Conkling v. Butler, Case No. 3,100.

A sheriff's levy under an attachment is terminated by an order of the state court appointing a receiver of the debtor, and a seizure by the marshal, then in possession under admiralty process, becomes legal.—The Roslyn, Case No. 12,068.

The fact that a state law provides a mode in which a third person may intervene when his property is attached on process against another does not prevent such person maintaining replevin in the federal court, where his property is attached under process of a state court.—Manier v. Trumbo, Case No. 18,309.

Poll books, ballots, and other books relating to an election, which have come into the possession of a federal court by virtue of its process for use as evidence in pending prosecutions, cannot be taken from its custody by a state court.—Ex parte Turner, Case No. 14,246.

Persons, with knowledge that a vessel was under attachment by a marshal, during the temporary absence of the ship keeper, forcibly carried her into another state, and caused her to be attached by process out of the state court. *Held*, that the marshal might follow and retake her.—The Joseph Gorham, Case No. 7,537.

A sheriff has no right to interfere with the possession of property legally in the possession of a United States marshal.—Crane v. McCoy, Case No. 3,354; The Croatan, Id. 3,395.

A vessel seized under process from a state court is from that time under the exclusive control of the state court, and its possession cannot be disturbed on a libel in rem in admiralty.—The Celestine, Case No. 2,541; Anonymous, Id. 452; Fisher v. The Plymouth, Id. 4,822; Lewis v. The Orpheus, Id. 8,330; The Circassian, Id. 2,721.

Quære, whether a sheriff in possession of a vessel has the right to exclude the marshal from executing process to enforce a paramount lien in admiralty.—The Gazelle, Case No. 5,289.

The attachment of freight moneys in the hands of third persons by a sheriff under process from the state court will not prevent the marshal from levying process upon it in a suit in rem by seamen to recover their wages, so as to give jurisdiction to the district court in admiralty.—The Sailor Prince, Case No. 12,218.

Where a conflict arises between the sheriff and a United States marshal as to the right to the custody of property, the sheriff may apply either to the state court to be protected, or to the federal court to order its officers to withdraw.—The Circassian, Case No. 2,721.

The circuit court can compel, by summary process, the restoration of property abstracted from its custody, whether the person abstracting it be a party to the suit or not.—Erie Ry. Co. v. Heath, Case No. 4,514.

A person depriving certificates of stock in the hands of a receiver of a privilege attached thereto *held* guilty of a spoliation which he should be required to restore by summary process.—Erie Ry. Co. v. Heath, Case No. 4,514.

A petition for the delivery of certificates of shares of stock in the hands of a receiver *held* should be denied where the petitioner was unable to identify any certificates as belonging to him.—Erie Ry. Co. v. Heath, Case No. 4,515.

§ 119. Courts of different states or countries.

The forms or modes of remedies in one state to enforce contracts are not regarded in other states.—Titus v. Hobart, Case No. 14,063.

Where a dispute exists between two independent countries as to the right of sovereignty over a particular territory, the courts of justice of each country are bound to consider the claim of their own government as rightful, it being a subject of political and diplomatic negotiation, and not of judicial cognizance.—Williams v. Suffolk Ins. Co., Case No. 17,738.

In the case of an inseparable railroad line running through two states, the court of the place of residence of its principal office may appoint a receiver of its entire property.—Wilmer v. Atlanta & R. Air Line Ry. Co., Case No. 17,775

COVENANT, ACTION OF.

§ 1, Grounds. § 2, Defenses. § 3, Pleading. § 4, Issues and proof. § 5, Evidence. § 6, Costs.

§ 1. Grounds.

Covenant will not lie on the condition of an injunction bond.—Summers v. Watson, Case No. 13,605.

Covenant will not lie on words in a penal bond, inserted by way of condition or defeasance by the performance of some collateral act, but it will lie upon the bond itself where the breach assigned is nonpayment of the penalty, and not nonperformance of the condition.—United States v. Brown, Case No. 14,670.

Covenant, and not debt, is the proper action on a bond payable by installments until all become due; but debt may be brought if payment be secured by a penalty.—Fontaine v. Aresta, Case No. 4,905.

§ 2. Defenses.

Different defenses may be made in an action for covenant.—United States v. Clarke, Case No. 14,812.

§ 3. Pleading.

The performance of a condition precedent must be averred, but matters of defense need not be anticipated and negatived.—Wilcox v. Cohn, Case No. 17,640.

Distinct breaches of separate covenants may be assigned in the same count.—Wilcox v. Cohn, Case No. 17,640.

Only so much of the covenant as is essential to the cause of action should be set forth.—Wilcox v. Cohn, Case No. 17,640.

It is sufficient to assign a breach of the covenant according to its legal effect, or in words which contain its sense and substance.—Wilcox v. Cohn, Case No. 17,640.

Defendant given leave to withdraw the plea of covenants performed and to file a special plea.—Gill v. Patten, Case No. 5,427.

§ 4. Issues and proof.

Where the covenants are independent, evidence under the plea of covenants performed with leave, etc., cannot be given of other breaches either by way of bar, offset, or in mitigation of damages.—Webster v. Warren, Case No. 17,339.

The plea of covenants performed with leave to give in evidence everything which amounts to a legal defense permits defendant to give in evidence anything which he might plead, and which, in point of law, can protect him from plaintiff's claim.—Webster v. Warren, Case No. 17,339.

§ 5. Evidence.

Where the covenants are dependent, the plaintiff cannot support his action as to them without showing performance of every affirmative covenant on his part, and in such case it is competent for the defendant to prove a breach of such as are negative.—Webster v. Warren, Case No. 17,339.

§ 6. Costs.

Full costs will be given in an action of covenant, though the verdict be for one cent only.—Woodrow v. Coleman, Case No. 17,984.

COVENANTS.

§ 1, Implied covenants. § 2, Construction and operation—General or special. § 3, —— Warranty. § 4, —— Against incumbrances. § 5, —— For quiet enjoyment. § 6, —— For further assurance. § 7, Covenants running with the land. § 8, Breach of covenant of seisin. § 9, Actions for breach—Parties. § 10, —— Pleading. § 11, —— Damages.

See, also, "Covenant, Action of"; "Easements," § 3.
In insurance policies, see "Insurance," §§ 66–88.
In lease, see "Landlord and Tenant," § 6.

§ 1. Implied covenants.

A covenant of title is not implied in a deed which is without covenants.—Baldwin v. Le Roy, Case No. 800a.

No covenant is implied from the words "bargain, sell, and quitclaim," either at common law or under the Oregon statute. Or. Archives, 138, "Conveyances."—Lamb v. Kamm, Case No. 8,017.

§ 2. Construction and operation—General or special.

Certain words construed to be covenant of regularity of proceeding out of warranty of title.—Thayer v. Wendell, Case No. 13,873.

A covenant against the claim, right, or title of any person claiming through the grantor is a special covenant of nonclaim, which does not operate upon after-acquired title.—Lamb v. Kamm, Case No. 8,017.

§ 3. —— Warranty.

It is not necessary, in a general warranty deed, to use the word "warrant," if other words of equal import are used.—Kirkendall v. Mitchell, Case No. 7,841.

The heir is not bound by a warranty which did not bind his ancestor.—Piatt v. Oliver, Case No. 11,116.

The warranty of the ancestor does not bind the heir, where the right does not vest before the fall of the warranty.—Piatt v. Oliver, Case No. 11,116.

The statute of 4 & 5 Anne, c. 16, respecting collateral warranty, etc., has been adopted in Rhode Island.—Sisson v. Seabury, Case No. 12,913.

A covenant to warrant and defend against all persons except the United States or those deriving title therefrom, does not estop the grantor or his heirs from claiming an interest subsequently purchased from a donee of the United States.—Lamb v. Wakefield, Case No. 8,024.

A covenant "against the claims of all persons claiming by, through, or under the grantors" operates only upon the estate which the grantors then had, and not against a title afterwards acquired.—Lamb v. Burbank, Case No. 8,012.

§ 4. —— **Against incumbrances.**
A covenant against incumbrances caused by the grantor is not prospective.—Lamb v. Kamm, Case No. 8,017.

The inchoate right of dower is not an incumbrance, within the meaning of a covenant against incumbrances.—Powell v. Monson & Brimfield Mfg. Co., Case No. 11,356.

§ 5. —— **For quiet enjoyment.**
A clause in a quitclaim, "and by these presents give them peaceable possession of the same, to have and to hold for their own use and benefit forever," is not a covenant for quiet enjoyment, nor a representation estopping the grantor from asserting after-acquired title.—Lamb v. Starr, Case No. 8,022.

§ 6. —— **For further assurance.**
A covenant that, if the grantors obtain title from the United States, they will convey the same to the grantees by deed of general warranty, is a covenant for further assurance, entitling the grantees to a conveyance of the legal title when the contingency happens.—Lamb v. Burbank, Case No. 8,012.

The interest acquired by the husband and children on the death of the wife of a settler under the donation act of 1850 *held* to be within a covenant to convey the title of the United States, if the covenantors obtained the same, in a deed by them made before the passage of the act.—Fields v. Squires, Case No. 4,776.

§ 7. **Covenants running with the land.**
A covenant to pay rent runs with the land.—Hurst v. Rodney, Case No. 6,937.

A covenant which runs with the land is divisible, and the grantee of any part or interest in the land may, as to the same, maintain suit upon the covenant against the original covenantor, or his legal representatives.—Fields v. Squires, Case No. 4,776.

§ 8. **Breach of covenant of seisin.**
A judgment for taxes and a sale and tax deed thereunder are a breach of a covenant of seisin, and it is not a good plea that the sale was not valid.—Vorhis v. Forsythe, Case No. 17,004.

It is not a breach of covenant of warranty of seisin to show a conveyance by defendant's grantor subsequent to the conveyance to the defendant.—Vorhis v. Forsythe, Case No. 17,004.

§ 9. **Actions for breach—Parties.**
If there be a covenant to three persons jointly, and a breach, and two die, the survivor may sue alone.—Crocker v. Beal, Case No. 3,396.

§ 10. —— **Pleading.**
To avoid circuity of action a covenant may be pleaded as a release when between the parties, and intended to defeat the right of action.—Garnett v. Macon, Case No. 5,245.

§ 11. —— **Damages.**
In an action for breach of a covenant that lands conveyed are of a certain quality, the measure of damages is the value of the land at the time of the covenant broken or date of the deed.—Estill v. Blakemore, Case No. 4,538.

The measure of damages for breach of a covenant for quiet enjoyment made by the lessee, on a transfer by him, where the covenantee is evicted, is the fair rental value, not the rate of rent payable by the covenantor.—In re Bonnett, Case No. 1,633.

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," §§ 70–83.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Compositions with Creditors"; "Creditors' Suit"; "Fraudulent Conveyances"; "Insolvency"; "Marshaling Assets and Securities."
Competency as witness, see "Witnesses," § 37.
Of intestate, see "Descent and Distribution," § 4.
Remedies of and against surety, see "Principal and Surety," §§ 11, 12–14.
Rights as to chattel mortgage by debtor, see "Chattel Mortgages," §§ 17, 18.
—— of officers of corporation as creditors, see "Corporations," § 36.
Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

§ 1, Nature of remedy. § 2, Time of bringing suit. § 3, Defenses. § 4, Jurisdiction. § 5, Adequate remedy at law. § 6, Conditions precedent to suit—Judgment or lien. § 7, Parties. § 8, Pleading. § 9, Evidence. § 10, Rights acquired by suit. § 11, Receiver. § 12, Judgment or decree and control or distribution of property.

Lien in bankruptcy, see "Bankruptcy," § 253.
Remedies in case of assignments, see "Assignment for Benefit of Creditors," §§ 11, 12.
—— of fraudulent conveyances, see "Fraudulent Conveyances," §§ 28–35.

§ 1. **Nature of remedy.**
A creditors' bill for discovery is a continuation of the suit at law, as it merely seeks to obtain the fruits of the judgment, or to remove obstacles to the remedy at law.—Hatch v. Dorr, Case No. 6,206.

§ 2. **Time of bringing suit.**
In Michigan a creditors' bill may be filed on the return of an execution nulla bona before the return day named in the writ.—Howe v. Cobb, Case No. 6,767.

§ 3. **Defenses.**
A proceeding in a state court by attachment, where a garnishee is summoned, cannot be set up in bar or abatement to a creditors' bill.—Wilkinson v. Yale, Case No. 17,678.

On a creditors' bill to recover assets pledged to a national bank as security on the ground that the loan secured was ultra vires, it appeared that afterwards the debtor had made a general assignment for creditors. *Held*, that complainant could have no relief, for if the bank had no title the title became vested in the assignees under the general assignment.—Stewart v. National Union Bank, Case No. 13,435.

§ 4. **Jurisdiction.**
The Illinois statute of 1877, giving the county court full jurisdiction in the case of assignments for creditors, does not deprive courts of equity of jurisdiction of a creditors' bill to set aside a fraudulent assignment or preference consummated prior to the assignment.—Strong v. Goldman, Case No. 13,542.

§ 5. **Adequate remedy at law.**
Creditors' suit sustained though defendant had property subject to levy, where it was mortgaged and his affairs complicated.—Bassett v. Orr, Case No. 1,095.

On a creditors' bill, assignees under an alleged fraudulent assignment, made defendants, may show that defendant in execution had property.—Howe v. Cobb, Case No. 6,767.

§ 6. **Conditions precedent to suit—Judgment or lien.**
A creditors' suit cannot be maintained by general creditor to set aside a conveyance, unless he has a lien on the property, or has reduced his claim to judgment.—Barker v. Barker's As-

signee, Case No. 9S6; Stewart v. Fagan, Id. 13,426; Vint v. King, Id. 16,950; Findlay v. Vint, Id.; Allen v. Same, Id.; Sheffey v. Same, Id.; Wells v. Dalrymple, Id. 17,392.

A debt due from a purchaser for the price of goods sold by an agent of the owner, who refuses to pay because of a private claim against one of the agents, is not the debt of the agent, and is not the subject of a suit in equity until reduced to judgment by an action at law.—Vose v. Philbrook, Case No. 17,010.

The aid of equity will not be given to enforce a judgment at law against a chattel, unless it appear that the creditor has tried to enforce the same by execution at law; otherwise as to land upon which the judgment is a lien.—United States v. Sturges, Case No. 16,414.

Execution cannot be required as preliminary to a creditors' bill where at law the property cannot be reached.—Wilkinson v. Yale, Case No. 17,678.

Equity has jurisdiction of a bill by a judgment creditor for relief against a conveyance of land with intent to defeat the lien of the judgment or delay its satisfaction, whether execution has issued or not.—McCalmont v. Lawrence, Case No. 8,676.

The relief in such case is based on the fraud against a lien already attached or to prevent its attaching, and the remedy given in equity is as full as could have been obtained through the lien by execution.—McCalmont v. Lawrence, Case No. 8,676.

Marshal's return of execution nulla bona is a sufficient basis for a creditors' bill.—Bassett v. Orr, Case No. 1,095.

Such falsity may be shown by establishing that the debtor had property liable to execution, and which could have been levied on, though insufficient to pay the debt.—Bassett v. Orr, Case No. 1,095.

The presumption in favor of the truth of the marshal's return of nulla bona is not overcome by the fact that he returned the process on the day he received it.—Bassett v. Orr, Case No. 1,095.

A creditors' suit will be dismissed if it is apparent that there was no bona fide attempt made by the officer to find property to satisfy the judgment.—Bassett v. Orr, Case No. 1,095.

§ 7. Parties.

After return of execution nulla bona, the judgment creditor alone, or with other judgment creditors, may file a bill against persons holding property of the debtor, which, because of fraud or a trust, cannot be reached by execution.—Marsh v. Burroughs, Case No. 9,112.

Where the defendant in such a case has a remedy over against others for contribution or indemnity, it is no defense that they are not made parties.—Marsh v. Burroughs, Case No. 9,112.

When a creditors' bill is filed in the state court in Georgia to settle a trust, all creditors notified of the bill according to law are parties and bound by the decree.—Samples v. Bank, Case No. 12,278.

§ 8. Pleading.

A creditors' bill is maintainable in the federal court in the form prescribed by the state statutes.—Suydam v. Beals, Case No. 13,653.

The objection that plaintiff has no lien is waived, unless taken in the answer.—Wells v. Dalrymple, Case No. 17,392.

§ 9. Evidence.

The burden of showing that a marshal's return of nulla bona is false is on defendant.—Bassett v. Orr, Case No. 1,095.

§ 10. Rights acquired by suit.

The creditor who first institutes suit to avoid a fraudulent conveyance is entitled to relief, without regard to others having the same right who have not joined as parties.—McCalmont v. Lawrence, Case No. 8,676.

The preferable equity which the vigilant creditor acquires becomes a specific lien by the filing of his bill.—Burt v. Keyes, Case No. 2,212.

§ 11. Receiver.

Where the debtor disposed of $200,000 worth of stock before making a general assignment of $18,000, *held*, that a receiver would be appointed.—Strong v. Goldman, Case No. 13,542.

A receiver may be appointed on a creditors' bill against the surviving partner of a mercantile firm.—Dick v. Laird, Case No. 3,891.

After the appointment of a receiver under a creditors' bill, another creditor can acquire no rights by levying an attachment upon property of the judgment debtor.—Perego v. Bonesteel, Case No. 10,976.

§ 12. Judgment or decree, and control or distribution of property.

The decree must be so framed that all persons shown to have a claim on the fund may be brought in for their distributive shares.—Marsh v. Burroughs, Case No. 9,112.

A court of equity may control the custody of notes assigned as security so as to prevent their being negotiated, to the detriment of the judgment debtor of the owner.—Babcock v. Millard, Case No. 699.

Where land was fraudulently conveyed before judgment, to prevent the lien thereof from attaching, *held*, that equity might properly require the debtor and his assignee to join with the receiver in the suit, in making a conveyance to the purchaser at a sale directed by the decree; and that such conveyance would discharge all right of the debtor or of other judgment creditors to redeem the land.—McCalmont v. Lawrence, Case No. 8,676.

On bill by judgment creditor to set aside conveyance as fraudulent, the court will look into the original consideration, and give the creditor only what appears due him.—Bean v. Smith. Case No. 1,174.

CRIMINAL LAW.

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Effect of repeal of law, see "Statutes," § 15.

—— of state criminal laws on federal courts, see "Courts," § 77.

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Power of attorney general to control indictment, see "Attorney General."

—— to punish crimes on high seas, see "Commerce," § 3.

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Offenses by particular classes of persons.

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Bastardy, see "Bastards," § 2.

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Cruelty to animals, see "Animals," § 2.

Cutting timber on public lands, see "Public Lands," § 9.

In Indian country, see "Indians," §§ 14, 15.

Injury to foreign minister, see "Ambassadors and Consuls," § 3.

Obstruction of highways, see "Highways," § 6.

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Offenses against bankrupt laws, see "Bankruptcy," §§ 672–680.

—— customs laws, see "Customs Duties," §§ 77–128.
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—— of regulations as to carriage of passengers, see "Shipping," § 207.
—— of treaties, see "Treaties," § 1.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ 1. Criminal intent.

An intent to seize a man by force for uttering slanderous or offensive words, and to carry him by force before a justice of the peace, without a legal warrant, is an unlawful intent.—United States v. Fenwick, Case No. 15,086.

Where a statute makes criminal an act not malum in se or infamous, without requiring the act to be knowingly done, a criminal intent need not be proved.—United States v. Leathers, Case No. 15,581.

If a person injure another while using a dangerous weapon in a reckless manner, having reasonable cause to believe that he may injure some one, he is as guilty of a criminal intent as if he had a special intent to injure the person hurt. —United States v. McClare, Case No. 15,659.

§ 2. Compulsion.

The putting in fear which is sufficient to excuse the perpetration of a criminal act must proceed from an immediate and actual danger threatening the life of the accused. The apprehension of the loss of property or of slight or remote injury to the person is not sufficient.—United States v. Vigol, Case No. 16,621.

§ 3. Attempts.

The rule requiring a criminal or unlawful attempt as an element of an offense does not apply to penal statutes not authorizing indictments.—United States v. Thomasson, Case No. 16,478.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

§ 4. Insane persons.

It is not every kind or degree of insanity which exempts from punishment. If the accused understood the nature of his act, if he knew it was wrong, and deserved punishment, he is responsible.—United States v. McGlue, Case No. 15,679; Same v. Holmes, Id. 15,382.

A person who can discriminate a right from a wrong act is liable to punishment, and his acts are the best test of his sanity.—United States v. Shults, Case No. 16,286.

It is a good defense that a prisoner, at the time of committing the act, was in such a state of mental insanity, not produced by the immediate effects of intoxicating drink, as not to have been conscious of the moral turpitude of the act. —United States v. Clarke, Case No. 14,811.

Insanity, to constitute a defense, need only to have existed at the moment when the act was charged to have been committed.—United States v. Sickles, Case No. 16,287a.

See, also, post, § 77.

§ 5. Drunken persons.

Drunkenness is no justification, but is admissible to enable the jury to judge of the intent.—United States v. Bowen, Case No. 14,629.

Intoxication is an excuse for crime where an habitual or fixed frenzy is produced thereby.—United States v. Forbes, Case No. 15,129.

Insanity caused by drunkenness, where the person is not intoxicated at the time of committing the offense charged, is a good excuse.—United States v. Woodward, Case No. 16,760a.

If a person suffering from delirium tremens is so far insane as not to know the nature of his act, etc., he is not punishable.—United States v. McGlue, Case No. 15,679.

III. PARTIES TO OFFENSES.

See, also, post, §§ 63, 66–68, 79, 87, 106.

§ 6. Principals.

On the unlawful loan of public moneys by a public officer to persons having knowledge of the fact, both lender and borrower are principals and are equally guilty.—United States v. Hartwell, Case No. 15,318.

If many go to do an unlawful act, and one only does it, all are principals. If they go to do a lawful act, and all but one commit a felony, in his presence, but without his participation, he is not guilty.—United States v. Jones, Case No. 15,494.

All persons present at the commission of a crime, consenting thereto, aiding, assisting, or abetting therein, or in doing any act which is a constituent of the offense, are principals.—United States v. Wilson, Case No. 16,730.

If a principal in a transaction be not liable, another cannot be charged merely for aiding and abetting him, unless the other perform acts which render himself liable as a principal.—United States v. Libby, Case No. 15,597.

In cases of misdemeanor, not only those who are present, participating in the act, but those who, though absent when the offense was committed, did procure, counsel, command, or abet others to commit it, are indictable as principals. —Charge to Grand Jury, Case No. 18,250.

Language addressed to persons who immediately afterwards commit an offense, if actually intended by the speaker to incite those addressed to commit it, and adapted thus to incite them, is such a counseling or advising to the crime as the law contemplates, and the person so inciting is liable to indictment as a principal.—Charge to Grand Jury, Case No. 18,250.

§ 7. Accessories.

Where defendant was not present nor aiding or abetting at the act, although he was concerned in the design to commit the offense, he is only liable as accessory before the fact.—United States v. White, Case No. 16,675.

There are no accessories at common law in misdemeanors.—United States v. Hartwell, Case No. 15,318; Same v. White, Id. 16,675; Same v. Williams, Id. 16,708.

See, also, "Homicide," § 1.

§ 8. Prosecution.

The person charged as accessory may be tried and convicted, if the principal cannot be found; but, where the principal has been tried and acquitted, a person charged as accessory will be

discharged on motion.—United States v. Crane, Case No. 14,888.

After the principal's plea of nolo contendere, the other defendants will be held to be principals, and not accessories.—United States v. Hartwell, Case No. 15,318.

An accessory after the fact cannot be tried as a principal unless the indictment show either that the principal has been convicted, or has fled from justice, or cannot be found.—United States v. New, Case No. 15,866a.

IV. JURISDICTION.

See, also, post, § 112; "Courts," §§ 22, 99.

§ 9. Nature and extent of criminal jurisdiction in general.

Extent of the criminal jurisdiction of the United States stated by Field, C. J.—United States v. Smiley, Case No. 16,317.

The federal courts have jurisdiction of all criminal cases arising under the federal laws.—United States v. Smith, Case No. 16,323; Same v. Reese, Id. 16,138.

The federal courts have no common-law jurisdiction to try and punish crimes, but only such jurisdiction as is expressly authorized by the constitution or by congress.—United States v. New Bedford Bridge, Case No. 15,867; Same v. Ramsay, Id. 16,115; Same v. Swett, Id. 16,427; Same v. Wilson, Id. 16,731, 16,732; United States v. Hare, Id. 15,304; Same v. Lancaster, Id. 15,556; Same v. Barney, Id. 14,524; Same v. Scott, Id. 16,241.

Except offenses committed on the high seas, or in places in the states which are under the exclusive jurisdiction of the United States, there are no felonies against the United States, cognizable by courts of the United States, except those which are expressly made such by act of congress.—United States v. Shepherd, Case No. 16,274.

An indictment as accessory before the fact of murder will not lie in the federal courts.—United States v. Ramsay, Case No. 16,115.

An indictment for robbery on land will not lie in the federal courts.—United States v. Terrel, Case No. 16,452.

Conspiracy as known at common law is not cognizable as such in the federal courts.—United States v. Martin, Case No. 15,728.

Such courts have no jurisdiction of offenses at common law, though the general government be the party immediately aggrieved.—United States v. Hutchinson, Case No. 15,432.

The fact that the punishment for a common-law crime has been changed by statute does not affect the jurisdiction to punish it at common law.—United States v. Hammond, Case No. 15,293.

If the official character of an officer of the United States is not a necessary ingredient of the offense charged in the indictment, the naming him as such, and the averment that he was such an officer, will not prevent a court of law from taking cognizance of the offense.—United States v. Watkins, Case No. 16,649.

The federal judiciary, in the absence of legislation by congress, has jurisdiction of an offense against the law of nations, and may proceed to punish the offender according to the forms of the common law.—Henfield's Case, Case No. 6,360.

§ 10. Crimes committed on high seas.

Jurisdiction of courts of admiralty as to misdemeanors committed on the seas.—Corfield v. Coryell, Case No. 3,230.

The term "high seas" is used in the acts of congress in its popular and natural sense.—United States v. Wilson, Case No. 16,731.

The words "high seas," in Act 1825, c. 276, § 22, mean the uninclosed waters of the ocean on the sea coast, outside of the fauces terræ. United States v. Bevans, Case No. 14,589, overruled.—United States v. Grush, Case No. 15,268.

"High seas" (Act April 30, 1790, c. 9, § 8) mean any waters on the sea coast which are without the boundaries of low-water mark.—United States v. Ross, Case No. 16,196.

An offense committed in a bay which is entirely landlocked and inclosed by reefs is not committed on the high seas, within Act March 26, 1804, c. 40.—United States v. Robinson, Case No. 16,176.

An offense committed on a United States naval vessel while lying in the channel of the harbor of Boston, outside of low-water mark, is committed upon the "high seas," and is within the jurisdiction of the federal courts.—United States v. Bevans, Case No. 14,589.

The Great Lakes are not "high seas" within the meaning of Act July 29, 1850, punishing the burning of vessels.—Miller's Case, Case No. 9,558.

The court has no jurisdiction on an indictment for larceny upon the high seas, under Act 1790, c. 9, § 16, where the taking was on board of a vessel while lying in the port of Savannah.—United States v. Davis, Case No. 14,931.

The court does not obtain jurisdiction by the fact that the property was carried on the high seas from the port of Savannah to New York.—United States v. Davis, Case No. 14,931.

The federal courts have jurisdiction of the offense of plundering property from a stranded vessel or after it has been thrown upon the shore. Act 1825, c. 65, § 9.—United States v. Pitman, Case No. 16,051.

An American vessel was wrecked within 150 feet of the Mexican shore, and completely broken up and destroyed. Defendant recovered a part of her treasure, buried in the sand under water, and converted the same. *Held*, that the United States courts had no jurisdiction either over the place or property.—United States v. Smiley, Case No. 16,317.

To give the federal courts jurisdiction over a murder, as having been committed on the high seas, the death, as well as the mortal stroke, must have happened on the high seas.—United States v. McGill, Case No. 15,676.

State courts have exclusive jurisdiction of offenses committed on arms of the sea, creeks, havens, basins, and bays within the ebb and flow of the tide within the body of a county.—United States v. Grush, Case No. 15,268.

Where such arm of the sea, creek, haven, etc., is so narrow that a person standing on one shore can reasonably discern and distinctly see by the naked eye what is doing on the opposite shore, the waters are within the body of a county.—United States v. Grush, Case No. 15,268.

A vessel lying in the mouth of a river a mile and a half wide is on the high seas, within Act April 30, 1790.—United States v. Smith, Case No. 16,344.

The county of Suffolk, Mass., extends to all waters between the circumjacent islands, down to the Great Brewster and Point Allerton.—United States v. Grush, Case No. 15,268.

A vessel lying in a harbor, fastened to the shore by cables, and communicating with the land by her boats, and not within any inclosed dock, or at any pier or wharf, is on the "high seas," outside of low-water mark on the coast.—United States v. Seagrist, Case No. 16,245.

A vessel lying on the sea outside of the bar of a harbor of the United States, within three miles

of the shore, is on the high seas.—United States v. Smith, Case No. 16,337.

The circuit court has jurisdiction over a revolt on a vessel which has not cleared, but is lying at anchor in a navigable stream where the tide ebbs and flows.—United States v. Staly, Case No. 16,374; Same v. Collyer, Id. 14,838.

The federal admiralty courts have jurisdiction under the act of 1835 of an indictment for an endeavor to make a revolt on a ship lying 60 yards from the wharf in New York City, ready for sea, and in the East river, where the tide ebbs and flows.—United States v. Lynch, Case No. 15,648.

See, also, post, § 23.

§ 11. Crimes committed on vessels.

To render a vessel American, so as to punish offenses on board of her, it is enough to show that she sailed from and to an American port, and was apparently owned and controlled by citizens of the United States.—United States v. Peterson, Case No. 16,037.

The offense of maltreating a seaman on board an American vessel is punishable, under Rev. St. § 5347, regardless of the location of such vessel. —United States v. Bennett, Case No. 14,574.

The federal courts have no jurisdiction of offenses upon or against the property of another committed on board of an American vessel lying within a land-locked harbor within the jurisdiction of a foreign sovereign.—United States v. Morel, Case No. 15,807; Same v. Jackson, Id. 15,457.

The federal courts have jurisdiction, under the act of 1825 (4 Stat. 115), of the offense of endeavoring to make a revolt and mutiny on board an American vessel lying in an inclosed dock within the jurisdiction of a foreign sovereign.—United States v. Roberts, Case No. 16,173.

The fact that a person stealing goods in a foreign port brings them upon the high seas in an American vessel will not give jurisdiction of the offense to the federal courts.—United States v. Morel, Case No. 15,807.

The federal circuit court has jurisdiction of piracy on board of an American ship, committed in an open roadstead adjacent to a foreign territory, and within half a mile of the shore. Act April 30, 1790, c. 9, § 8.—United States v. Ross, Case No. 16,196.

Congress has not, by the crimes acts of 1825 and 1835 (4 Stat. 115, 775), given to the civil courts any jurisdiction over the crime of murder, when committed on board a United States ship of war, and triable before a court-martial under the navy regulations.—United States v. Mackenzie, Case No. 18,313.

The United States courts have no jurisdiction over robbery or piracy committed by an alien on board a foreign vessel on the high seas, whether within or without a marine league of our coasts. —United States v. Kessler, Case No. 15,528.

An offense commenced to be committed on board an American vessel lying at the time in a river which is an arm of the sea on the coast of Africa, and continued uninterruptedly to a point in the Atlantic Ocean several miles from our shores, is within the jurisdiction of the federal circuit court.—United States v. Gordon, Case No. 15,231.

Quære, whether a federal court has jurisdiction to try a person who committed murder on board an American merchant ship in the Bay of Cadiz. —United States v. Gourlay, Case No. 15,241.

See, also, post, § 20.

§ 12. Crimes committed on land within the exclusive jurisdiction of United States.

Act March 3, 1825, § 3, is confined to offenses committed in places the sites whereof have been ceded to and are under the jurisdiction of the United States at the time of its enactment.—United States v. Barney, Case No. 14,524; Same v. Davis, Id. 14,930.

A larceny committed in a place not under the sole and exclusive jurisdiction of the United States may be punishable under Act 1825, c. 276, § 3.—United States v. Davis, Case No. 14,930.

The acceptance by congress of the cession by a state of exclusive jurisdiction over territory in a military reservation which existed before the state was created is not necessary to vest such jurisdiction in the United States, under Const. art. 1, § 8.—Ex parte Hebard, Case No. 6,312.

The circuit court has jurisdiction over the offense of murder committed within a fort purchased by the United States by the consent of the state legislature (Act 1790, c. 9, §§ 3, 7), although in the cession the state reserved the right to execute its civil and criminal processes in such places.—United States v. Cornell, Case No. 14,868.

The federal district court has exclusive jurisdiction of crimes committed in the Gosport navy yard in Virginia. Rev. St. § 711.—Ex parte Tatem, Case No. 13,759.

The "navy yard" includes contiguous waters necessary to float vessels of the navy while at the navy yard.—Ex parte Tatem, Case No. 13,759.

The circuit court for the Eastern district of New York has jurisdiction of an indictment for an assault with intent to kill committed in the navy yard at Brooklyn. Act March 3, 1825.—United States v. Dolan, Case No. 14,978.

A larceny committed at West Point, N. Y., is punishable in the federal courts, under the crimes act of 1790.—United States v. Knapp, Case No. 15,538.

Under a cession of jurisdiction in places purchased by the United States "for forts or fortifications," the federal courts have no jurisdiction to punish a crime committed upon land purchased and used for the purposes of an arsenal only.—United States v. Hopkins, Case No. 15,387a.

Where a state grants land to the general government, reserving concurrent jurisdiction in executing process therein for offenses committed out of it, the federal courts have exclusive jurisdiction of offenses committed within such territory. —United States v. Travers, Case No. 16,537.

The federal courts have no jurisdiction to punish the crime of murder committed within a fort of the United States existing in the state of Kansas at the time such state was admitted into the Union.—United States v. Stahl, Case No. 16,373.

§ 13. Exclusive and concurrent jurisdiction.

Perjury committed during judicial investigation, conducted under authority of congress, is an offense against the public justice of the United States, and is exclusively cognizable in their courts.—Ex parte Bridges, Case No. 1,862.

The jurisdiction of state courts as to treason is not limited.—Kemp v. Kennedy, Case No. 7,686.

The same offenses may be made punishable under both state and federal laws, and both state and federal courts will have concurrent jurisdiction over them.—United States v. Wells, Case No. 16,665.

The rule that in cases of concurrent jurisdiction the court that first gets control of the subject-matter will continue to exercise exclusive jurisdiction until judgment is applicable to criminal cases.—United States v. Wells, Case No. 16,665.

The federal courts have no jurisdiction of the crime of larceny under Act 1790, § 16, committed in a place where the jurisdiction of the United

States is concurrent with that of a state.—United States v. Tierney, Case No. 16,517.

The jurisdiction of the federal courts is not ousted by the fact that the indictment charges that in carrying out their design the conspirators were guilty of a crime of higher grade, of which the state courts had exclusive jurisdiction. —United States v. Goldman, Case No. 15,225.

§ 14. Jurisdiction of courts of the District of Columbia.

An offense against the state committed in the District of Columbia before the first Monday of December, 1800, may be prosecuted before the circuit court of the District of Columbia, as an offense against the United States.—United States v. Heinegan, Case No. 15,340.

The daily penalty for keeping a faro table can only be recovered by issuing warrants for the offense daily.—Dixon v. Washington, Case No. 3,935.

The circuit court of the District of Columbia has no jurisdiction of larceny by a slave.—United States v. Jack, Case No. 15,452; Same v. Louder, Id. 15,630.

The circuit court of the District of Columbia has no jurisdiction of an indictment against a domestic servant of a foreign minister.—United States v. Lafontaine, Case No. 15,550.

The circuit court of the District of Columbia may hold special sessions for the trial of criminal causes, at which it may try offenses committed between the time of ordering and the time of holding such session.—United States v. Williams, Case No. 16,712.

The circuit court of the District of Columbia for the county of Washington has jurisdiction of an offense committed in that county against the common law of Maryland adopted by Act Feb. 27, 1801.—United States v. Watkins, Case No. 16,649.

Justices of the peace in the District of Columbia have jurisdiction in cases against women.—Johnson v. Washington, Case No. 7,420; Patten v. Same, Id. 10,813.

A justice of the peace has no jurisdiction of the offense of selling intoxicating liquors, under Act 1861, except as an examining magistrate. —United States v. Marshal of District of Columbia, Case No. 15,726b.

A justice of the peace for the county of Washington has jurisdiction of offenses against the by-laws of the corporation of Washington, although the amount of the penalty be discretionary within certain limits.—Washington v. Eaton, Case No. 17,228.

V. VENUE.

See, also, post, §§ 42, 43.

§ 15. Place of bringing prosecution—In general.

Under the constitution, a crime committed within the limits of the United States can be tried only within the state and judicial district within which it is committed, and the accused has the right to a trial by jury in such state or district. If, therefore, the condition of such state or district be such that the federal courts there cannot or will not perform their functions, crimes committed there cannot be punished by the regular administration of justice. —Charge to Grand Jury, Treason, Case No. 18,274.

For an offense against the United States committed in an organized territory, the offender may be arrested in any district of the United States, and removed to the territory for trial, if the territorial courts have cognizance of the offense.—United States v. Haskins, Case No. 15,322.

Under the sixth amendment, criminal prosecutions must be had in a district which has been ascertained by law previous to the commission of the crime, and not merely previous to the trial.—United States v. Maxon, Case No. 15,748.

Jurisdiction to try the offense attaches either to the district into which the offender is first brought or that in which he is apprehended. —United States v. Thompson, Case No. 16,492.

The federal circuit court will not surrender one charged with a capital crime for trial in another jurisdiction for a minor offense.—United States v. Corrie, Case No. 14,869.

A person guilty of acts of treason in a Southern state, arrested in a Northern state before actual hostilities of the Civil War commenced, will not be committed or required to give bail to answer the charge of treason in the place where it was committed, where it appears that the federal courts were not open.—United States v. Greiner, Case No. 15,262.

§ 16. —— Bigamy.

An indictment for bigamy in the District of Columbia must be tried in the county where the second marriage was celebrated.—United States v. Jernegan, Case No. 15,477.

§ 17. —— Conspiracy.

A conspiracy to do an unlawful act, formed in one district, and in part executed there, is punishable in that district, though it was consummated in other parts of the United States. —United States v. Noblom, Case No. 15,896.

The defendants may be tried in any district where the overt acts were committed.—United States v. Rindskopf, Case No. 16,165.

§ 18. —— Fraud and false pretenses.

An indictment cannot be sustained in one place for obtaining money by false pretenses made in another place.—United States v. Plympton, Case No. 16,057.

Where a person by fraud procures money to be deposited to his credit, and draws against the same, the offense is complete in a place where the draft is drawn and discounted, and at the time when it is paid.—United States v. Watkins, Case No. 16,649.

§ 19. —— Forgery.

A forgery under the federal laws must be tried in the district where the crime is committed.—United States v. Britton, Case No. 14,650.

§ 20. —— Homicide.

In the case of a homicide by shooting, the place where the shot takes effect, and not that from which it is fired, determines the jurisdiction of the offense, and where a shot from an American vessel in a foreign harbor kills a person on board of a foreign vessel lying in such harbor, the jurisdiction of the offense belongs to the foreign government, and not to the courts of the United States, under Act 1790, c. 36, § 12.—United States v. Davis, Case No. 14,932.

The place where the death happens, and not that where the mortal stroke is given, determines the jurisdiction of the court on an indictment for manslaughter; otherwise where the indictment is for assault and battery.— United States v. Bladen, Case No. 14,605.

§ 21. —— Larceny and receiving stolen goods.

A person who steals goods in one jurisdiction, and brings them into another, is guilty of larceny in the latter place.—United States v. Haukey, Case No. 15,328; Same v. Mason, Id. 15,738; Same v. Tolson, Id. 16,530.

The receiving of stolen goods in one jurisdiction with knowledge that they were stolen in another is an offense in the former jurisdic-

tion.—United States v. Mortimer, Case No. 15,821; Same v. Montgomery, Id. 15,800.

§ 22. —— Libel.

The author and publisher of a libel in the District of Columbia may be there indicted and punished for an offense against the United States.—In re Buell, Case No. 2,102.

§ 23. —— Offenses committed on high seas.

An offense committed without the limits of the United States, on the high seas, must be tried in the district where the offender is apprehended, or into which he may be first brought in legal custody.—United States v. Bird, Case No. 14,597; Charge to Grand Jury, Treason, Id. 18,274; Charge to Grand Jury, Treason and Piracy, Id. 18,277.

And the fact that a criminal committed the offense in a ship on a voyage to a port in a particular judicial district, and that the prisoner is in custody in such port, will warrant the jury, in the absence of proof to the contrary, in finding that he was first brought into that district.—United States v. Mingo, Case No. 15,781.

A person captured on the high seas by a public armed vessel of the United States for an offense committed on the high seas, and transferred at Hampton Roads to another vessel, destined to New York, may be tried in either district, under Act March 3, 1825, § 14.—United States v. Baker, Case No. 14,501.

The American members of a crew of a foreign privateer, who mutinied, and secured control of the vessel, may be tried in the United States, where the case is one of general piracy.—United States v. Brush, Case No. 14,677a.

See, also, ante, § 20.

§ 24. Change of venue.

Where nearly the whole county is in a state of insurrection, and is occupied by a military force, a trial for treason may be held in another county.—Case of Fries, Case No. 5,126.

Where defendant has pressed for trial, he cannot, when the cause is called for trial, ask for a change of venue on the ground of prejudice.—United States v. White, Case No. 16,676.

The failure to move for a continuance until the next stated session of the court, which by law is required to be held at a place in the county where the offense was committed, is a waiver of the right to be tried in such county.—United States v. Cornell, Case No. 14,868.

The court's decision that "great inconvenience" prevented the trial being held in the county where the crime was committed is conclusive after verdict.—Case of Fries, Case No. 5,126.

The prisoner may be tried at a regular session without any express adjudication by the court that there would be inconvenience in having the trial at a special session, where neither the prisoner nor the United States makes any application to the court upon the subject, or any objection to the time or place of trial.—United States v. Cornell, Case No. 14,868.

The court has no authority to try a prisoner at a special session upon an indictment found at a regular session of the court.—United States v. Cornell, Case No. 14,868.

The court has no power to adjourn a stated general session from the place at which it is directed by statute to be held to another place, for the purpose of trying there a person indicted for a capital crime, in compliance with section 29, Judiciary Act 1789.—United States v. Cornell, Case No. 14,868.

A motion for a special session made after an indictment found at a general session is too late.—United States v. Cornell, Case No. 14,868.

Act March 2, 1793, in relation to special sessions of the circuit court at places nearer to where the offense was committed, vests in the court a legal discretion, to be exercised on considerations of convenience and practicability.—United States v. Insurgents, Case No. 15,442.

VI. LIMITATION OF PROSECUTION.

See, also, post, § 46.

§ 25. Commencement of prosecution.

The finding of an informal presentment is not the finding or instituting of the indictment, so as to take the case out of the statute.—United States v. Slacum, Case No. 16,311.

The indictment or information must be found within the limitation of the statute. A second indictment after the two years will not save the bar where the first one, found in due time, was non-prossed.—United States v. Ballard, Case No. 14,507.

The time of finding the indictment will appear by the caption, and, where it appears therefrom that the offense was committed beyond the time limited, judgment will be rendered for defendant.—United States v. Watkins, Case No. 16,649.

An indictment for counterfeiting, not found within two years subsequent to the commission of the acts charged, is barred by the statute of limitations.—United States v. Shorey, Case No. 16,281.

§ 26. Application of statutes in general.

Act April 30, 1790, § 32, limiting the time for a criminal prosecution to two years, applies to offenses created after, as well as before, the act.—United States v. Ballard, Case No. 14,507; Johnson v. United States, Id. 7,418; United States v. White, Id. 16,675.

Act April 30, 1790, § 32, limiting the prosecution of offenses not capital to two years, is applicable to common-law misdemeanors, in the District of Columbia.—United States v. Porter, Case No. 16,072; Same v. Slacum, Id. 16,311; Same v. Watkins, Id. 16,649.

Rev. St. § 5440, punishing conspiracies to commit any offense against the government, or to defraud it, is a part of the revenue laws, and prosecutions thereunder are limited to five years (section 1046).—United States v. Dustin, Case No. 15,012; Same v. Fehrenback, Id. 15,083.

Act Feb. 28, 1839, § 4, extending the time for suits and prosecutions for penalties to five years, does not apply to indictments for crimes which may be punished by imprisonment.—United States v. Brown, Case No. 14,665.

§ 27. Knowledge of offender's guilt.

The statute of limitations runs in favor of an offender, although it was not known that he was the person who committed the offense.—United States v. White, Cases Nos. 16,675, 16,676.

§ 28. Absence of offender.

Where an offense is committed on a ship engaged in a whaling voyage, and which ship does not return to the United States until more than two years afterwards, the limitation of Act April 30, 1790, will bar a prosecution against the offender.—United States v. Brown, Case No. 14,665.

§ 29. Fugitives from justice.

There must be a leaving of one's home, residence, or place of abode within the district, or a concealing of one's self therein, to avoid detection or punishment for some offense against the United States, to constitute a "fleeing from justice," under 1 St. 117, § 32.—United States v. O'Brian, Case No. 15,908.

A departure of the offender from the place where the offense was committed to his usual residence in another part of the United States for the purpose of avoiding punishment for any offense is a fleeing from justice, and the statute will not run until his public return to the place where the offense was committed.—United States v. White, Cases Nos. 16,675, 16,676, 16,677.

VII. FORMER JEOPARDY.

See, also, post, § 49.

§ 30. Former conviction in general.

The term "jeopardy," in the amendment of the constitution, defined by Washington, C. J.—United States v. Haskell, Case No. 15,321.

A former conviction cannot be pleaded in bar unless followed by judgment.—United States v. Herbert, Case No. 15,354.

No person can be tried a second time for the same offense, after a trial by a competent and regular jury upon a good indictment, whether there be a verdict of acquittal or conviction.—United States v. Gibert, Case No. 15,204.

The circuit court of the United States cannot grant a new trial in a capital case after a verdict regularly rendered upon a sufficient indictment.—United States v. Gibert, Case No. 15,204.

On a joint indictment against several, the acquittal of some of defendants does not prevent the conviction of two shown to have conspired.—United States v. Rindskopf, Case No. 16,165.

§ 31. Entry of nolle prosequi.

A prior conviction and nol. pros. upon a sufficient indictment at common law, though insufficient under the statute, is a bar to a subsequent prosecution on a new indictment sufficient under the statute, for the same offense.—Fletcher v. United States, Cases Nos. 4,868, 4,869.

A nolle prosequi, without defendant's consent, after the jury has been sworn, is equivolent to an acquittal, and may be so pleaded.—United States v. Farring, Case No. 15,075. See, also, United States v. Maxwell, Case No. 15,749.

The prosecuting attorney, after the jury are impaneled and witnesses sworn, has no right to enter a nolle prosequi, because the evidence is not sufficient to convict, which will not have the effect of a verdict of acquittal.—United States v. Shoemaker, Case No. 16,279.

§ 32. Acquittal under defective indictment.

A defendant acquitted upon a flaw in the indictment will be remanded for trial at the next term.—United States v. Smith, Case No. 16,326.

§ 33. Acquittal before court-martial.

An acquittal before a court-martial cannot be pleaded in defense of an indictment in a court of law for substantially the same offense.—United States v. Cashiel, Case No. 14,744.

§ 34. Discharge of jury.

In all cases not capital the court may discharge the jury when it is apparent that they cannot agree, and it may then order another jury to be summoned.—United States v. Workman, Case No. 16,764.

A jury sworn, even in a capital case, may be discharged by the court under any sudden and uncontrollable emergency, and such discharge is no bar to another trial.—United States v. Shoemaker, Case No. 16,279.

The discharge of a jury will be considered equivalent to an acquittal where it did not appear by the minutes of the court that the grounds of postponement—the illness of the district attorney and the absence of witnesses—were matters of surprise, nor that defendant consented thereto.—United States v. Watson, Case No. 16,651. But, see United States v. Gibert, Case No. 15,204; Same v. Morris, Id. 15,815.

In a capital case the jury may be discharged without the consent of the prisoner where one of the jurors is insane; and the prisoner may be again brought to trial.—United States v. Haskell, Case No. 15,321.

An information at the suit of the commonwealth of Virginia may be discontinued before appearance of the defendant.—Virginia v. Eakin, Case No. 16,960.

Defendant is not put in jeopardy where the jury are impaneled and sworn before he has been arraigned or has pleaded to the indictment, and after he has been arraigned and has pleaded a new jury may be impaneled and sworn.—United States v. Riley, Case No. 16,164.

§ 35. Verdict set aside.

Where a verdict is so imperfect that no judgment can be given upon it, though it has been recorded, defendant has not been in jeopardy, and a new trial will be granted.—United States v. Watkins, Case No. 16,649.

§ 36. Identity of offenses.

A conviction for stealing a pocketbook bars a subsequent prosecution for stealing a banknote contained in the pocketbook.—United States v. John, Case No. 15,479; Same v. Lee, Id. 15,586.

A conviction of the offense of keeping a faro bank, in violation of a municipal ordinance, is no bar to an indictment at common law for keeping a disorderly house, supported by the same evidence.—United States v. Hood, Case No. 15,385.

A conviction for violating a municipal by-law in keeping a faro table *held* no bar to an indictment for a nuisance at common law in keeping a common gambling house at the same time.—United States v. Holly, Case No. 15,381.

A conviction or acquittal of the offense of keeping a faro table *held* a bar to all acts of keeping prior to the issuing of the warrant.—Dixon v. Washington, Case No. 3,935.

Conviction and sentence of an outsider by the house of representatives for breach of privilege by assaulting a member for words spoken in debate is no bar to an indictment for assault and battery.—United States v. Houston, Case No. 15,398.

Acquittal on an indictment for having in possession a counterfeit plate *held* a bar to a subsequent indictment for having in possession, at the same time, another plate.—United States v. Miner, Case No. 15,780.

An acquittal on an indictment under Act July 13, 1866, § 23, for knowingly carrying on the business of a distiller, without having paid the special tax, *held* not a bar to an indictment under section 25, for knowingly using a still for the purpose of distilling in a dwelling house, it being the same place.—United States v. Flecke, Case No. 15,120.

An acquittal upon an indictment for forging an order with intent to defraud John L. is no bar to an indictment for forging the same order with intent to defraud William L.—United States v. Book, Case No. 14,624.

§ 37. Waiver of objections.

On conviction of a capital offense, the court may grant a new trial on the application of the prisoner, as he may waive the constitutional provision that he shall not be put twice in jeopardy.—United States v. Harding, Case No. 15,301; Same v. Keen, Id. 15,510; Same v. Macomb, Id. 15,702.

VIII. PRELIMINARY COMPLAINT, WARRANT, EXAMINATION, COMMITMENT, AND REMOVAL.

§ 38. Examination.

A preliminary examination, or an order to show cause and a hearing thereon, is not a necessary preliminary to a proceeding on information.—United States v. Ronzone, Case No. 16,192.

The commissioner has power to adjourn to another time and place, as incident to the power to hear and determine, but he cannot adjourn in the absence of the accused.—United States v. Rundlett, Case No. 16,208.

A person arrested in one district for an offense committed in another, if not indicted nor committed by a commissioner, is entitled to an examination in the district in which he is arrested.—In re Bailey, Case No. 730.

On a preliminary examination the court may examine defendant's witnesses to explain the testimony of witnesses for the prosecution.—United States v. White, Case No. 16,685.

Where a witness resides at a great distance, and there is no evidence that the materiality of his testimony was known to the prosecutors in time to have directed his attendance, the magistrate will act upon his affidavit.—United States v. Burr, Case No. 14,692c.

An accused has the right, before indictment found, to compel, by way of precaution, the production of letters containing statements of his conduct, written by the person who is declared to be the essential witness against him.—United States v. Burr, Case No. 14,692d.

The constitutional rights of the prisoner to be confronted by witnesses, and to be represented by counsel, have reference to the trial only, and not to proceedings on commitment.—In re Bates, Case No. 1,099a.

Where a person is arrested, and brought up to be held to bail for trial in another district, a certified copy of the indictment found in such other district, if it be consistent and set forth an offense, is competent evidence against defendant.—United States v. Pope, Case No. 16,069.

See, also, post, § 72.

§ 39. Warrant and complaint.

Criminal process will not be awarded on the mere motion and suggestion of the district attorney, unsupported by oath.—United States v. Burr, Case No. 14,692.

No instruction or official authorization is required for the institution of a criminal prosecution, and it is the duty of a judge to issue a warrant on the complaint of any citizen.—United States v. Skinner, Case No. 16,309.

A certified copy of an information filed for an offense against the laws of the United States, without copies of some oath or affirmation to facts showing probable cause to believe defendant guilty, does not authorize issuing a warrant of arrest.—United States v. Shepard, Case No. 16,273.

The probable cause referred to in Const. U. S. Amend. 4, as the basis of a warrant of arrest, must be submitted to the committing magistrate, who must judge of the sufficiency of the grounds shown for believing the accused party guilty.—In re Rule of Court, Case No. 12,126.

Before issuing the warrant, the magistrate should have before him the oath of the real accuser to the facts on which the charge is based, and on which the belief or suspicion of guilt is founded.—In re Rule of Court, Case No. 12,126.

An affidavit based solely upon information and belief, where the names of the informants are not given, is not sufficient.—In re Rule of Court, Case No. 12,126.

On an application for a bench warrant on a charge for treason, as well as upon a motion to commit, messages from the president to congress may be read.—United States v. Bollman, Case No. 14,622.

A complaint charging the crime of forgery in that one "willfully, etc., uttered and put in circulation forged or counterfeit papers or obligations or other titles or instruments of credits," without specifying the same, is not sufficient to authorize an arrest.—Ex parte Van Hoven, Case No. 16,858.

The day laid in the warrant for the offense is not material, so that the time actually proved be subsequent to a former prosecution, and before the issuing of the warrant, and within the time of limitation.—Dixon v. Washington, Case No. 3,935.

A signature in lead pencil to a warrant by a justice of the peace is not sufficient.—United States v. Thompson, Case No. 16,484.

§ 39a. Capias.

A capias may be issued upon an indictment as the first process against the defendant.—United States v. Cottom, Case No. 14,873; Same v. Burr, Id. 14,694.

A capias is proper process on an indictment for misdemeanor.—United States v. Jamesson, Case No. 15,466.

A capias is the proper process upon an indictment for misdemeanor found after service of a summons to show cause why an indictment or information should not be filed.—United States v. Veitch, Case No. 16,613.

Where the accused is already in court, an order of the court will supply the place of a capias.—United States v. Burr, Case No. 14,694.

§ 40. Commitment or discharge.

Upon a motion to commit for trial, the accused may be heard by counsel.—United States v. Bollman, Case No. 14,622.

The fact that the prosecutor has evidence to support an indictment, and the grand jury is in session, ready to receive it, is no ground for refusing to hear a motion to commit a person.—United States v. Burr, Case No. 14,692b.

The authority of a commissioner to arrest, hold to bail, or commit to jail, is limited to complaints or charges importing an offense against the laws of the United States.—United States v. Hand, Case No. 15,296.

The authority to commit a seaman on the charge of deserting his ship is limited to a justice of the peace.—Ex parte Sprout, Case No. 13,267.

A person may be arrested for trial and imprisoned or bailed for violation of a statute, although the only punishment prescribed therein is a fine.—In re Jackson, Case No. 7,124.

Evidence showing probable cause to believe that the accused is guilty is sufficient to warrant his being committed for trial.—In re Van Campen, Case No. 16,835; United States v. Steffens, Id. 16,384; Same v. Lumsden, Id. 15,641; Same v. Burr, Id. 14,692a; Graham v. Dominguez, Id. 5,664.

On an examination before a United States commissioner of a person charged with crime, his confession of the crime, without any proof of the corpus delicti, is sufficient to warrant his being held for trial.—United States v. Bloomgart, Case No. 14,612.

A commitment in South Carolina may be valid without any examination of prisoner or state witnesses.—In re Bates, Case No. 1,099a.

A bench warrant will be issued upon ex parte affidavits against a person charged with treason,

and he will be committed to prison without stating when or where he is to answer for the offense.—United States v. Bollman, Case No. 14,622.

Where the indictment has been quashed, defendant will be held in custody to answer a new indictment.—United States v. Dustin, Case No. 15,011.

A warrant of commitment must be under seal, and show a charge upon oath.—Ex parte Bennett, Case No. 1,311; Ex parte Sprout, Id. 13,267.

Such warrant must state probable cause, and limit the term of imprisonment.—Ex parte Sprout, Case No. 13,267; Ex parte Burford, Id. 2,148.

Magistrate committing on charge of forgery ordered, on motion, to restore to the prisoner genuine notes taken from his possession.—Ex parte Craig, Case No. 3,321.

Where an indictment for homicide is held bad, the prisoner will be remanded to custody on proof of the commission of the offense.—United States v. Town-Maker, Case No. 16,533a.

The judge of the court which the grand jury attended is to make the order for the discharge of prisoners against whom no indictment is found. Act 1863, c. 81, § 3.—In re Blum, Case No. 1,572.

§ 41. Commitment for examination.

A commitment for further examination is valid, as well as a commitment for trial.—In re Bates, Case No. 1,099a.

A person arrested on a criminal charge may be committed for a further examination, and held under such commitment for a reasonable time.—United States v. Bates, Case No. 14,544.

A commitment by a commissioner on a preliminary warrant for examination should be for a definite time, and should not exceed 24 hours, except for special cause shown, or when requested by the prisoner.—United States v. Worms, Case No. 16,765.

§ 42. Removal of offender to another district.

The power to remove an accused from the district of his arrest to the one of trial is in the district judge, and not the circuit judge.—In re Bailey, Case No. 730.

A warrant for the removal of a prisoner to another district, in which he was indicted, will not be granted, in the absence of the original affidavit or information or indictment or duly-certified copies thereof, or proof of the commission of the offense.—United States v. Newcomer, Case No. 15,869.

A certified copy of indictment from another judicial district will warrant transfer of person arrested on complaint.—In re Alexander, Case No. 162; United States v. Haskins, Id. 15,322.

Contempt is a crime against the United States, within the meaning of section 33 of the judiciary act. 1 Stat. 91.—United States v. Jacobi, Case No. 15,460.

A warrant will not be granted for the removal of a prisoner for trial in another jurisdiction on information for libel filed in a court in which trial is without a jury.—In re Dana, Case No. 3,554.

A district judge will not issue a warrant for the removal of an offender indicted in another district, where the indictment is fatally defective in averments essential to constitute an offense in such district.—In re Buell, Case No. 2,102.

No warrant for the removal of the accused to another district for trial can be issued until he has been arrested and imprisoned. If he offer satisfactory bail under section 33 of the judiciary act, he has a right to be discharged on bail.—United States v. Jacobi, Case No. 15,460.

A person arrested in one district cannot be removed to another until after examination and commitment, but is entitled to examination in the district in which arrested.—United States v. Shepard, Case No. 16,273.

A warrant may be issued for the arrest and transportation of a fugitive from justice directly to the district where the offense is triable, without his being first committed in the district where arrested.—United States v. Harris, Case No. 15,313.

The mere production of a bench warrant from the federal circuit court for one state by an officer thereof to a federal district court in another is sufficient to authorize the issue of such process.—United States v. Harris, Case No. 15,313.

Where a person, after an acquittal on an indictment for treason, is in the custody of the marshal, bound to answer an indictment for a misdemeanor, the court has no authority to send him to another district for trial for treason in the place where the crime was committed.—United States v. Burr, Case No. 14,694.

After an indictment found in one district, the offender may be arrested in any other district, and committed and removed or bailed, as the case may be, for trial in the district where the indictment was found. Rev. St. § 1014.—United States v. Haskins, Case No. 15,322.

§ 43. Remission of indictment.

An indictment found in a circuit court cannot be remitted by it to the district court, unless the district attorney deems it necessary.—United States v. Bennett, Case No. 14,571.

The fact that the judge had given strong and decided views of the law in a charge to the grand jury is no ground for remitting the case to the circuit court.—United States v. O'Sullivan, Case No. 15,973.

A case will not be remitted to the circuit court from the district court except when it appears that the questions of law are, in the judgment of the district court, of so grave a character that it must judicially declare them both difficult and important.—United States v. O'Sullivan, Case No. 15,973.

An indictment for a misdemeanor may be remitted from the district to the circuit court by an order made at a term subsequent to that to which the indictment was returned, and after defendant has pleaded and some proceedings have been had.—United States v. Morris, Case No. 15,815.

Rev. St. § 1037, authorizing the district court to remit an indictment to the circuit court, does not require transmission of the original indictment, but of an exemplification of the record, including a certified copy of the indictment.—United States v. McKee, Case No. 15,687.

Even if the original should be sent, the objection comes too late after verdict.—United States v. McKee, Case No. 15,687.

IX. ARRAIGNMENT AND PLEAS.

§ 44. Sufficiency of arraignment.

In cases of felony the prisoner must be arraigned in the criminal bar, or dock.—United States v. Pettis, Case No. 16,038; Same v. Pittman, Id. 16,053.

The prisoner charged with a felony need not hold up his hand when called, if he admits himself to be the person indicted.—United States v. Pittman, Case No. 16,053.

§ 45. Pleas in abatement.

Defendants who have not had any earlier chance to object to the composition of the

grand jury by which they have been indicted may do so by plea in abatement.—United States v. Reeves, Case No. 16,139.

Pleas in abatement to an indictment must be pleaded with strict exactness.—United States v. Williams, Case No. 16,716.

The proper conclusion of a plea in abatement is a prayer that the indictment be quashed.—United States v. Hammond, Case No. 15,294.

A plea in abatement which prays for a judgment which the court cannot give upon a plea in abatement is defective and bad.—United States v. Hammond, Case No. 15,294.

A plea in abatement alleging a disqualification of one of the grand jurors who found the indictment need not be verified.—United States v. Hammond, Case No. 15,294.

Where the accused had no chance to challenge the grand jurors, he may take advantage of the disqualification of any one or more of them by plea in abatement.—United States v. Hammond, Case No. 15,294.

It cannot be pleaded in abatement to an indictment that it was founded on illegal testimony introduced before the grand jury.—United States v. Smith, Case No. 16,341a.

A previously formed and expressed opinion of defendant's guilt by one of the grand jurors who found the indictment is no ground for a plea in abatement.—United States v. White, Case No. 16,679.

A plea in abatement to an indictment alleging irregularities in drawing and summoning grand jurors, and want of qualification, where no prejudice is averred, is bad on demurrer.—United States v. Tuska, Case No. 16,550.

The mere fact that the prosecutor was a member of the grand jury which found the bill, and participated in its proceedings, is not a good ground for a plea in abatement to the indictment.—United States v. Williams, Case No. 16,716.

Quære, whether the fact that an interested person caused himself and others to be nominated and placed upon the grand jury which found the bill may be pleaded in abatement.—United States v. Williams, Case No. 16,716.

A plea in abatement which alleges as a disqualification of a grand juror that he joined the Rebellion against the United States, without any specific averment of time and place, is bad.—United States v. Hammond, Case No. 15,294.

§ 46. Plea of limitation.

A bar, under the statute of limitations, to be available, must be pleaded.—Johnson v. United States, Case No. 7,418.

§ 47. Plea of guilty.

The legal effect of the plea of "Nolo contendere" and "Guilty" is the same as regards all the proceedings on the indictment.—United States v. Hartwell, Case No. 15,318.

The court will permit the prisoner to retract his plea of guilty in a capital case, and to plead not guilty.—United States v. Dixon, Case No. 14,968.

§ 48. Plea of not guilty.

On arraignment for a capital offense, where the prisoner stands mute, a plea of "Not guilty" will be entered.—United States v. Hare, Case No. 15,304.

The plea of not guilty will put the prisoner upon the country by a sufficient issue, without any further express words.—United States v. Gibert, Case No. 15,204.

Defendant, on trial upon an indictment, may take advantage of the bar of the statute under the plea of not guilty.—United States v. Brown, Case No. 14,665; Same v. White, Id. 16,676, 16,677.

§ 49. Plea of autrefois convict.

A plea of autrefois convict to an indictment for receiving stolen goods is sustained by evidence of a previous conviction for stealing such goods.—United States v. Harmison, Case No. 15,308.

§ 50. Duplicity.

Pleas of the general issue and the statute of limitations, being double pleading, are not allowable, and the special plea will be stricken out.—United States v. Shorey, Case No. 16,280.

In misdemeanors, as well as in felonies, two or more pleas in abatement, not repugnant to each other, may be pleaded together.—United States v. Reeves, Case No. 16,139.

X. EVIDENCE.

See, also, post, §§ 83–85, 88–90, 92.
Disclosure of communications between officer and informant, see "Witnesses," § 56.
Dying declarations, see "Homicide," § 7.

§ 51. Judicial notice.

The court will take judicial notice of the public statutes of the state referred to in the indictment.—United States v. Quinn, Case No. 16,110.

The court can take judicial knowledge that the offense charged in the different counts is the same, varied so as to meet the proof; and a conviction on one will bar a future prosecution for the same offense.—United States v. Keen, Case No. 15,510.

On an indictment for bribing voters, the court takes judicial notice that the state of Oregon is a representative and judicial district of the United States.—United States v. Johnson, Case No. 15,488.

§ 52. Presumptions and burden of proof.

See, also, "Homicide," § 6; "Internal Revenue," § 105; "Larceny," § 9.

An unlawful intent will be inferred from an unlawful act.—United States v. Darton, Case No. 14,919.

Where an intent is charged in a statute as constituting part of a crime, it must be proved as a fact.—United States v. The William Arthur, Case No. 16,702.

The presumption that one intends the necessary, natural, or legal consequences of his deliberate act may be either conclusive or disputable, depending on the nature of the act and intent. When, by law, the consequences must necessarily follow, the presumption is ordinarily conclusive.—In re Smith, Case No. 12,974.

The presumption of innocence operates in favor of the accused, however degraded or abandoned.—United States v. Montgomery, Case No. 15,800.

The accused must be presumed to be sane till his insanity is proved.—United States v. McGlue, Case No. 15,679.

There is no presumption that insanity arose from any particular cause; and if the government assert that the prisoner is guilty, though insane, because his insanity was drunken madness, this allegation must be proved.—United States v. McGlue, Case No. 15,679.

§ 53. Res gestæ.

Words accompanying acts are admissible to show the intent.—United States v. Omeara, Case No. 15,919.

The statements of a party charged with absconding, made on his way from the place of his residence, as to his intention of returning, are competent evidence to disprove the charge.—United States v. Penn, Case No. 16,025.

§ 54. Evidence of other offenses.
The acts of the accused in a different district, which constitute in themselves substantive causes for prosecution, cannot be given in evidence, unless they go directly to prove the charges laid in the indictment.—United States v. Burr, Case No. 14,694.

§ 55. Character of accused.
Defendant is entitled in all criminal cases to put in evidence his good character, which is to be considered by the jury, as other items of evidence.—United States v. Hutchins, Case No. 15,430.

Proof of previous good character, and that without compulsion defendant sought an investigation, is admissible.—United States v. Crow, Case No. 14,895.

The prosecution cannot give evidence as to character, unless the accused opens the door by himself introducing evidence of his character.—United States v. Kenneally, Case No. 15,522; Same v. Carrigo, Id. 14,735.

Good general character avails a defendant only in a doubtful case.—United States v. Roudenbush, Case No. 16,198.

Proof of good character may afford good ground for a presumption of innocence if there is doubt of guilt, but it will not overcome satisfactory proof of guilt.—United States v. Smith, Case No. 16,322.

See, also, post, § 75.

§ 56. Attempted escape by accused.
The concealment of the offense, as well as flight from justice, and a judicious use of the money stolen, by a thief, show a knowledge of the offense.—United States v. Shults, Case No. 16,286.

The offer of a bribe by the prisoner to the officer to permit him to escape is evidence independent of his confession.—United States v. Barlow, Case No. 14,521.

§ 57. Attempted escape of third person.
Testimony as to the evasion of criminal process by a third person whose connection with the prisoner's case is not shown is erroneously admitted.—United States v. Buck, Case No. 14,680.

§ 58. False statements of accused.
False and contradictory statements, and falsification of records by defendant, and special circumstances not consistent with his innocence, may all be considered in determining his guilt.—United States v. Randall, Case No. 16,118.

Where the evidence shows that defendant made a false statement about the circumstances of the commission of the crime charged, he may show that he had good reason to believe at the time that the statement was true.—United States v. Randall, Case No. 16,118.

§ 59. Animus of prosecution.
The accused has the right to show the spirit and temper with which the prosecution has been conducted.—United States v. Dowden, Case No. 14,990a.

The fact that defendant had instituted habeas corpus proceedings to secure the release of a person imprisoned by the military authorities is admissible to show that the present prosecution arose from the animosity of the authorities engendered by such conduct on his part.—United States v. Workman, Case No. 16,764.

§ 60. Declarations and admissions of accused.
Conversations of defendant may be proved, though not amounting to a confession, and not corroborated.—United States v. Larkin, Case No. 15,561.

But the whole of a connected conversation on the subject must be given.—United States v. Wilson, Case No. 16,730.

Declarations and admissions made to an individual, and not in court or before a magistrate, may be admissible.—United States v. Matthews, Case No. 15,741b.

Proof of declarations of defendant is admissible to explain or determine the character of acts which are ambiguous or unintelligible.—United States v. Lumsden, Case No. 15,641.

That declarations and admissions were made by the prisoner in answer to questions put by the witness does not render them inadmissible, if no persuasion or intimidation was used.—United States v. Matthews, Case No. 15,741b.

If a document be read by defendant by consent, containing a statement of his conversations, such conversations may be considered by the jury.—United States v. Laub, Case No. 15,568.

How far the acknowledgment of a prisoner as to a crime meditated to be committed may be given in evidence to connect it with the offense for which he is on trial.—United States v. Tardy, Case No. 16,432; Same v. Craig, Id. 14,883; Same v. Milburn, Id. 15,764.

Evidence of acts and declarations of the prisoner and prosecuting witness at the time of the commission of the alleged crime is admissible.—Turner v. United States, Case No. 14,262a.

The declarations of an alleged counterfeiter, when apprehended, that he had never been at the house where he was apprehended until such time, are admissible to repel any unfavorable conclusion which his silence might have warranted.—United States v. Craig, Case No. 14,883.

The presumption of guilty intent cannot be rebutted by proof of the declarations of the accused made after committing the offense.—United States v. Imsand, Case No. 15,439.

Statements in the presence of the prisoner before the examining magistrate, to which he made no reply, are not evidence against him.—United States v. Brown, Case No. 14,660.

§ 61. Declarations of third persons.
On the trial of an indictment for setting on foot a military expedition against a nation with which the United States were at peace, containing no allusion to a conspiracy, the declarations of third persons not forming a part of the transaction, and not made in the presence of the accused, are not admissible in evidence.—United States v. Burr, Case No. 14,694.

§ 62. Acts and declarations of co-defendants.
Acts, conduct, and declarations of each defendant made during the pendency of a criminal enterprise are competent evidence against all concerned in it.—United States v. Hartwell, Case No. 15,318; Same v. Hertz, Id. 15,357.

The acts of a co-defendant are admissible to show the connection between him and the prisoner in the same offense.—United States v. Wilson, Case No. 16,730.

Declarations and admissions of one charged with participation in the crime, made in the presence of the accused, and without contradiction by him, are inadmissible.—United States v. Matthews, Case No. 15,741b.

The declarations of a person charged with the same offense as defendant in a separate indictment, made after the supposed accomplishment of the common purpose, are inadmissible.—United States v. White, Case No. 16,675.

On a separate trial of one of three persons jointly indicated for murder, it is not competent for him to give in evidence a conversation between the other two, when they were alone, inculpating themselves, and exculpating him from all participation in the crime.—United States v. Douglass, Case No. 14,989.

§ 63. Acts and declarations of conspirators.

Where the existence of the conspiracy, and defendant's connection therewith, are established by independent evidence, he is bound by the acts and declarations of his co-conspirators.—United States v. Goldberg, Case No. 15,223.

Though not done or made in the presence of each other.—United States v. Hamilton, Case No. 15,288; Same v. McKee, Id. 15,686.

Upon prima facie proof of a conspiracy, the acts and declarations of each conspirator are admissible upon the trial of any one of them.—United States v. Stevens, Case No. 16,392.

And the statements of those implicated, though not included in the indictment, are evidence.—United States v. Cole, Case No. 14,832.

In determining whether there is sufficient evidence of conspiracy to warrant the admission, against defendant, of the acts and declarations of alleged conspirators, the uncorroborated testimony of self-confessed accomplices and members of the conspiracy cannot be rejected.—United States v. McKee, Case No. 15,685.

Where a conspiracy to defraud the revenues has been proved, and there is evidence connecting the defendant therewith, and one conspirator has testified that he gave moneys realized by the conspiracy to a co-conspirator weekly, it is competent to show, by such witness, what directions he gave as to paying the money to defendant.—United States v. McKee, Case No. 15,685.

The subsequent declarations of such co-conspirator as to what he did with such moneys were admissible as part of the res gestæ, but not to connect defendant with the conspiracy, and should be disregarded by the jury unless such connection be proved by evidence aliunde.—United States v. McKee, Case No. 15,685.

Acts or declarations of a witness who was assumed to be a guilty agent, but not made in furtherance of the purposes of the crime for which defendant stands accused, cannot affect the defendant directly.—United States v. Gardiner, Case No. 15,186a.

The declarations of conspirators are not admissible, of themselves, to connect a third person with the conspiracy; but where such third person is shown to be a member of the conspiracy, such declarations are admissible against him.—United States v. Babcock, Case No. 14,487; Same v. McKee, Id. 15,686.

A letter speaking of smuggling operations, written by a guilty person after discovery of his guilt, *held* admissible, where there was evidence to show the connection of the addressee and a person mentioned therein and the writer in the conspiracy.—United States v. Graff, Case No. 15,244.

Conspirators are competent witnesses, and are compellable to testify by either party; but their testimony is to be received with extreme caution, and the jury should not convict upon it alone, unless they are most positively convinced of its truth.—United States v. McKee, Case No. 15,686.

The jury must be first satisfied of a common design, confederation, and purpose, before the acts and declarations of one participating are competent evidence against a confederate to prove the scope and purpose of the conspiracy.—United States v. Stevens, Case No. 16,392.

In the case of a conspiracy made punishable by law, the entire acts of the conspirators in relation to the subject-matter, both before and after the doing of the thing which was the subject of the conspiracy, are admissible.—United States v. Cole, Case No. 14,832. But, see United States v. Hamilton, Case No. 15,288; In re Martin, Id. 9,151.

§ 64. Documentary or parol evidence.

A pardon granted by a governor of a state under its great seal is evidence per se, without any further proof.—United States v. Wilson, Case No. 16,730.

A commitment not stating on its face any offense, although written on the back of a warrant of arrest charging a felony, but not referring to it, is not evidence of a commitment for felony.—United States v. Brown, Case No. 14,659.

Letters written after the crime was committed cannot be given in evidence as the act of a confederate.—United States v. Gardiner, Case No. 15,186a.

Where, on an indictment for forging and delivering bank notes, the forging of a large quantity, and the delivery of one note, are proved, evidence of the contents of the letter to an accomplice from defendant on the subject of counterfeit notes, which the accomplice believed had been lost, is admissible.—United States v. Doebler, Case No. 14,977.

Where a letter is in the hands of defendant, it need not be produced, or notice given to defendant to produce it, before evidence is given of the contents of the answer.—United States v. Doebler, Case No. 14,977.

In a criminal case parol evidence is admissible to explain the intention with which a deed was made.—United States v. Thomas, Case No. 16,474.

§ 65. Expert testimony.

Experts are not allowed to give their opinions on the question of sanity, where the facts are controverted; but counsel may put to them a state of facts, and ask their opinion thereon.—United States v. McGlue, Case No. 15,679.

§ 66. Testimony of accomplices and co-defendants.

It rests alone with the district attorney to determine whether the testimony of an accomplice shall be received, and as to whether he has an equitable right to executive clemency.—United States v. Hartwell, Case No. 15,319.

An accomplice may be used as a witness from the necessity of the case; and, if he acts in good faith in giving testimony, the government is bound in honor not to prosecute him further.—United States v. Lee, Case No. 15,588.

If, in so testifying, he implicate himself, he should be discharged, although the person against whom he testified was acquitted.—United States v. Lee, Case No. 15,588.

An accomplice separately indicted is a competent witness in favor of or against a person indicted for the offense.—United States v. Henry, Case No. 15,351.

But his testimony is not entitled to the same weight as that of other witnesses.—United States v. Troax, Case No. 16,540.

The evidence of an accomplice is to be received with great caution, and, in crimes involving great moral turpitude, must be corroborated by creditable testimony.—United States v. Harries, Case No. 15,309.

The jury may convict on the testimony of an accomplice alone; but his testimony should be corroborated in some parts, at least, by other evidence.—United States v. Kessler, Case No. 15,528.

The evidence of an accomplice cannot be corroborated by his statements at another time unless it has been impeached.—United States v. Wilson, Case No. 16,730.

In joint indictments, one of defendants is not a competent witness for another, unless he has been acquitted.—United States v. Clements, Case No. 14,817.

If persons jointly concerned in an assault and battery be separately indicted, but all tried together, one may be a witness for the others.—United States v. Hunter, Case No. 15,425.

A person who stands indicted for treason along with defendant in another indictment not now trying is a competent witness for him in an indictment now trying, and in which such person is not included.—United States v. Hanway, Case No. 15,299.

Where two persons are jointly indicted for robbery, and one is acquitted, and the other convicted, a new trial may be granted the latter, on which the other may be examined as a witness.—United States v. Campbell, Case No. 14,714.

On a joint indictment of three persons for a riot, where one only is put upon trial, the others, who have forfeited their recognizances, cannot be examined as witnesses for him.—United States v. Rutherford, Case No. 16,210.

See, also, post, §§ 79, 93.

§ 67. Confessions — Accomplices and co-defendants.

The confessions of the principal are admissible, on trial of accessories, to prove that he committed the offense.—United States v. Hartwell, Case No. 15,318.

But the confessions of the principal are not admissible to prove the charge against the accessories.—United States v. Hartwell, Case No. 15,318.

Where the accessory is jointly indicted with the principal, who pleads "Nolo contendere," the record of conviction of the principal is prima facie evidence of his guilt at the trial of the other defendant, and his confessions are admissible to show that he was rightfully convicted.—United States v. Hartwell, Case No. 15,318.

§ 68. —— Third person.

Evidence that another person confessed himself to be the guilty person is inadmissible.—United States v. McMahon, Case No. 15,699; Same v. Miller, Id. 15,773.

See, also, post, §§ 78, 93.

§ 69. —— Made under oath.

A confession of a prisoner, taken upon oath, *held* inadmissible against him upon the trial.—United States v. Bascadore, Case No. 14,536; Same v. Duffy, Id. 14,998.

When not made under oath, confessions of the accused are admissible in evidence, although the proof that the crime has been committed is not independent of the confession plenary.—United States v. Williams, Case No. 16,707.

A voluntary confession made by the prisoner on his preliminary examination may be received in corroboration of matters already testified to by two witnesses; but, as to matters not thus testified to, it must be disregarded.—Case of Fries, Case No. 5,126.

§ 70. —— Made under influence of hope or fear.

Under an indictment for receiving stolen goods, statements by the prisoner to one who visited him in the watch house that he had received the goods, that he had better tell the truth, and disclosing where the goods could be found, *held* voluntary and admissible.—Lucasey v. United States, Case No. 8,588a.

A confession made under the influence of hope or fear is inadmissible.—United States v. Charles, Case No. 14,786; Same v. Pumphreys, Id. 16,097; Same v. Pocklington, Id. 16,060; Same v. Cooper, Id. 14,864; Same v. Nott, Id. 15,900.

But facts discovered in consequence thereof are admissible.—United States v. Hunter, Case No. 15,424.

While a confession made upon promise of favor is not admissible, the fact that the prisoner went to the place where the property was secreted, and identified it, is admissible.—United States v. Richard, Case No. 16,154.

It is not proper to ask a witness on cross-examination to explain how, or by what influence, he expected to induce the prisoner to confess, when he asked permission to take the prisoner to a private room. But he may be asked what influences he had to obtain a confession.—White v. United States, Case No. 17,558.

§ 71. —— Confessions made after those induced by improper methods.

Where confessions are once induced by improper influences, subsequent voluntary confessions are inadmissible, unless the prior improper influence was removed.—United States v. Cooper, Case No. 14,864; Same v. Charles, Id. 14,786.

Confession made on preliminary hearing by a prisoner previously cautioned by the magistrate is inadmissible, where, 42 hours before, he had confessed to one of the magistrate's officers, under the influence of false promises.—United States v. Chapman, Case No. 14,783.

If a prisoner confess to one larceny upon the promises of an officer, and afterwards, without any threat or promise, confess a different larceny before the magistrate, the latter confession is admissible.—United States v. Kurtz, Case No. 15,547.

§ 72. Evidence at preliminary examination or former trial.

The examination of a witness before an examining court, where the witness has since died, is competent evidence upon the trial of the party for the same offense.—United States v. Penn, Case No. 16,025; Same v. Macomb, Id. 15,702.

It is sufficient in such case to prove substantially all that the deceased witness testified on the particular subject of inquiry.—United States v. Macomb, Case No. 15,702.

The rule that the testimony of a deceased witness may be given in evidence on a second trial between the same parties does not apply to a criminal case.—United States v. Sterland, Case No. 16,387.

§ 73. Weight and sufficiency — Reasonable doubt.

"Beyond a reasonable doubt," as applied to the measure of proof, defined by Dillon, C. J.—United States v. Babcock, Case No. 14,487.

A "reasonable doubt" must be a doubt for which a reason can be given, but need not be sufficient to convince another, but such as may properly influence a juror:—United States v. Butler, Case No. 14,700; Same v. Stevens, Id. 16,392.

A reasonable doubt is a doubt founded on the consideration of all the circumstances and evidence, and not on mere conjecture or speculation.—United States v. Knowles, Case No. 15,540; Same v. Foulke, Id. 15,143.

The reasonable doubt which should lead to an acquittal should be founded on something in the case as disclosed by the testimony which leaves in the mind a rational uncertainty as to guilt, not removed by any other matter in the testimony.—United States v. Gleason, Case No. 15,216.

§ 74. —— Circumstantial evidence.

Rules laid down by Dillon, C. J., where the evidence tending to show guilt is wholly circumstantial.—United States v. Babcock, Case No. 14,487.

The circumstances relied upon to establish guilt ought to be so strong as to leave no doubt and consistent with themselves, each circumstance tending to establish guilt.—United States v. Vanranst, Case No. 16,608.

In a case of circumstantial evidence the jury must find the circumstances to be satisfactorily

proved as facts, and that those facts clearly and unequivocally imply the guilt of the accused, and cannot be reasonably reconciled with any hypothesis of his innocence.—United States v. Douglass, Case No. 14,989.

§ 75. —— Good character of accused.
Previous good life and character are entitled to consideration when the jury are in doubt.—United States v. Knowles, Case No. 15,540; Same v. Emerson, Id. 15,051.

But when the jury have no doubt on the question of guilt, they cannot take into consideration proof of defendant's good character.—United States v. Allen, Case No. 14,432.

See, also, ante, § 55.

§ 76. —— Alibi.
The jury must consider the evidence in relation to an alibi, and give it whatever weight they think it deserves.—United States v. Williams, Case No. 16,722.

§ 77. —— Insanity.
Where there is conflicting testimony on the question of the sanity of the prisoner, he is entitled to the benefit of a reasonable doubt.—United States v. Sickles, Case No. 16,287a.

§ 78. —— Confessions.
Evidence of verbal confessions is to be received with the greatest caution.—United States v. Montgomery, Case No. 15,800.

The whole confession must be given in evidence if any part is given, but the jury is not bound to accept it all as true.—United States v. Prior, Case No. 16,092; Same v. Smith, Id. 16,342a.

See, also, ante, § 67.

§ 79. —— Testimony of accomplice.
The uncorroborated evidence of a single accomplice is not sufficient to support a conviction.—United States v. Blaisdell, Case No. 14,608.

See, also, ante, § 66.

XI. TIME OF TRIAL AND CONTINUANCE.

§ 80. Time of trial.
Where the jury has been discharged on failure to agree, the case may be tried again at the same term.—United States v. White, Case No. 16,675.

Criminal cases pending at a regular session cannot be continued to a special session held for the trial of crimes, nor can any order be made therein at such session.—United States v. Milburn, Case No. 15,766.

§ 81. Right to discharge for delay.
A prisoner is not entitled to be discharged because he is not indicted at the first term of the court, or the grand jury has ignored the bill.—United States v. Bates, Case No. 14,544.

Where the government is not diligent in producing its testimony, the prisoner should be discharged.—United States v. Worms, Case No. 16,765.

§ 82. Continuance.
Omission of defendant in a criminal case to employ compulsory process for his witnesses will not deprive him of a continuance if his witnesses be absent, but will justify the court in imposing terms.—United States v. Moore, Case No. 15,805.

Prosecutor required to make affidavit that he could not, in his opinion, safely proceed to trial without the attendance of a witness, on the ground of whose absence a postponement was asked.—United States v. Frink, Case No. 15,171.

Where the execution of a commission to examine witnesses has been prevented by the acts or omission of the prosecutor or his agents, defendant is entitled to a continuance, even if he be guilty of laches in taking out the commission.—United States v. Duane, Case No. 14,996.

A continuance will be allowed to obtain the testimony of a material witness, then abroad, but resident here, who has declared that he will return within two weeks.—United States v. Workman, Case No. 16,764.

The absence of a witness who could testify that he heard another man confess that he had stolen the property in question is no ground for a continuance of a prosecution for larceny.—United States v. Toms, Case No. 16,532.

The court will not postpone a criminal trial on the ground of the absence of witnesses, unless the evidence to be given by such witnesses is pertinent to the issue, and the witnesses are material.—United States v. Smith, Case No. 16,342.

In the case of felony the prisoner is entitled, after being furnished with the names of the witnesses against him, to a reasonable time in which to bring testimony from the counties in which such witnesses live.—United States v. Stewart, Case No. 16,401.

A criminal trial will not be postponed to enable defendant to obtain evidence which would have an influence upon the mind of the court in mitigation of punishment, but which is not legally admissible before a jury.—United States v. Smith, Case No. 16,342.

The affidavit for the continuance on the ground of the absence of witnesses residing out of the district must particularly set forth in what matters their testimony is material.—United States v. Smith, Case No. 16,342.

Proper practice where a postponement is desired by plaintiff for the purpose of obtaining testimony of new witnesses.—United States v. Stevenson, Case No. 16,398.

The probability that difficult and important questions of law will arise will not ordinarily justify the postponement of the trial, so as to await the holding of the court by two judges, with a view to a certificate of division of opinion.—United States v. Fullerton, Case No. 15,175.

Criminal cases pending at a regular session cannot be continued to a special session held for the trial of crimes, nor can any order be made therein at such session.—United States v. Milburn, Case No. 15,765.

A trial is in progress, in the meaning of Rev. St. § 746, so as to authorize proceeding therein after the day fixed for the end of the term, when several jurors have been called, and three accepted and sworn, on the last day of the term.—United States v. Loughery, Case No. 15,631.

If the prosecuting attorney fail to enter a nolle prosequi, the court will continue the case until a pardon can be procured.—United States v. Lee, Case No. 15,588.

It is not a sufficient ground for a delay of the trial of a capital case that the party wishes to procure papers from a foreign country, since the court cannot issue process which will be effectual in procuring such papers.—United States v. Gibert, Case No. 15,204.

It is no cause for a continuance that defendant has not been furnished with a copy of the indictment and a list of the jurors, if he has not applied for them.—United States v. Shive, Case No. 16,278.

The court has power to discharge the jury, even in capital cases, whenever it is necessary for the purposes of justice.—United States v. Coolidge, Case No. 14,858.

XII. TRIAL.

See, also, ante, §§ 15–24, 38, 42, 43.
Right to trial by jury, see "Jury," §§ 3, 4.

§ 83. Preliminary proceedings—Service of copy of indictment or information.

In capital cases the prisoner is entitled to a copy of the indictment, to be delivered to him two entire days before his arraignment.—United States v. Dow, Case No. 14,990; Same v. Curtis, Id. 14,905.

Upon a prosecution under Act March 3, 1823 (3 Stat. 771), for knowingly transmitting false papers to the pension office, a prisoner is not entitled to have a copy of the indictment furnished to him at the expense of the government.—United States v. Bickford, Case No. 14,591.

The omission of the words "A true bill" on the copy of the indictment furnished defendant is waived where the prisoner makes no objection on that ground.—United States v. Cornell, Case No. 14,868.

A copy of the caption of the indictment must be delivered to the prisoner, along with the indictment, of which it naturally forms a part.—United States v. Insurgents, Case No. 15,443.

§ 84. —— Service of list of witnesses and jurors.

In cases not capital, the district attorney is not bound to furnish defendant with the names of the prosecutor and witnesses.—United States v. Butler, Case No. 14,700.

Where there has been no preliminary examination, it is within the discretion of the court to order a list of the witnesses sworn before the grand jury to be furnished the accused.—United States v. Southmayd, Case No. 16,361.

Act April 30, 1790, § 28, which requires a list of the witnesses to be delivered to the prisoner three days before the trial, is confined to treason.—United States v. Wood, Case No. 16,756.

In capital cases the prisoner is entitled to a list of the jury, with their residences, to be delivered to him two entire days before his arraignment.—United States v. Dow, Case No. 14,990; Same v. Curtis, Id. 14,905.

The arraignment is to be regarded as the commencement of the trial, and the day of delivery and the day of the arraignment are not computed in the time. Act April 30, 1790, c. 38, § 28.—United States v. Dow, Case No. 14,990; Same v. Curtis, Id. 14,905.

The lists of jurors furnished to the prisoner should designate their abode by the township; and a description of their residence merely as within the state is insufficient.—United States v. Insurgents, Case No. 15,443.

§ 85. —— Furnishing of minutes of proceedings before grand jury.

The accused is not entitled to the minutes of the proceedings before the grand jury, nor, in the absence of strong reasons to the contrary, should they be furnished him.—United States v. Southmayd, Case No. 16,361.

§ 86. Presence of accused.

Trials for misdemeanors may be had, after service of summons upon the accused, without his actual presence in court, especially if he be represented by counsel.—United States v. Shepherd, Case No. 16,274; Same v. Leckie, Id. 15,583; Same v. Mayo, Id. 15,754.

If the accused escape from custody after the trial is commenced, it may proceed in his absence.—United States v. Loughery, Case No. 15,631.

A prisoner on trial for perjury, who persists in interrupting the district attorney during his opening address, may be removed from the court room during such address.—United States v. Davis, Case No. 14,923.

§ 87. Trial of joint defendants.

Where several persons are included in one indictment, it is in the court's discretion to try them separately or together.—United States v. Davidson, Case No. 14,922; Same v. Gibert, Id. 15,204; Same v. Kelly, Id. 15,516; Same v. Matthews, Id. 15,741b; Same v. White, Id. 16,682; Same v. Wilson, Id. 16,730. CONTRA, see United States v. Sharp, Case No. 16,264.

Separate trials will not be granted in the case of persons jointly indicted to enable one to have the benefit of the testimony of the others, as they are not competent witnesses for each other.—United States v. Collyer, Case No. 14,838; Same v. Gibert, Id. 15,204.

Proper location of the prisoners within the bar, where there were 12 in number.—United States v. Gibert, Case No. 15,204.

§ 88. Reception of evidence—Order and time of admission.

After the case and arguments were closed, the prosecution was allowed to introduce records and explanations thereof by the town clerk to show a conveyance of the locus of the crime as affecting the jurisdiction of the court. *Held*, that it was not an abuse of discretion to refuse to allow defendant to introduce evidence in respect to the incidents immediately preceding the crime.—United States v. Cornell, Case No. 14,868.

In rebuttal of evidence of acts, conduct, and declarations of the accused to show insanity, the prosecution may offer evidence of other acts, conduct, or declarations to show sanity.—United States v. Holmes, Case No. 15,382.

A witness was produced by defendant in rebuttal after the prosecution had failed to call him at defendant's request. *Held* no error.—United States v. Bennett, Case No. 14,572.

After a witness has been once examined, it is discretionary with the court to permit him to be examined again as to new matter.—United States v. Wilson, Case No. 16,730.

§ 89. —— Necessity of calling witnesses.

A witness whose name is on the back of the indictment need not be called by the prosecution if not material.—United States v. Dowden, Case No. 14,990a.

§ 90. —— Separation of witnesses and exclusion from court room.

The court may order certain witnesses to be removed while others are testifying, but it will not require them to be kept separate.—United States v. White, Case No. 16,675.

The court will not order witnesses for the prosecution to be sent out of the room after they have been examined, and while the prisoner's witnesses are under examination.—United States v. Woods, Case No. 16,760.

A witness ordered to be taken out of court during the examination of other witnesses, who remains in court in violation of the order, will not be permitted to be examined.—United States v. Woods, Case No. 16,760.

§ 91. Arguments of counsel.

In all criminal prosecutions the attorney for the government upon the general issue has the right to close.—United States v. Bates, Case No. 14,543.

In a capital case the junior counsel has a right, in opening, to argue at length the law and the facts, but ordinarily only one counsel has a right to close.—United States v. Mingo, Case No. 15,781.

Practice of abusing witnesses and attacking absent persons by counsel, in arguments to the jury, commented on.—United States v. Robbins, Case No. 16,170.

Counsel will be permitted to argue before the jury questions of law not involved in the in-

struction asked and submitted to the court.—United States v. Watkins, Case No. 16,649.

Counsel will not be allowed to argue to the jury a point of law which has been decided by the court.—United States v. Cottom, Case No. 14,873; Same v. Fenwick, Id. 15,086; Same v. Stockwell, Id. 16,405; Virginia v. Zimmerman, Id. 16,968.

Counsel will not be permitted to argue to the jury questions as to the constitutionality of the law under which the indictment is found.—United States v. Callender, Case No. 14,709.

And the court may require that the constitutionality of the act on which the indictment is founded shall be argued to the court, instead of the jury.—United States v. Riley, Case No. 16,164.

§ 92. Motion to strike out evidence.

Testimony legal in form, pertinent to the issue, and received without objection, cannot afterwards be stricken out by the court merely because the foundation for its admission by preliminary inquiry has not been made.—United States v. Holmes, Case No. 15,382.

§ 93. Province of court and jury.

Under the constitution and laws of the United States, the jury in a criminal case are not the judges of the law. They are to take the law from the court, and apply it to the facts which they find from the evidence.—United States v. Morris, Case No. 15,815; Same v. Battiste, Id. 14,545; Same v. Riley, Id. 16,164. But see United States v. Greathouse, Case No. 15,254; Same v. Wilson, Id. 16,730.

The right of the jury to decide the law as well as the facts results only from their power to find a general verdict.—United States v. Stockwell, Case No. 16,405.

Whether the accused, in making confessions before the finding of the indictment, believed himself to be speaking under oath or not, is a question of fact for the jury.—United States v. Williams, Case No. 16,707.

The question whether one fact can be inferred from another is a question of law, to be decided by the court.—United States v. Stockwell, Case No. 16,405.

The court cannot declare, as matter of law, that the declarations of self-confessed accomplices and members of a conspiracy are unworthy of belief unless corroborated. The credibility of such testimony is for the jury, under the advice and direction of the court.—United States v. McKee, Case No. 15,685.

Questions of jurisdiction ordinarily belong to the court as matters of law, but, where the jurisdiction depends upon facts to be found by the jury, the latter may, under the direction of the court as to matters of law, affirm, through the medium of a general verdict, whether there is or is not jurisdiction.—United States v. Sanders, Case No. 16,220.

On the trial of an indictment it is the duty of the court to direct a verdict of guilty whenever the facts constituting the guilt are undisputed.—United States v. Anthony, Case No. 14,459.

Where the court is of the opinion that the evidence is not sufficient to warrant a conviction, it should direct an acquittal.—United States v. Fullerton, Case No. 15,176.

An accomplice being a competent witness, it is not erroneous for the court to direct a jury to find a verdict upon his uncorroborated evidence, if they believe him.—Steinham v. United States, Case No. 13,355.

§ 94. Instructions.

It is the duty of the court, when requested, to declare the law; but the jury are not bound to conform thereto, having the right to decide both the law and the facts.—United States v. Hodges, Case No. 15,374.

It is error to instruct the jury that the evidence is sufficient to convict defendant.—United States v. Fenwick, Case No. 15,087.

§ 95. Requests for instructions.

In capital cases, counsel should state the points of law on which they wish instructions to the jury, at some time before the charge is given, that the court may have time to examine and consider them.—United States v. Gibert, Case No. 15,204.

§ 96. Custody, conduct, and deliberations of jury.

If a jury, after having retired to consider their verdict, return into court to re-examine a witness, neither party will be permitted to ask any question of the witness, nor to make any motion to the court in the presence of the jury.—Virginia v. Zimmerman, Case No. 16,968.

It is improper, after the jury have retired, to give an instruction upon a question not asked by them.—United States v. White, Case No. 16,677.

During a trial for a capital offense, the jury, after the adjournment from day to day, previous to the charge, may take refreshments, but not afterwards.—United States v. Haskell, Case No. 15,321.

Permitting the jury in a capital case to read the newspapers after all matter relating to the trial had been cut out, *held* an irregularity, but not sufficient to justify setting aside the verdict.—United States v. Gibert, Case No. 15,204.

In a case where a jury declared that they could not agree after being kept in consultation several days, the judge gave them a binding instruction to bring in a verdict of guilty.—In re Wiltbank, Case No. 17,855.

After the jury has been out a long time without any probability of agreeing in a case of misdemeanor, they may be discharged without defendant's consent.—United States v. Watkins, Case No. 16,649.

The jury having been discharged after being out only about four hours and reporting that they were equally divided and could not agree, the court was divided on the question whether the discharge was justifiable under the circumstances.—United States v. Perez, Case No. 16,033.

§ 97. Verdict—Sufficiency in general.

When the facts found by a verdict neither establish nor are inconsistent with the guilt or innocence of defendant, there is no verdict.—United States v. Watkins, Case No. 16,649.

A verdict against the law, if in favor of defendant, is as conclusive and effectual as if it were according to law.—Stettinius v. United States, Case No. 13,387.

A verdict: "We, of the jury, say that A. B. is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty,"—is, in effect, a verdict of not guilty, and will be so entered on the record.—United States v. Burr, Case No. 14,693.

A verdict of "not guilty upon the plea of limitations, more than two years having elapsed from the committing of the offense to the finding of the indictment," is argumentative, and bad.—United States v. White, Case No. 16,675.

Where the jury bring in a verdict not answering to the whole matter in issue, the court, without recording it, will inform the jury that they may retire, and reconsider their verdict.—United States v. Watkins, Case No. 16,649.

§ 98. —— Several counts.

The court may permit discontinuance of a count upon which the jury have omitted to find; but the verdict cannot be amended, as in case of special verdict, by entering not guilty

on such count.—United States v. Keen, Case No. 15,510.

On a general verdict of guilty, the evidence will be applied to any sufficient count, and the remaining counts will be wholly disregarded.—United States v. Knapp, Case No. 15,538; Same v. Potter, Id. 16,078; Same v. Dustin, Id. 15,011; Same v. Burroughs, Id. 14,695.

Where there are two or more counts upon distinct offenses, or upon different statements of the same offense, the jury may find a verdict upon any or all of such counts; and where they disagree upon any count, they may be discharged as to that, and it will stand for retrial.—United States v. Davenport, Case No. 14,920.

Where an indictment describes in different counts different offenses, of different grades and punishments, implied from the same transaction, and the verdict is guilty of the last count only, judgment may properly be rendered on the verdict.—United States v. Stetson, Case No. 16,390.

An indictment in which there is a joinder of offenses or offenders, so far as the jury are concerned, is to be considered a several one as to each of such offenses or offenders.—United States v. Davenport, Case No. 14,920.

§ 99. —— Polling jury.

Where a sealed verdict is brought in by consent of the parties, the court will not permit the jury to be questioned as to their finding, but will order them to be polled.—United States v. Potter, Case No. 16,077.

Where it is agreed that a sealed verdict shall be delivered, defendant has no right to have the jury polled when it is read.—United States v. Bridges, Case No. 14,644.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 100. Power to grant new trials.

Quære, if congress may invest the federal courts with power to grant new trials in all criminal cases, capital or otherwise.—United States v. Gibert, Case No. 15,204.

The federal circuit courts may grant new trials in criminal cases, on defendant's application, after conviction by the jury.—United States v. Keen, Case No. 15,510; Same v. Macomb, Id. 15,702.

Circuit courts of the United States have power to grant new trials after conviction, both in misdemeanors, and felonies.—United States v. Williams, Case No. 16,707; Same v. Conner, Id. 14,847. But see United States v. Gibert, Case No. 15,204.

Independent of the express prohibition of the constitution, there can be no new trial in a capital case after a regular trial had upon a good indictment.—United States v. Gibert, Case No. 15,204.

The court has power in criminal, as in civil, cases, to grant a new trial; but the new trial can only be granted in favor of the prisoner, and not to his prejudice.—Case of Fries, Case No. 5,126.

§ 101. Grounds for new trial.

Alleged error, without prejudice, is no ground for new trial.—United States v. Hudson, Case No. 15,412; Same v. Martin, Id. 15,729, 15,731.

A new trial for failure of the evidence to sustain a particular allegation should not be granted unless it appears that the objection was made at the trial in a manner to attract attention.—United States v. Jenther, Case No. 15,476.

The verdict will not be set aside in the case of a misdemeanor, where the court, in the absence of the prisoner, directed that a sealed verdict might be delivered, where the jury, on being polled, stated that the sealed verdict was their verdict.—United States v. Bennett, Case No. 14,571.

It is ground of new trial that the court submits as a question of fact to the jury a material fact, where the case was tried upon the assumption that such fact was admitted.—United States v. Smidth, Case No. 16,316a.

Where the government has so conducted the trial that defendant is entitled to take certain facts as admitted, and does not offer evidence thereon, he is entitled to a new trial, where such facts are subsequently left to the jury.—United States v. Smith, Case No. 16,320.

It is no ground of new trial that the jury, after retirement, were furnished with several city directories, where it appears that they were recalled, and directed by the court to wholly disregard any information derived therefrom.—United States v. Horn, Case No. 15,389.

The mere fact that jurors purchased copies of newspapers containing editorial comments on the trial, which they had been forbidden by the court to read, *held* no ground for a new trial, where there was no proof that they read them.—United States v. McKee, Case No. 15,683.

A new trial should be granted where it appears that one of the jurors, before the trial, had used expressions to the effect that the prisoners ought to be hung, and that the community would not be safe unless they were hung.—Case of Fries, Case No. 5,126.

The fact that members of the jury indulged in intoxicating liquors with consent of defendant's counsel is no ground of new trial unless the indulgence was grossly abused, or operated injuriously to the prisoners.—United States v. Gibert, Case No. 15,204.

A new trial will be granted where the jury took to their room the coroner's inquest and depositions without defendant's consent.—United States v. Clarke, Case No. 14,810.

A verdict will not be set aside because a juror, during the trial, indiscreetly made a remark out of court, where the same showed no bias, but only the impressions received from the evidence. — United States v. Swett, Case No. 16,427.

The fact that one of the jurors was asleep during part of a trial, where known to the defendant at the time, is no ground for new trial, where first brought forward after the verdict.—United States v. Boyden, Case No. 14,632.

A correct verdict should never be set aside because of supposed or actual errors in the process by which it was reached. — United States v. Mathoit, Case No. 15,740.

A new trial will not be granted for misconduct of a juror in which the applicant participated.—United States v. Salentine, Case No. 16,213.

It is no ground of exception that jurors were set aside because they were Quakers, without objection being made by either party, and upon their mere statement that they were such.—United States v. Cornell, Case No. 14,868.

The fact that a juror was not warned to attend as directed by the statute is no ground of exception where he is regularly drawn, and attends the court.—United States v. Cornell, Case No. 14,868.

Nothing that is a cause of challenge to a juror before verdict can be used to set aside a verdict.—United States v. Baker, Case No. 14,499.

The fact that one of the jurors in a criminal trial was deaf, though defendant was ignorant thereof, is no ground of setting aside the verdict.—United States v. Baker, Case No. 14,499.

A new trial will not be granted on the ground of surprise unless it appear that such surprise is in no degree attributable to the negligence of the applicant.—United States v. Smith, Case No. 16,341.

A new trial will not be granted merely because counsel have been indulged in too great latitude in arguing as to the inferences to be drawn from the evidence.—United States v. Flowery, Case No. 15,122.

A new trial will not be granted as for newly-discovered evidence, in order that defendant may avail himself of the testimony of persons jointly indicted with him, who were acquitted. —Lander v. United States, Case No. 8,039; United States v. Gibert, Id. 15,204.

Newly-discovered evidence impeaching the credibility of one of the witnesses is no ground for a new trial.—United States v. Potter, Case No. 16,077.

The newly-discovered evidence must have come to the knowledge of the party since the trial, and must be so material that it would probably produce a different result.—United States v. Smith, Case No. 16,341.

§ 102. Hearing and determination.

On motion for new trial affidavits of jurors cannot be received to impeach their own verdict. —United States v. Clements, Case No. 14,817.

On a question whether a juror had, before the trial, and contrary to his sworn statement on his voir dire, expressed an opinion of the prisoner's guilt, the court may receive affidavits, and also require the principal witnesses to be orally examined before it.—United States v. McKee, Case No. 15,683.

The burden rests upon the party charging misconduct of a juror during a trial to prove it. —United States v. Swett, Case No. 16,427.

After a sentence of an imprisonment has been in part executed, a new trial will not be granted, though moved for at the same term.—United States v. Hastings, Case No. 15,323.

§ 103. Motion in arrest of judgment.

A motion for a new trial is too late after the case has gone to the supreme court on a certificate of a division of opinion on a motion in arrest of judgment.—United States v. Simmons, Case No. 16,289.

The court, in a capital case, arrested judgment on its own motion, for want of jurisdiction, and directed that the prisoner be turned over to the state authorities.—United States v. Sa-Coo-Da-Cot, Case No. 16,212.

The judgment will be arrested where, upon a special verdict, it does not appear that the offense was committed before the filing of the information.—Virginia v. Leap, Case No. 16,964.

It is not sufficient ground of arrest of judgment that it appears upon the face of the indictment and the record that the indictment was not found within the time of limitation.— United States v. White, Case No. 16,675.

The pendency of another indictment against defendant for the same offense is no ground for arresting the judgment.—United States v. Herbert, Case No. 15,354.

The failure to read the indictment to the prisoner or to the jury, where its reading is not demanded by him, is no ground for a motion in arrest of judgment.—United States v. Bickford, Case No. 14,591.

The want of the name of a prosecutor written on the indictment is not a ground of arrest.— United States v. Turley, Case No. 16,546; Same v. Singleton, Id. 16,293; Same v. Jamesson, Id. 15,466; Same v. Lloyd, Id. 15,615.

A conclusion in the plural, where there is but one prohibitory act, is not ground for motion in arrest of judgment.—United States v. Trout, Case No. 16,542.

The judgment will be arrested where an indictment against a pension agent for withholding a pension alleges that minor children were the pensioners, and that the pension was withheld from another person as their guardian.— United States v. Chaffee, Case No. 14,771.

The court will not stop the trial on the ground that the proof does not show a case clearly within the indictment, but will leave the prisoners to their remedy by motion in arrest of judgment.—United States v. Davis, Case No. 14,931.

Upon a motion in arrest of judgment the court will presume that everything which was necessary to support the verdict and could be proved under the issue was proved to the satisfaction of the jury.—United States v. White, Case No. 16,676.

After conviction, a motion in arrest of judgment will not be decided where defendant has forfeited his recognizance, and does not appear in person.—United States v. Erskine, Case No. 15,057; Same v. Askins, Id. 14,471.

The objection that the district in which seamen indicted for endeavoring to make a mutiny and revolt were tried was not the district in which they were first brought and apprehended cannot be taken for the first time on motion in arrest of judgment.—United States v. Crawford, Case No. 14,890.

See, also, post, § 109.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

See "Bigamy"; "Common Scold," § 3; "Disturbance of Public Assemblage," § 2; "Embezzlement," § 5; "Homicide," § 10; "Larceny," § 13; "Perjury," § 10; "Rape," § 3; "Riot," § 6; "Treason," § 20.

Violation of revenue laws, see "Customs Duties," § 128; "Internal Revenue," § 109.

§ 104. Jurisdiction and power to sentence.

On trial and conviction for a capital offense before a circuit court held by two judges, it is competent for such court, when held by only one of the judges, to pass sentence.—United States v. Gordon, Case No. 15,231.

On an indictment at common law, the court may pass sentence under a statute.—United States v. King, Case No. 15,534.

Where the court has entirely changed pending motion for a new trial in a capital case, and there is no record of the evidence or charge to the jury, sentence will not be passed upon the verdict.—United States v. Harding, Case No. 15,301.

§ 105. Disposal of prisoner upon acquittal.

On an acquittal of the crime charged, the court will not require the prisoners to give security for their good behavior, although it appear from the evidence that they are guilty of another crime.—United States v. Venable, Case No. 16,616; Same v. Brooke, Id.

A prisoner acquitted, on the ground of insanity, of an assault with intent to kill, will be remanded to the custody of the marshal, when the court is satisfied that it would be dangerous to permit him to be at large.—United States v. Lawrence, Case No. 15,577.

§ 106. Sentence upon joint indictment.

Upon a joint indictment the judgment must be several.—United States v. Ismenard, Case No. 15,450.

§ 107. Fine and imprisonment.

A territorial court is a United States court within the meaning of Act May 12, 1864, relat-

ing to imprisonment.—In re Osterhaus, Case No. 10,609.

Where a statute merely alters the punishment of a common-law offense, the statutory punishment may be inflicted, although the indictment does not conclude against the form of the statute.—United States v. Norris, Case No. 15,899.

Where a statute directs a fine and imprisonment to be imposed for an offense, the court, on conviction, is bound to inflict both.—United States v. Vickery, Case No. 16,619.

In cases of statutory crimes punishable by fine, or by fine and imprisonment, the federal courts may sentence defendant to confinement in jail until the fine is paid.—United States v. Robbins, Case No. 16,171.

In misdemeanor cases in the federal courts, the court, and not the jury, should assess the fine.—United States v. Mundell, Case No. 15,834.

The district court may designate any place within its jurisdiction as the place of punishment.—Ex parte Geary, Case No. 5,293.

The district court does not exceed its power in fixing a part of the term of imprisonment in the county jail, and the remainder in the penitentiary.—Ex parte Geary, Case No. 5,293.

The district court may direct imprisonment in the state penitentiary in which prisoners are put to hard labor, though hard labor is not imposed by the terms of the sentence. Act June 30, 1834.—Ex parte Geary, Case No. 5,293.

The convict cannot object that there is no state legislation authorizing such imprisonment where federal convicts have been received in such prison for many years.—Ex parte Geary, Case No. 5,293.

A sentence to a jail in a certain place will authorize the holding of the prisoner by the keeper of that jail at another place, to which the jail has been removed by authority of the state legislature.—In re Hartwell, Case No. 6,173.

A prisoner confined in a New York jail under a sentence which did not fix the place of confinement is not entitled to the deduction of five days during every month, under Act March 3, 1875, but to the deduction allowed by Rev. St. § 5543.—United States v. Schroeder, Case No. 16,233.

A sentence to imprisonment for a year at Blackwell's Island does not direct imprisonment in any particular state prison or penitentiary (Act March 3, 1863, § 3), but the prisoner is properly delivered to the custody of the keeper of the Blackwell's Island penitentiary.—In re De Puy, Case No. 3,814.

The punishment for cheating at cards, fixed at a fine of five times the amount of the loss, and imprisonment of six months.—United States v. Bascadore, Case No. 14,535.

§ 108. Cumulative sentences.

Where defendant is convicted of several offenses, charged in one indictment, in separate counts, he may be separately punished for each offense.—United States v. Bennett, Case No. 14,572.

If a person be convicted of a second offense while under sentence for the first, the sentence for the second may be made to commence from the expiration or other termination of the period for which he was first sentenced.—United States v. Farrell, Case No. 15,074.

A criminal convicted of several offenses under several counts of an indictment may be sentenced under the first count, and sentence suspended as to the others until after the first sentence is fully executed.—United States v. Blaisdell, Case No. 14,608.

Where a separate sentence was rendered on each verdict, the prisoner is entitled to be discharged on serving the full term of imprisonment under one judgment.—Ex parte Joyce, Case No. 7,556.

But one judgment should be rendered where the various offenses charged substantially constitute but one offense, though a separate verdict of guilty is rendered on each count.—Ex parte Joyce, Case No. 7,556.

Where a party is convicted of two crimes arising out of one transaction, that fact will be considered in fixing the measure of his punishment.—United States v. Harmison, Case No. 15,308.

§ 109. Stay of sentence.

A stay of proceedings will not be granted after verdict to enable counsel to prepare a bill of exceptions, where none of the exceptions go to the merits.—United States v. Williams, Case No. 16,722.

Upon a motion by defendants to continue an indictment and suspend sentence, *held*, that admitted rights may be waived in criminal cases by laches where it clearly appears that the omission to claim their exercise was voluntary, and with a full knowledge of all the circumstances.—United States v. Hartwell, Case No. 15,319.

The court will not delay judgment merely to give defendant time to discover new evidence on which to ask a new trial.—United States v. Randall, Case No. 16,118.

After verdict, defendant will be permitted to give security to abide the judgment.—United States v. Greenwood, Case No. 15,260.

§ 110. Amendment of record.

Defendant will not be allowed to have the record amended after conviction so as to show that the plea of not guilty was never entered by him, where he failed to object when the record was read in open court.—United States v. Conklin, Case No. 14,845.

§ 111. Commitment.

The circuit court of the United States, sitting as a court, possesses the power to commit a person charged with an offense against the United States.—United States v. Burr, Case No. 14,692b.

No person can be detained upon a commitment which does not show sufficient cause upon its face.—Ex parte Williams, Case No. 17,699.

In cases of imprisonment under Act May 12, 1864, § 1, no special process of commitment is necessary.—In re Osterhaus, Case No. 10,609.

See, also, ante, §§ 40, 41.

XV. APPEAL AND ERROR.

§ 112. Jurisdiction.

The federal circuit courts have final jurisdiction in all cases of crimes under the laws of the United States, and no writ of error or appeal lies to the supreme court in such cases, and consequently a bill of exceptions will not be allowed. However, in case of a division of opinion at the trial, the question may be certified to the supreme court, under Act 1802, c. 31, § 6.—United States v. Gibert, Case No. 15,204.

§ 113. Review.

See, also, "Habeas Corpus."

The opinions of the judges of the circuit courts in criminal cases can be reviewed only on a certificate of division of opinion.—United States v. Gibert, Case No. 15,204.

CROPS.

Mortgage of, see "Chattel Mortgages," § 5.

CROSS BILL.

See "Equity," §§ 55–59.

CROSSINGS.

Railroad crossings, see "Railroads," § 23.

CROSS LIBEL.

See "Admiralty," § 46.

CRUELTY.

To animals, see "Animals," § 2.
To slaves, see "Slaves," § 18.

CURRENCY.

See "United States," §§ 22, 23.

CURTESY.

§ 1, Requisites. § 2, Property subject to curtesy.

See, also, "Dower."

§ 1. Requisites.

Seisin during coverture must be shown, to entitle husband to claim as tenant by curtesy. Exceptions.—Barr v. Galloway, Case No. 1,037.

Entry on wild land not necessary, to enable the husband to claim as tenant by the curtesy. —Barr v. Galloway, Case No. 1,037.

§ 2. Property subject to curtesy.

In Maine the husband is entitled to hold a trust estate of his wife as tenant by the curtesy.—Robison v. Codman, Case No. 11,970.

In Rhode Island a husband is not entitled to a life estate, as tenant by the curtesy, of a remainder or reversion owned by the wife, but only of real estate of which he had actual seisin and possession in fee.—Stoddard v. Gibbs, Case No. 13,468.

CUSTODY.

Of bankrupt's property, see "Bankruptcy," §§ 154–159, 289.
Of child, see "Divorce," § 3; "Parent and Child," § 1.
Of goods in course of transportation, see "Carriers," § 6.
Of jury, see "Criminal Law," § 96; "Trial," § 21.
Of property in admiralty, see "Admiralty," § 78; "Salvage," § 69.
—— levied on, see "Attachments," § 11.

CUSTOMS AND USAGES.

§ 1, When may be shown in general. § 2, To explain or modify contract. § 3, Requisites. § 4, Knowledge. § 5, Conflicting customs. § 6, Evidence.

As to acceptance of goods by wharfingers, see "Wharves," § 2.
—— navigation, see "Collision," § 72.
—— the reception and delivery of cargo, see "Shipping," §§ 209, 218.
Customary laws, see "Common Law."
Effect of usage on construction of contract, see "Insurance," § 23.
Judicial notice, see "Evidence," § 3.

§ 1. When may be shown in general.

A custom is obligatory only when the law does not provide for the case.—The Lucy Anne, Case No. 8,596.

Proof of usage is inadmissible where the law is settled to the contrary.—Brown v. Jackson, Case No. 2,016.

A custom of a foreign country cannot be set up in opposition to its written laws by one claiming as a citizen of such country.—Gedney v. L'Amistad, Case No. 5,294a.

Usages among merchants should be sparingly adopted as rules of law by courts of justice.—Donnell v. Columbian Ins. Co., Case No. 3,987.

Regulations prescribed by merchants to define and control the usages or customs which shall prevail in their intercourse have not the effect of positive statutes.—The Illinois, Case No. 7,005.

When a usage is so proved as to leave no doubt of its existence, it becomes a part of the law; and the court will decide on it as such, without requiring it to be again proved.—Consequa v. Willings, Case No. 3,128.

The custom of a particular port, embracing an entire business, *held* to supersede the general maritime law.—Bourne v. Ashley, Case No. 1,698.

A custom or usage of paying debts in Confederate notes in the insurrectionary states during the war of the Rebellion was illegal, and cannot be sanctioned as of any binding force.—Williamson v. Richardson, Case No. 17,754.

An alleged local custom to keep back one-third the gross freight for charges in a policy on freight where the loss is total is unreasonable, and will not control against the terms of the policy.—McGregor v. Insurance Co. of Pennsylvania, Case No. 8,811.

§ 2. To explain or modify contract.

A usage or custom of trade may always be waived by, and cannot vary, a positive stipulation.—Knox v. The Ninetta, Case No. 7,912.

A usage or custom is admissible to ascertain the nature and extent of contracts arising from implications, presumptions, and acts of an equivocal character, or to ascertain the true meaning of particular words in an instrument, when they have various meanings; but it is inadmissible to control, vary, or contradict a written and expressed contract.—The Reeside, Case No. 11,657. See, also, Citizens' Bank v. Nantucket Steamboat Co., Case No. 2,730.

A usage cannot be considered for the purpose of determining the construction of a charter party unless there is an ambiguity in the terms of the instrument itself.—Tyson v. Belmont, Case No. 14,316.

A usage or custom of a particular port in a particular trade is not such a usage or custom as will, in contemplation of law, limit, control, or qualify the language of contracts of insurance.—Rogers v. Mechanics' Ins. Co., Case No. 12,016.

A custom among commission merchants who buy and sell grain for customers to settle the difference in margins between themselves, their customers being substituted as parties to the contracts, *held* valid, and binding.—Williar v. Irwin, Case No. 17,761.

Evidence is admissible of a usage to explain a clause in a contract of insurance, when the law is unsettled; and in such case the usage, and not the opinions of witnesses, must control. —Winthrop v. Union Ins. Co., Case No. 17,901.

A usage in the Calcutta trade to stow full cargoes, including gunny cloth and bags, close up to the deck, without air space at top, is valid although cloth thus stowed is liable to damage from condensation of vapor.—Lamb v. Parkman, Case No. 8,020.

A custom that the owners of packet vessels on a certain line should be liable only for damage to goods occasioned by their own neglect is

inadmissible to vary the common bill of lading, by which the goods were to be delivered in good order and condition, the dangers of the seas only excepted.—The Reeside, Case No. 11,657.

A local usage among insurance companies, not including defendant company, to pay agents the commuted value of premiums during the whole existence of the policy, *held* inadmissible to explain a contract fixing an agent's compensation.—Partridge v. Life Ins. Co., Case No. 10,786.

Evidence of the usage of vessels in the trade in question to discharge at one port, and then to proceed to another for return cargo, *held* inadmissible to establish a usage under a marine policy.—Hearn v. Equitable Safety Ins. Co., Case No. 6,299; Same v. New England Mut. Marine Ins. Co., Id. 6,301.

Depositions admitted de bene esse to show that on a voyage of the kind in question the vessel might, under a usage, go to a second port to load.—Hearn v. Equitable Safety Ins. Co., Case No. 6,299.

A general usage in relation to the settlement of average losses known to the parties is binding as part of the contract.—Sanderson v. Columbian Ins. Co., Case No. 12,298.

§ 3. Requisites.

A custom or usage of trade, to be obligatory, must be ancient (so as to be generally known), certain, and reasonable. Where merchants in the trade differ as to its existence it is not obligatory.—Collings v. Hope, Case No. 3,003.

The party alleging that it was the custom of the merchants in the particular trade to contract in reference to the value of foreign coins, as fixed by the act of congress, has the burden of showing a general and well-established custom, or that the parties contracted in reference to it.—Phillips v. Insurance Co. of Pennsylvania, Case No. 11,102.

The adoption by a produce exchange of a rule requiring cargo to be received from lighters in two days does not make a binding custom for the port.—The Innocenta, Case No. 7,050.

A former course of dealing between A. and a broker is not admissible to explain a contract between A. and B., made through the same broker, if unknown to B., and not founded on a general usage of trade.—Ex parte Caylus, Case No. 2,534.

§ 4. Knowledge.

A usage which is to govern a question of right between parties must be so certain, uniform, and notorious as to be understood and known by them.—United States v. Duval, Case No. 15,015.

A local custom is established only by such general knowledge and recognition as to raise a presumption that the parties contracted in silent reference thereto.—The Paragon, Case No. 10,708.

A usage or custom, to control a contract of insurance, must have been a known general usage or custom in the trade, applied to all ports of the state, and so notorious as to afford a presumption that all contracts of insurance in that trade are made with reference to it, as a part of the policy.—Rogers v. Mechanics' Ins. Co., Case No. 12,016.

In order that a usage of trade shall control the method of stating accounts between two persons, it must have been continued for such a length of time as to have become generally known to those engaged in the trade, and must be so general as to have become the general rule of commercial intercourse, in the absence of any special agreement or particular course of dealing between individuals.—York v. Wistar, Case No. 18,141.

§ 5. Conflicting customs.

A general custom of the Lake ports as to delivery will not control as against a particular custom of one port.—Strong v. Certain Quantity of Wheat, Case No. 13,541.

§ 6. Evidence.

The existence of a usage may be proved by one witness.—York v. Wistar, Case No. 18,141.

The rules of law in relation to the proof and nature of customs stated by Washington, J.—McGregor v. Insurance Co. of Pennsylvania, Case No. 8,811.

CUSTOMS DUTIES.

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(D) Offenses.

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See, also, "Forfeitures."

Jurisdiction of suits arising under customs laws, see "Courts," § 32.

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Removal of causes, see "Removal of Causes," § 8.

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Taxation of exports, see "Commerce," § 1.

I. VALIDITY, CONSTRUCTION, AND OPERATION OF CUSTOMS LAWS IN GENERAL.

§ 1. General rules of construction.

Rule as to the construction of revenue laws stated by Story, J.—United States v. Breed, Case No. 14,638.

Statutes levying duties are not to be extended by implication beyond the clear import of the language used.—Adams v. Bancroft, Case No. 44; United States v. Wigglesworth, Id. 16,690.

A law imposing a duty on articles used for a particular purpose should not be construed to cover articles not so used at the date of the act, unless expressly so provided.—Martin v. Curtis, Case No. 9,160.

Revenue laws are not penal in the sense that requires them to be construed with great strictness in favor of the importer.—In re Twenty-Eight Cases of Wine, Case No. 14,281; United States v. Twenty-Five Cases of Cloths, Id. 16,563.

But an ambiguity in the language of a tariff act will be resolved in his favor.—Powers v. Barney, Case No. 11,361; United States v. Ullman, Id. 16,593; Same v. Wigglesworth, Id. 16,690.

The interpretation of doubtful and ambiguous words is to be explained in subservience to the common policy of the country.—United States v. Whidden, Case No. 16,670.

Terms in a tariff act are to be construed according to their commercial meaning at the time the act was passed, which is a question for the jury.—Bacon v. Bancroft, Case No. 714; Hutton v. Schell, Id. 6,962; Hadden v. Hoyt, Id. 5,891; Hall v. Same, Id. 5,934; Jaffray v. Murphy, Id. 7,172; Roosevelt v. Maxwell, Id. 12,034.

This is not the rule where it appears from the act itself that a different meaning was intended.—Roosevelt v. Maxwell, Case No. 12,034.

Specific description must prevail over commercial designation known at time of passage.—Bailey v. Schell, Case No. 745.

The question whether certain articles upon which a specific duty is imposed by name are, like certain other articles, within a treaty stipulation for nondiscriminating duties is exclusively for congress.—Taylor v. Morton, Case No. 13,799.

Where two provisions in a customs law are repugnant, the last one will prevail.—Powers v. Barney, Case No. 11,361.

Practice of government is admissible as bearing on construction of law.—Benkard v. Schell. Case No. 1,307.

The contemporaneous exposition by the government of an act prohibiting certain importations, followed by the concurrent practical construction for 30 years, will govern, as against the claim of the government to a different construction.—United States v. The Recorder, Case No. 16,129.

The construction of a tariff act in which congress reproduces the very words of an earlier law will be much aided by a reference to treasury decisions long in force, construing the prior act.—United States v. Kaub, Case No. 15,507.

§ 2. When laws take effect.

An act laying duties on goods imported "from and after the passage of the act" takes effect from the beginning of the day on which it is passed, and not from the time of its being signed by the president.—United States v. Williams, Case No. 16,723.

Act July 1, 1812, c. 112, laying double duties, took effect on that day as to all vessels arriving at their port of entry and discharge on that day, though they were previously within the jurisdictional limits of the United States.—United States v. Arnold, Case No. 14,469.

§ 3. Repeal.

Part of the tariff act of June 6, 1872, having been embraced in the Revised Statutes, that act was consequently repealed on June 22, 1874, by the express provisions of Rev. St. § 5596.—Dodge v. Arthur, Case No. 3,950.

An act imposing additional duty on wood imported from certain places *held* repealed by a

subsequent act which provides, "in lieu of the duties now imposed by law," certain specified duties on all wool "imported from foreign countries."—Washington Mills v. Russell, Case No. 17,247.

The repeal of a paragraph in a revising act *held* not to revive or leave in operation a similar paragraph of the original act.—Butler v. Russell, Case No. 2,243.

A declaration that certain duties and rates of duty should be imposed upon certain imports in lieu of the duties heretofore imposed, *held* tantamount to a repeal of the prior rates of duty.—Gossler v. Goodrich, Case No. 5,631.

§ 4. What constitutes a revenue law.

Revenue laws are those laws only whose principal object is the raising of revenue, and not those under which revenue may incidentally arise.—The Nashville, Case No. 10,023.

§ 5. Retroactive operation.

Act June 30, 1864, § 20, had no retroactive effect.—Smith v. Draper, Case No. 13,037.

§ 6. Treaties.

Construction of reciprocity treaty of 1854 with Great Britain.—In re One Hundred and Thirty-Four Thousand Nine Hundred and One Feet of Pine Timber, Case No. 10,523.

A customs law plainly imposing a discriminating duty against the manufactures of a certain country will be construed as a repeal, pro tanto, of a provision of a treaty against discriminating duties.—Ropes v. Clinch, Case No. 12,041.

§ 7. Operation in general.

The tariff act of 1857 operated simply as a reduction as to duties of the act of 1846.—Christ v. Schell, Case No. 2,699.

The collection law is adapted to a regular and usual course of business, and extraordinary cases, where compliance with its letter is impracticable, do not come within its meaning.—Six Hundred and Fifty-One Chests of Tea v. United States, Case No. 12,916.

The revenue acts of 1799 and 1863 apply to commercial intercourse between Canada and the United States as well as to other foreign countries.—United States v. Seventy-Eight Cases of Books, Case No. 16,258.

II. GOODS SUBJECT TO DUTY, RATE, AND AMOUNT.

§ 8. In general.

An article not named in the act of 1846 does not come under the clause providing for nonenumerated articles, where it so resembles some enumerated article, in quality, material, or use, as to be governed by the similitude clause of the act of 1842.—Ross v. Peaslee, Case No. 12,077.

The similitude clause of Act Aug. 30, 1842, does not contemplate that the nonenumerated articles shall in every particular bear a similitude to an enumerated article.—Boker v. Redfield, Case No. 1,606a.

The similitude clause of Act 1842 (section 20) was not repealed by Act 1864, and furnishes a rule of construction thereunder.—Cohen v. Phelps, Case No. 2,964.

The words "similar description" are to be understood in their popular and generally received meaning,—goods similar in product, and adapted to similar uses, and not necessarily produced by similar processes or methods of manufacture.—Greenleaf v. Goodrich, Case No. 5,778.

Section 20 of Act Aug. 30, 1842, in regard to the rate of duty on nonenumerated articles, was not repealed by Act July 30, 1846, or Act March 3, 1857.—Field v. Schell, Case No. 4,772; Gamble v. Mason, Id. 5,209.

A charge of a specific duty upon an article in a particular form or vessel is a charge upon the whole article, as described, including the vessel or material described as containing it.—Karthaus v. Frick, Case No. 7,615.

General terms in a customs act, although sufficiently broad to comprehend a certain article, are not applicable if it is specifically designated therein.—Hutton v. Schell, Case No. 6,962; Tong Duck Chung v. Kelly, Id. 14,093. CONTRA, see Jaffray v. Murphy, Case No. 7,172.

An article is provided for in a revenue law when it is aptly described as well as when it is named.—Faxon v. Russell, Case No. 4,707.

When the question is whether samples bore a particular name in commercial transactions, it is necessary they should have been so known generally, and not in particular places, to the exclusion of others, or to particular persons only.—Wilkinson v. Greely, Case No. 17,672.

A change which renders an article substantially different as an article of commerce, and adapts it to all the uses of another article, on which a higher rate of duty is levied, destroys its legal identity, and is a material change, under the revenue law.—Wilkinson v. Greely, Case No. 17,672.

Articles specifically provided for in a tariff act cannot be subjected to duty at a different rate under a general designation which would otherwise include them.—Dodge v. Arthur, Case No. 3,950.

Section 20, Act Aug. 30, 1842, providing that on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which any of its component parts may be chargeable, though not repealed by Act June 30, 1846, applies only in cases where an article has not been specially provided for by the later act.—Lottimer v. Lawrence, Case No. 8,521.

§ 9. What law governs.

Goods are dutiable under the law in force at the time of their arrival and entry.—Gossler v. Goodrich, Case No. 5,631.

Imported goods, so long as they remain in a warehouse, are subject to new revenue legislation, as well in relation to duties as to alteration in warehouse laws.—United States v. Benzon, Case No. 14,577.

Goods warehoused under Act Aug. 5, 1861, and withdrawn more than three months from the date of importation, and after Act July 14, 1862, was passed, *held* dutiable under the latter act.—United States v. Benzon, Case No. 14,577.

§ 10. Duty on package containing dutiable article.

The sacks in which salt subject to a specific duty is imported are not subject to an additional ad valorem duty.—Karthaus v. Frick, Case No. 7,615.

§ 11. Wrecked, damaged, and prize goods.

Dutiable goods wrecked and strewn upon the shore are liable to duties upon their value as they lie there.—United States v. Cook, Case No. 14,852.

Goods saved from a wreck and brought within the United States are subject to import duties, under Acts April 20, 1818, and March 1, 1823.—The Waterloo, Case No. 17,257.

The tackle, apparel, and furniture of a foreign vessel wrecked upon our shore, and landed and sold separate from the hull, are not subject to duty as imported articles.—The Gertrude, Case No. 5,370.

To obtain a reduction of duties on goods damaged during the voyage, the importer must demand an appraisal before entry.—Shelton v. Austin, Case No. 12,752.

Although included in the invoice, goods lost on the voyage are not subject to duty.—United States v. Nash, Case No. 15,856.

Prize goods brought in by government war vessels are liable to the payment of duties, as to the moiety belonging to the officers and crew of the capturing ship.—The Liverpool Hero, Case No. 8,405.

§ 12. Reimported goods.

Barrels manufactured in this country, sent to Cuba, and reimported filled with molasses, are liable to duty.—Knight v. Schell, Case No. 7,887.

One claiming to reimport American goods free of duty under Act 1799, § 47, has the burden of showing that the goods are American goods in the same condition as exported.—Kidd v. Swartwout, Case No. 7,756.

The right to reimport exported American products under Act 1799, § 47, is not affected by a sale of a part thereof in a foreign port.—Kidd v. Swartwout, Case No. 7,756.

The oath as to the American manufacture of an article sought to be reimported may be waived by the collector when he admits its American character but claims duty on another ground.—Knight v. Schell, Case No. 7,887.

Waiver of such oath by a deputy collector estops the collector from setting up the omission to give it.—Knight v. Schell, Case No. 7,887.

Foreign goods once lawfully imported lose the character imparted to them by such admission on their re-exportation, and cannot again be imported without a permit.—In re Ten Cases of Opium, Case No. 13,828.

Goods removed from a bonded warehouse and carried without the jurisdiction of the United States, and returned, are subject to duty, though not actually landed at a foreign port.—McGlinchy v. United States, Case No. 8,803; Perkins v. Same, Id. 10,990.

§ 13. Ship's equipments and sea stores.

Trade between the Atlantic and Pacific ports of the United States is "foreign trade," and not "coastwise trade," within Act June 1, 1872, § 10.—United States v. Patten, Case No. 16,007.

A vessel sailing in ballast from Boston, by way of New York, to San Francisco, for a cargo to Europe, is not engaged in "coastwise" trade, within Act June 1, 1872, § 10; and articles withdrawn from bond, and used in repairing her, are exempt from duty.—United States v. Patten, Case No. 16,007.

Articles purchased for the ship's equipment to replace articles lost or deteriorated by use are not subject to duty.—United States v. One Hempen Cable and One Hempen Hawser, Case No. 15,931a.

In the absence of fraud or collusion, the decision of the collector is conclusive as to the reasonable allowance of goods to be made to a vessel for entry free of duty, as sea stores.—In re An Ullage Box of Sugar, Case No. 14,324.

Hempen cables and hawsers are not "vessel and cabin stores" (1 Stat. 644, § 23), nor are they "sea stores." Id. § 45.—United States v. One Hempen Cable and One Hempen Hawser, Case No. 15,931a.

Cordage, ravensduck, and sail cloth are not "sea stores" (Act 1799, § 45), but, if not intended for the use of the ship, they are a part of the cargo.—United States v. Twenty-Four Coils of Cordage, Case No. 16,566.

§ 14. Property of United States.

Property purchased abroad by the United States is not liable to pay duties, and a sale thereof by a collector for nonpayment of duties is void.—United States v. Lutz, Case No. 15,644.

If such property be in the actual possession of the United States at the time of the sale, and is taken therefrom by the purchaser, the United States may maintain replevin for it.—United States v. Lutz, Case No. 15,644.

§ 15. Discriminating duties.

The 10 per cent. ad valorem discriminating duty imposed by Act Aug. 5, 1861, § 3, does not apply to goods not charged with duty by such act.—Echeverria v. Barney, Case No. 4,262.

The discriminating duty of 10 per cent. under Act Aug. 30, 1832, § 11, was not abolished by Act July 30, 1846.—Stalker v. Maxwell, Case No. 13,283.

Calcutta, in the British East Indies, is to be regarded as a country beyond the Cape of Good Hope. Act July 14, 1862, § 14.—Campbell v. Barney, Case, No. 2,354.

Rice grown in a country beyond the Cape of Good Hope, and imported into England in an uncleaned state, and thence imported into the United States, is liable to duty as the growth or production of a country beyond the Cape of Good Hope, and also to the duty imposed on cleaned rice. Act July 14, 1862, §§ 8, 14.—Williams v. Barney, Case No. 17,713.

Act June 6, 1872, § 5, exempting certain articles from duty, *held* not to repeal, by implication, Act June 30, 1864, § 18, placing discriminating duty on articles imported from countries east of Cape of Good Hope.—Gautier v. Arthur, Case No. 5,278.

§ 16. Subjects specifically enumerated.

Animals, Live: Singing birds *held* subject to duty as "live animals," under Act May 16, 1866, though in the previous act of 1861 they were specially mentioned.—Reiche v. Smythe, Case No. 11,666.

Berries or Vegetables: Rocoa, having a distinct commercial name, *held* not dutiable as anhatto, nor entitled to entry free as a berry or vegetable. Act Aug. 30, 1842.—Schneider v. Lawrence, Case No. 12,470.

Bindings: Act 1832, c. 227, § 2, cl. 25, includes all bindings, whether they are worsted or woolen.—Whiting v. Bancroft, Case No. 17,575.

Bindings: Under Tariff Act July 14, 1832, § 2, subd. 2, worsted carpet bindings are not chargeable with the duty of 25 per cent.—Chester v. Curtis, Case No. 2,661.

Blankets: The commercial meaning of "blanket," in the tariff act of 1857, is to be traced only to the time of the passage of that act.—Christ v. Baker, Case No. 2,697.

Brandy: The proper rate of duty on brandy warehoused December 1, 1866, and sold at auction after three years for nonpayment of duties, *held* to be the rate imposed by law at the expiration of three years from the date of the warehouse bond, and an additional duty equal to 10 per cent. thereof.—United States v. Duvivier, Case No. 15,017.

Busts of Marble, Metal, or Plaster: It seems that busts of lead are duty free, under Act 1832, as "all busts of marble, metal, or plaster," though put in that form to avoid the duty on lead in pigs, bars, and sheets.—United States v. Levitt, Case No. 15,594.

Carpets: Brussels and Wilton rugs, composed wholly of linen and worsted, *held* not dutiable as carpets or carpeting, or as manufactures of wool. Act 1832.—Hadden v. Hoyt, Case No. 5,890.

Carpets, Hemp: "A manufacture of hemp" does not include "hemp carpeting" so called in the trade, which, in fact, contains no hemp.—Baxter v. Maxwell, Case No. 1,126.

Chairs, Wrought Iron Railroad: Fishplates, under Act 1864, § 3, construed with Act 1842,

§ 20, are classed under the head of "wrought iron railroad chairs."—Cohen v. Phelps, Case No. 2,964.

Clothing, Ready-Made: Knit shirt and drawers ready to wear, *held* dutiable as "ready-made clothing" (Act 1832), unless known in trade as "hosiery."—Hall v. Hoyt, Case No. 5,934.

Coal: In order to ascertain whether "coke" is within the designation of "coal" in the tariff act, the intention of congress, as well as the commercial meaning of the word, will be inquired into.—Cochrane v. Swartout, Case No. 2,928.

Coins, Gold, Silver, and Copper: Chinese coin composed of copper and an alloy is not free of duty as "coins, gold, silver, and copper," unless imported to be used as currency.—Crocker v. Redfield, Case No. 3,400.

Copper Manufactures: Brass is a metal within the tariff acts, and Dutch metal, being a manufacture of brass, will not be considered a manufacture of which copper is a component of chief value. Act Feb. 24, 1869.—United States v. Ullman, Case No. 16,593.

Coral, Cut or Manufactured: Coral cut into form of a cameo, but not set. Act 1846, amended 1857.—Bailey v. Schell, Case No. 745.

Cordial, Sweet: Juniper cordial, which contains sufficient saccharine matter to disguise 11 per cent. of alcohol, is a sweet cordial, within section 103 of the customs act of 1799.—United States v. Three Hundred Casks of Juniper Cordial, Case No. 16,511.

Cork Wood or Bark Manufactured: In order that cork wood or bark should be classed as "manufactured," under the act of 1864, it should be in a state capable of being used, and designed for use, without further manufacture. —King v. Smith, Case No. 7,806.

Cork Unmanufactured: "Cork squares" are free from duty, under Act 1870, as "cork unmanufactured."—King v. Smith, Case No. 7,806.

Cotton Bagging: Substances not used for cotton bagging before the act of July 14, 1832, are not dutiable as such thereunder.—Martin v. Curtis, Case No. 9,160; Lee v. Lincoln, Id. 8,-195.

Cotton Bagging: Gunny cloth, known in commerce by that name, *held* dutiable as a manufacture of jute, and not as an article "suitable for the uses to which cotton bagging is applied," not otherwise provided for.—Troost v. Barney, Case No. 14,185.

Cotton Manufactures: Linen lusters, camlet lusters, toile du nord and lusters composed of linen and cotton, *held* dutiable as manufactures of cotton not otherwise provided for (Act July 30, 1846), under the rule of construction provided by Act Aug. 30, 1842, § 20.—Morlot v. Lawrence, Case No. 9,815.

Ebony or Rosewood, Manufactures of: Fancy boxes, of common wood, veneered with rosewood or ebony, and known to the trade as rosewood and ebony boxes, and as fancy boxes and furnished boxes, were dutiable under the act of 1846, as "manufactures of ebony, rosewood," etc.—Sill v. Lawrence, Case No. 12,850.

Engravings: Under the act of 1857, colored engravings were dutiable as "engravings," at 8 per cent., and not as "nonenumerated articles," at 15 per cent.—Knoedler v. Schell, Case No. 7,-890.

Fish: Though originally caught in American waters, and frozen in Canada, they are still subject to duty, unless identity be regularly proved. —Gauthier v. Bell, Case No. 5,277.

Fish, Fresh for Immediate Consumption: Fresh fish imported frozen together in barrels or large cakes are not exempt from duty as "fish, fresh for immediate consumption." Rev. St. § 2505.—Gauthier v. Bell, Case No. 5,277.

Fish, Product of Foreign Fishing: Whale oil, manufactured by the crew of an American whaler, is not dutiable as the product of "foreign fishing," though purchased and brought into port by persons in a foreign service.— United States v. Burdett, Case No. 14,684.

Glass Manufactures: Polished window glass *held* dutiable under Act July 30, 1846, as manufactures of glass not otherwise provided for.— Roosevelt v. Maxwell, Case No. 12,034.

Gloves, French Silk: French silk gloves are free under Act 1833, c. 54, § 4.—Adams v. Bancroft, Case No. 44.

Hair, Goats': Uncleaned and unmanufactured, *held* entitled to entry duty free, under Act March 2, 1861, § 23.—In re Fifty-One Bales of Goats' Hair, Case No. 4,781.

Hair, Goats': Goats' hair plush or mohair plush, composed partly of cotton, *held* dutiable as a manufacture of "goats' hair or mohair," under Act Aug. 30, 1842.—Thorp v. Lawrence, Case No. 14,005.

Hair Manufactures: "Calf-hair goods," manufactured of cotton and hair, the warp being cotton, and the woof being cattle hair, is not dutiable as a manufacture of hair, but as a manufacture of cotton. Rev. St. §§ 2499, 2504.—Butterfield v. Arthur, Case No. 2,249.

Hair, the Hair of an Animal: Bristles, being separately classified, are not included in the general words "the hair of an animal."—Von Stade v. Arthur, Case No. 16,998.

Hats: Hats made of palmetto leaf are not hats made of straw, chip, or grass, within Act May 22, 1824, c. 136.—United States v. Goodwin, Case No. 15,229.

Hosiery: Worsted cravats woven on stocking frames, and known in commerce under the general class of "hosiery," are dutiable as such. Act 1832.—Dorr v. Hoyt, Case No. 4,009.

Hosiery: "Hosiery," in Act 1832, has a more general meaning than "stockings," in Act 1816. —Hall v. Hoyt, Case No. 5,934.

Hosiery, Colored: Duties on colored hosiery, under Act July 30, 1846, as amended by Act March 3, 1857.—Reimer v. Schell, Case No. 11,-676.

India Rubber Manufactures: Act June, 1872, making a reduction of 10 per cent. on all manufactures of India rubber, gutta percha, and straw, means articles composed wholly of those materials.—Faxon v. Russell, Case No. 4,707.

India Rubber Manufactures: Webbing made of India rubber, silk, and cotton *held* taxable as a manufacture of India rubber, silk, and other articles. Act July 14, 1866, § 8.—Faxon v. Russell, Case No. 4,707.

Indigo: Duty on indigo under Acts July 14, 1832, c. 227, § 24; March 2, 1833, c. 55, § 5; 1841, c. 24, § 1; Aug. 30, 1842, c. 270, § 25.— United States v. Wigglesworth, Case No. 16,-690.

Iron: To authorize the entry of small pieces of bolt iron under the name of "chain links," it must be proved that they have been previously known in commerce by that name.—United States v. Sarchet, Case No. 16,224.

Iron: Construction of terms "anchor iron," "anchors," "straight, bent, and turned links," "cables and parts thereof."—United States v. Thirty-One Boxes & Packages of Imported Articles, Case No. 16,465a.

Iron, Bar or Bolt: Where bar or bolt iron has been changed by subsequent manufacture, it ceases to be subject to duty as such, although it may not have become a new and distinct manufacture, having a new name or use.—United States v. Sarchet, Case No. 16,224.

Iron Manufactures: Telegraph cable, composed of iron wire and gutta percha, *held* duti-

able as a manufacture not otherwise provided for, of which iron is the component material of chief value. Act March 2, 1861, § 22.—United States v. United States Tel. Co., Case No. 16,603.

Laces, Thread: Thread lace, made wholly by machinery, composed of linen and cotton, introduced since Act July 30, 1846, took effect, *held* dutiable as "thread laces," in Schedule E.—Lottimer v. Lawrence, Case, No. 8,521.

Laces, Silk: "Silk laces," as used in Act June 30, 1864, § 8, embrace all laces made of silk, except such as are specifically known exactly by other terms used in the tariff acts.—Jaffray v. Murphy, Case No. 7,172.

Leather, Upper, of All Kinds: "Patent leather" was dutiable under the act of July 30, 1846, at 20 per cent. ad valorem as "leather, upper, of all kinds," and not as a manufacture of leather.—Keutgen v. Lawrence, Case No. 7,745.

Linens: Linen pocket handkerchiefs, hemstitched or hemmed, *held* dutiable as "linens or a manufacture of flax," and not as "articles worn by men, women or children, made up wholly or in part by hand." Act Aug. 30, 1842.—Richardson v. Lawrence, Case No. 11,785.

Linens, Cambric: Cambric linen handkerchiefs, cut from the piece, and made abroad, are free of duty, under the act of 1832, as linen cambric.—Sheldon v. Swartwout, Case No. 12,749.

Marble, Manufactured: Marble cut into blocks simply for convenience in transportation is not dutiable as manufactured marble. Act 1832.—United States v. Wilson, Case No. 16,736.

Ornaments, Bead: Slipper cases consisting of cotton canvas embroidered with beads are dutiable as embroidered manufactures of cotton, and not as bead ornaments.—Weihenmyer v. Arthur, Case No. 17,360.

Paper Manufactures: Cardboard, on which is imprinted in colors an ornamental design or pattern for the purpose of showing the method of embroidering the pattern upon canvas, is a manufacture of paper.—Weihenmyer v. Arthur, Case No. 17,360.

Printed Matter: Pattern books consisting of sheets of paper stitched or folded together, upon which designs or patterns are printed in colors, are dutiable as printed matter.—Weihenmyer v. Arthur, Case No. 17,360.

Printed Matter: Perforated cardboard, on which are printed sentences or mottoes to be filled in with embroidery, are manufactures of paper, and not printed matter.—Weihenmyer v. Arthur, Case No. 17,360.

Printed Matter: German lottery tickets printed in full abroad, so as to require no additions in writing, were dutiable under Rev. St. § 2504, as "all printed matter," or under section 2516, as nonenumerated articles.—United States v. Kaub, Case No. 15,507.

Ribbons: Silk and cotton velvet ribbons, silk constituting the chief value, were dutiable at 60 per cent. under section 8 of the act of June 30, 1864.—Lane v. Russell, Case No. 8,053.

Ribbons: Under Act June 30, 1864, § 8, "ribbons" does not include cotton ribbons.—Chapon v. Smythe, Case No. 2,611.

Saltpeter, Crude: Saltpeter, known in commerce as "crude saltpeter," *held* entitled to free entry as such, though partly manufactured. Act 1832.—Farnham v. Bancroft, Case No. 4,671.

Seeds: Mustard, caraway, cardamon, and fenugreek *held* dutiable under provision for "garden seed and all other seeds not otherwise provided for."—Boving v. Lawrence, Case No. 1,712.

Shawls: Shawls, in part woolen, *held* dutiable at 50 per cent., under Act 1832, § 2, art. 2.—Hughes v. Hoyt, Case No. 6,846. See, also, Albers v. Frick, Case No. 136.

Ship-Building Materials: Ship-building materials used in the construction of a vessel built for a foreign government, for use between ports in its own country, are not entitled to entry duty free. Rev. St. §§ 2513, 2514.—Russell v. United States, Case No. 12,164.

Ship's Equipments: An anchor and chain cable purchased abroad to be bona fide a part of the equipment of a vessel must not have been purchased under a necessity occasioned by any fault of her masters or owners in not properly equipping her originally for the voyage.—Weld v. Maxwell, Case No. 17,374.

Ship's Equipments: An anchor and chain cable which is bona fide a part of the equipments and appurtenances of an American vessel is not, on being brought by her to the United States, subject to duty.—Weld v. Maxwell, Case No. 17,374.

Silks, Piece: Silk crapes *held* dutiable as "manufactures of silk not otherwise provided for" and not as "piece silks." Act 1864.—Lottimer v. Smythe, Case No. 8,523.

Silk, Sewing: "Twist," composed of goat or mohair and silk, or entirely of silk, if not known as "sewing silk" in commerce, is not dutiable as such. Act March 2, 1833.—Dorr v. Hoyt, Cases Nos. 4,007, 4,008.

Skins: Buenos Ayres sheepskins, imported with the wool on and dried but not dressed, do not fall within the head of "raw hides and skins of all kinds," etc., and are subject to a duty of 20 per cent. ad valorem. Act July 30, 1846, § 3.—Coggill v. Lawrence, Case No. 2,956.

Spirituous Liquors: "Angostura Bitters," used principally as a flavoring extract for mixed drinks, *held* dutiable as "spirituous liquors not otherwise enumerated," and not as a medicinal preparation.—Dallet v. Smythe, Case No. 3,545.

Straw Manufactures: Twisted straw, used for making straw laces, not known in commerce at the time of the passage of the tariff act, *held* not dutiable as straw manufactures, but as articles not otherwise specially provided for.—Rheimer v. Maxwell, Case No. 11,738.

Sugar, Loaf: Crushed loaf sugar is not "loaf sugar," within Act 1816, c. 107, where in commerce loaf sugar means sugar in loaves.—United States v. Breed, Case No. 14,638.

Teas: Under Act June 30, 1864, all teas in warehouse on July 1, 1864, were dutiable at 25 cents a pound, when afterwards withdrawn for consumption.—Smith v. Draper, Case No. 13,037.

Teas: Under the joint resolution of April 29, 1864, and Act June 20, 1864, § 20, the duty payable on a consumption entry of teas made April 29, 1864, was 30 cents a pound.—Smith v. Draper, Case No. 13,037.

Terra Japonica: "Gambia" *held* synonymous with "terra japonica," and exempt from duty. Act 1861.—Hallett v. Smythe, Case No. 5,959.

Tin Plates: Tin plates and terne tin imported subsequent to the enactment of the Revised Statutes *held* subject to the combined operation of sections 2503 and 2504.—Dodge v. Arthur, Case No. 3,950.

Tin, Terne: "Terne tin" in strips formed of short plates locked together, and coated, *held* dutiable as "terne tin," and not as articles or manufactures of tin. Act July 14, 1862.—Bruce v. Murphy, Case No. 2,047.

Veils, Silk: Crape veils, made of silk, are presumptively embraced within the term "silk veils," unless commercially known as distinctive articles.—Morrison v. Arthur, Case No. 9,842.

Vermillion: Vermillion *held* dutiable as such, and not as a "mercurial preparation."—Boving v. Lawrence, Case No. 1,711.

Waste or Shoddy: Pulverized waste or flock or shoddy is dutiable as "waste or shoddy" and not as a manufacture of wool. Act July 30, 1846.—Lennig v. Maxwell, Case No. 8,243.

Wine, Bottled: Act July 14, 1870.—Bensusan v. Murphy, Case No. 1,329.

Wearing Apparel: One going to a foreign country to buy clothing is not entitled to free entry thereof, though he wears the same in returning home.—Simmons' Case, Case No. 12,865.

Wearing Apparel: Shawls or scarfs manufactured on looms in strips or pieces, but separated before importation, *held* dutiable as "wearing apparel." Act July 30, 1846.—Maillard v. Lawrence, Case No. 8,971.

Wearing Apparel: The purpose, adaptation, and use of the article, and not its commercial designation, is the test of its dutiable description by the words "wearing apparel." Act July 30, 1846.—Maillard v. Lawrence, Case No. 8,971.

Wearing Apparel: Silk neckties *held* dutiable as "wearing apparel," under the acts of 1861 and 1862.—Fiske v. Smythe, Case No. 4,833.

Wood Manufactures: Shingles not specifically enumerated in Act March 2, 1861, *held* dutiable at 30 per cent., as manufactures of wood.—Stockwell v. United States, Case No. 13,466.

Wool: Wool must pay duty on its weight on arrival, though the same was increased by absorption of moisture, where not exposed to or injured by sea water.—United States v. Choteau, Case No. 14,793.

Wool, Washed: The rate on washed wool is computed by doubling the specific and ad valorem rates for unwashed wool. Rev. St. § 2504, Sched. L.—Foster v. Simmons, Case No. 4,982a.

Wool Manufactures: Hearth rugs, made of worsted, *held* not dutiable as manufactures of wool. Act July 14, 1832.—Riggs v. Frick, Case No. 11,825.

Wool Manufactures: Bombazines, being goods of which wool is a component part, *held* dutiable at 30 per cent. Act 1824, c. 136.—United States v. Clarke, Case No. 14,813.

Worsted Manufactures: Slipper patterns made of cotton canvas embroidered with worsted, and designed to be filled with more embroideries, are dutiable as embroidered manufactures of cotton, and not as manufactures of worsted.—Weihenmyer v. Arthur, Case No. 17,360.

III. COLLECTION DISTRICTS AND OFFICERS.

See, also, post, § 123.

§ 17. Appointment of officers.

The approbation of the secretary of the treasury is presumed where the collector appoints and commissions an inspector.—United States v. Bachelder, Case No. 14,490.

§ 18. Powers.

The collector cannot bind the government by any acts beyond or contrary to the authority given him by law.—Johnson v. United States, Case No. 7,419.

The government cannot be prejudiced by an opinion or promise of its collector made after he left office.—Andrae v. Redfield, Case No. 367.

An ex-collector cannot appropriate moneys of the United States in his hands in payment of fees due to officers of the customs (Act March 2, 1799), as such authority can be exercised only by the collector actually in office.—Champney v. Bancroft, Case No. 2,587.

A customhouse officer has no power to control gate keepers at piers.—United States v. Desmond, Case No. 14,951.

Jurisdiction of surveyor for port of Eastport includes district of Passamaquoddy.—Ayer v. Thacher, Case No. 684.

§ 19. Duties and liabilities.

The duties of the collector of the port in relation to the branding of casks, chests, or cases of distilled spirits, wines, and teas, and the giving of certificates under Acts March 2, 1799, and April 6, 1802.—United States v. Austin, Case No. 14,480.

Duties of collectors as disbursing agents under Acts Aug. 23, 1842, and June 12, 1858.—United States v. Austin, Case No. 14,480.

The collector is not liable for goods lost while on deposit in a customhouse warehouse, in the absence of personal negligence. Negligence cannot be inferred from the mere loss.—Brissac v. Lawrence, Case No. 1,888.

The collector is not personally responsible for the negligence of his subordinates.—Brissac v. Lawrence, Case No. 1,888.

A collector is not liable for moneys stolen by his deputy without neglect or default on his part.—United States v. Collier, Case No. 14,833.

A collector is personally liable for the illegal acts of his deputy in exacting fees not authorized by law, though he has paid them over to the government.—Ogden v. Maxwell, Case No. 10,458.

Daily intoxication of the bookeeper is not sufficient to charge the collector with a loss not shown to have been caused thereby.—Brissac v. Lawrence, Case No. 1,888.

Officer wrongfully seizing goods, if without probable cause, is liable for all losses and injuries; but if with probable cause, only for those caused by ordinary neglect.—Burke v. Trevitt, Case No. 2,163.

The treasury department acts in a judicial capacity in determining the charges to which a collector is subject, and cannot subsequently vary such adjudication to his prejudice.—United States v. Collier, Case No. 14,833.

§ 20. Secretary of treasury.

The secretary of the treasury has no legal power to direct the judgment of the appraisers in valuing goods, or in adding to or subtracting from the charges in invoices, for the purpose of determining market values.—Gray v. Lawrence, Case No. 5,722.

Regulations made by the secretary of the treasury under authority of Rev. St. § 251, when fairly within its scope, and not infringing legal rights of individuals, have the force of law.—United States v. Hutton, Case No. 15,433.

The secretary of the treasury has no power to suspend the issue of certificates to importers of distilled spirits, under Act March 2, 1799.—Foster v. Peaslee, Case No. 4,979.

Secretary of the treasury has no power to fix a chemical analysis of Peruvian bark as the only test of dutiable value.—Bartlett v. Kane, Case No. 1,077.

See, also, post, § 63.

§ 21. Deputies and assistants.

A collector, when authorized by the secretary of the treasury, may appoint as many deputies as may be necessary.—Schmaire v. Maxwell, Case No. 12,460.

Inspectors of the customs are public officers, and not the mere servants and agents of collector.—Hooper v. Fifty-One Casks of Brandy, Case No. 6,674; United States v. Morse, Id. 15,820.

The offices of deputy collector and of inspector may be held by the same person. Act 1822, c. 107.—United States v. Morse, Case No. 15,820.

The deputy collector is a permanent officer of the customs, and may exercise and perform the

functions, powers, and duties of the collector. Act March 3, 1817.—United States v. Barton, Case No. 14,534.

He may appoint a merchant appraiser, on a reappraisement.—Falleck v. Barney, Case No. 4,625.

He may administer any oath required to be administered by the collector.—Schmaire v. Maxwell, Case No. 12,460.

Reappraisers may be sworn by a deputy collector.—Falleck v. Barney, Case No. 4,625; Lehmaier v. Maxwell, Id. 8,214.

The principal appraisers must act in person. An appraisal on certificate of a deputy is void. Acts 1842, 1846.—Barker v. Lawrence, Case No. 991.

At a port where there are no appraisers, a deputy collector may examine goods entered for warehousing to ascertain their dutiable value, as well as the collector.—Spring v. Russell, Case No. 13,261.

A deputy collector has no authority to waive a tender proposed to be made by importers, by acknowledging a tender when none is made.—United States v. Nash, Case No. 15,856.

§ 22. Certificate of probable cause.

Where the seizure is under circumstances warranting suspicion, the collector is entitled to a certificate of probable cause. Act 1799, §§ 71, 89; Act 1807, § 1.—United States v. Three Bales of Cloth, Case No. 16,495.

A certificate of probable cause of seizure is properly granted on the report of public and merchant appraisers that an importation and entry was fraudulently made with intent to evade payment of duties.—United States v. Thirty-one Boxes & Packages of Imported Articles, Case No. 16,465a; Same v. Three Bales of Cloth, Id. 16,495.

A certificate of probable cause of seizure will be granted where it appears that the seizure was made in good faith, and after consultation with the surveyor, naval officer, and district attorney.—United States v. One Hempen Cable and One Hempen Hawser, Case No. 15,931a.

A motion for a certificate of probable cause of seizure may be made subsequent to the decree, and upon the hearing the court is not limited to the evidence introduced upon the trial.—In re Gala Plaid, Case No. 5,183.

In determining the question, the court cannot consider the fact that the officer acted in an oppressive manner, and without a warrant.—In re Gala Plaid, Case No. 5,183.

The fact that the claimant was selling the goods at a low price in an obscure town, declaring them to have been imported, and that duty had been paid upon only a small portion, was held sufficient to justify their seizure.—In re Gala Plaid, Case No. 5,183.

Under the act of March 3, 1863, the certificate therein provided for must be applied for in proper season.—Faber v. Barney, Case No. 4,601.

After two years and notice for execution on the judgment, *held*, that the application for a certificate should not be granted.—Faber v. Barney, Case No. 4,601.

A certificate of probable cause (Rev. St. § 989) and a stay of execution will be granted, though application not made until after judgment for excess duties paid where such appears to have been the practice.—Cox v. Barney, Case No. 3,300.

§ 23. De facto officers.

The acts of a de facto appraiser are valid.—Gibb v. Washington, Case No. 5,380.

§ 24. Compensation.

The amount received by officers of the customs for forfeitures constitutes no part of the emoluments to which the limitation of the maxim of compensation allowed by law applies.—Hooper v. Fifty-One Casks of Brandy, Case No. 6,674.

Commissions on duty bonds are a part of such "emoluments."—Hoyt v. Curtis, Case No. 6,808.

The estate of a collector of customs is not entitled to fees or perquisites of the office accruing, after his death, from the official acts of his deputies.—Merriam v. Clinch, Case No. 9,460.

Where the United States adopted the acts of a collector, they are estopped to claim that he is not entitled to the compensation allowed by the existing statutes.—United States v. Collier, Case No. 14,833.

Fees of collector of port for branding casks, chests, or cases of distilled spirits, wines, and teas, and giving certificates under Acts March 2, 1799, and April 6, 1802.—United States v. Austin, Case No. 14,480.

A surveyor of customs is entitled to commission on moneys paid to him for the treasury department, but not on moneys already in the treasury, which are transferred to him from other places of deposit.—United States v. Sherlock, Case No. 16,277.

A collector removed from office before the expiration of the year is entitled to the maximum amount of $3,000 out of the fees, etc., collected at such time, under Act 1822, c. 107, providing that the excess of emoluments over $3,000 in any one year shall be paid into the treasury.—United States v. Pearce, Case No. 16,021.

The aggregate compensation of the surveyor of the port of St. Louis cannot exceed $5,000 per annum. Acts 1822, 1831, 1841, 1857, 1872.—Donovan v. United States, Case No. 3,994.

Customs collectors, as respects compensation, are divided into two classes,—collectors of the seven enumerated ports, and collectors of non-enumerated ports.—Donovan v. United States, Case No. 3,994.

Under Act March 3, 1841, private bonded warehouses are public storehouses, and collectors are authorized to retain, as emoluments, money received for deposit of importations therein, under the same provisions applicable to public storehouses.—United States v. MacDonald, Case No. 15,668.

Act March 2, 1799, as amended by act of 1816, authorizing collectors to pay fees due to officers of the customs out of the revenue of the United States, creates no lien on money in his hands, arising from the revenue.—Champney v. Bancroft, Case No. 2,587.

Compensation of collectors under Acts Sept. 30, 1850, and Aug. 1, 1852.—United States v. Converse, Case No. 14,848.

As to the compensation of the collector of the district of Upper California under Act March 3, 1849.—United States v. Collier, Case No. 14,833.

Commissions of collector under Act 1820.—Bates v. Drury, Case No. 1,100.

Fees of collectors as disbursing agents, under Acts Aug. 23, 1842, and June 12, 1858.—United States v. Austin, Case No. 14,480.

Fees of collector for drawing drafts under Act July 29, 1813.—Andrews v. United States, Case No. 381.

Compensation of a deputy appointed under Act March 3, 1817.—Andrews v. United States, Case No. 381.

A deputy collector acting also as inspector may receive additional compensation therefor.—United States v. Morse, Case No. 15,820.

§ 25. Reimbursement of expenses.

Disbursements of collectors of ports.—Andrews v. United States, Case No. 381.

Collector of port, by failing to keep and transmit yearly accounts of incidental expenses, does not forfeit right to reimbursement, but only liable to penalty.—Andrews v. United States, Case No. 381.

Under Act May 7, 1822, c. 107, § 9, providing for the salaries of collectors and naval officers, the necessary expenses of the office are first to be paid out of the receipts, and the government is not liable if the balance is not sufficient to make up the salary.—Wentworth v. United States, Case No. 17,414.

§ 26. Official bonds.

A bond given by a collector of customs under Act March 2, 1799, binds the sureties from the time he assumed office, though not executed until several months thereafter.—United States v. Ellis, Case No. 15,047.

The bond of a collector of customs as a depositor of public money and fiscal agent of the United States under Act Aug. 6, 1846, does not apply to past transactions.—United States v. Ellis, Case No. 15,047.

Giving a second official bond by a collector, with different sureties, does not of itself merge or extinguish the first; and an unsatisfied judgment on one does not bar an action on the other for the same breach.—United States v. Hoyt, Case No. 15,409.

The sureties on a bond of a collector of customs appointed during a recess of the senate are not liable for his acts after he accepted a new appointment made by the president by and with the advice of the senate.—United States v. Ellis, Case No. 15,047.

Where duties not required by law were imposed on a collector of customs by the superior officers of the treasury department, he is still required to discharge his duties according to law, and the sureties on his official bond are liable for his failure to do so.—United States v. Gaussen, Case No. 15,192.

Delay on the part of the government in enforcing its rights cannot be set up as a defense.—United States v. Gaussen, Case No. 15,192.

No change made by law in the rate of duties, the routine of the office, or in the method of conducting it, which does not change materially the character of the office, will discharge the sureties on the official bond of the collector.—United States v. Gaussen, Case No. 15,192.

§ 27. Actions against officers.

The district court as a court of revenue has jurisdiction of an action to recover property wrongfully seized by customs officers, and to award damages, or to compel the seizor to proceed to adjudication.—Burke v. Trevitt, Case No. 2,163.

Trover will lie against a collector who unlawfully detains the goods of an importer, and it is no defense that the collector acts under the instructions of the secretary of the treasury.—Fiedler v. Maxwell, Case No. 4,760.

The remedy of an importer for the refusal of the collector to appoint a merchant appraiser is an action on the case.—Lehmaier v. Maxwell, Case No. 8,214.

The only defense admissible, in trespass against a customs officer for seizing goods as imported in violation of the revenue laws, is a judgment of condemnation on proceedings in rem in the district court, or a certificate of reasonable cause.—Hall v. Warren, Case No. 5,952.

Having possession of the goods, and exercising acts of ownership over them, the plaintiff may sue for a trespass on them in his own name.—Hall v. Warren, Case No. 5,952.

Shortness of public notice of sale of warehoused goods reported perishable *held* not per se sufficient evidence of fraud to warrant judgment against the collector.—Gould v. Hammond, Case No. 5,638.

Where bonds taken for property seized have been turned over to the government, and not collected, the collector is not entitled to a credit for any part thereof in an action against him by the government.—United States v. Collier, Case No. 14,833.

A collector is not liable to pay interest on moneys received in the case of open and running accounts, under Act March 3, 1797, § 1.—United States v. Collier, Case No. 14,833.

See, also, ante, § 22.

IV. ENTRY AND APPRAISAL OF GOODS, BONDS, AND WAREHOUSES.

Liability of goods in warehouse to levy on execution, see "Execution," § 1.

§ 28. Report of entry.

Privateers are included within the exemption of "ships or vessels of war" from making a report and entry on arriving at a port of the United States. Act March 2, 1799, § 31.—The Wilson v. United States, Case No. 17,846.

See, also, post, § 113.

§ 29. The entry.

On the entry of sugar in peculs the weight is properly stated by giving the weight of peculs under the usage of the custom house at the time of entry.—United States v. Baker, Case No. 14,500.

Goods imported by the purchaser, when subject to ad valorem duty, should be entered at the purchase price, while goods imported by the manufacturer should be entered at the market price or value at the place of exportation.—United States v. Twelve Casks of Cudbear, Case No. 16,553; Same v. Twenty-Six Bales of Rubber Boots, Id. 16,570; Same v. Twenty-Six Cases of Rubber Boots, Id. 16,571.

The importer may enter his goods at their cash value in the foreign country, reduced to specie.—Grant v. Maxwell, Case No. 5,699.

The consignee who has sworn to the invoice sent by the owner will not be allowed to amend the entry to avoid a penalty after the collector has directed an appraisement.—Harriman v. Maxwell, Case No. 6,105.

There is no importation under the customs laws unless the goods are landed, and it is not a compliance therewith to merely bond or pay duties and permit re-export without landing.—Kohne v. Insurance Co. of North America, Case No. 7,922.

See, also, post, § 79.

§ 30. Place of entry.

If the proper port of entry of the district be in possession of the enemy, the collector may remove the customhouse to some other convenient port within the district, and there admit vessels to entry.—United States v. Hayward, Case No. 15,336.

§ 31. Entry of distilled spirits.

The certificate which the collector is required to give the importer of distilled spirits is sufficient where the signature is printed. Act March 2, 1799, § 41.—United States v. Schoyer, Case No. 16,232a.

See, also, post, §§ 84, 123.

§ 32. The manifest.

The manifest must name shipper, and in case of return of part of cargo must show by whom shipped out and to whom consigned inward.—The Ariel, Case No. 527.

A horse brought in from adjacent foreign territory as a mere instrument of conveyance in the prosecution of a temporary journey is not within Act 1821, § 1, and no manifest thereof is necessary.—United States v. One Sorrel Horse, Case No. 15,953.

Articles purchased abroad for a vessel, to be used as a part of her equipment, are not sea stores (Act March 2, 1799), and, where they remain on board on her arrival, they need not be reported by the master in his manifest.—United States v. Twenty-Three Coils of Cordage, Case No. 16,573.

The master of a vessel entering a port of the United States with merchandise subject to duty consigned to such port is bound to deliver his manifest, though he intend such merchandise to be returned to a foreign port.—The Fame, Case No. 4,633.

See, also, post, §§ 81, 110.

§ 33. Permit to unlade.

Goods free of duty cannot be lawfully unladen and delivered without a written permit from the collector and naval officer. (Act March 2, 1799, § 50.)—United States v. The Sarah B. Harris, Case No. 16,223.

Mackerel, the property of an American citizen, caught in an American vessel by an American seaman, and shipped in an American vessel from a foreign port of transshipment, cannot be landed under such section without a written permit.—United States v. The Sarah B. Harris, Case No. 16,223.

Silver dollars are "goods, wares, and merchandize," within Act March 2, 1799, c. 128, § 50, for the landing of which a permit from the customhouse is necessary.—The Elizabeth and Jane, Case No. 4,355.

Appurtenances or equipments of a ship, purchased bona fide for its use, may be landed without a permit under act 1799, c. 128, § 50.—United States v. Chain Cable, Case No. 14,776.

Opium shipped from San Francisco to Portland by the way of Victoria, B. C., and taken ashore there, for however short a time, cannot be landed by the same vessel at Portland without a permit.—Ten Cases of Opium, Case No. 13,828.

See, also, post, §§ 83, 112.

§ 34. Invoices.

The collector has no power to permit an entry of merchandise unaccompanied by an invoice, or a sufficient excuse for its absence. Act March 3, 1863, § 1.—United States v. Thirty-Nine Thousand One Hundred and Fifty Cigars, Case No. 16,464.

An invoice executed in triplicate in due form must be produced at or before each shipment to the consul at the place of shipment. Shipments in trains are subject to the same rules as shipments by water.—Locke v. United States, Case No. 8,442.

It is no objection that an agent of the importer makes him debtor for the goods in the invoice, as bought of the agent, if in fact the latter acted only as agent for the importer in the purchase.—United States v. May, Case No. 15,752.

Under the act of 1799 a foreign manufacturer might invoice goods made by him at the actual cost of the raw material, the value of labor employed, and the expense of transportation to the port of shipment.—Ninety-Five Bales of Paper v. United States, Case No. 10,274.

The cost of the raw materials is to be taken at the market price of such material at the time when the manufacture of the goods was completed.—United States v. Sixteen Cases of Silk Ribbons, Case No. 16,301.

The sum at which an agent who purchased goods for his principal surrendered them to the latter, because he was unable to pay more, is not the proper invoice price; otherwise where the agent violated his authority in purchasing the goods.—United States v. Sixty-Five Packages of Glass, Case No. 16,305a.

The invoice of goods procured otherwise than by purchase must state their actual market value at the time and place when or where they are procured or manufactured. Act March 3, 1863.—In re Six Cases of Silk Ribbons, Case No. 12,914; In re Twelve Hundred and Nine Quarter Casks, etc., of Wine, Id. 14,279; United States v. Sixteen Cases of Silk Ribbons, Id. 16,301; Same v. One Case of Cashmere Shawls, Id. 15,923.

"Actual cost" means the cost at the place of exportation, with the addition of all dutiable charges. The fact that the goods could be manufactured for the invoice price is immaterial.—United States v. Eighty-Two Packages of Glass, Case No. 15,038.

"Actual market value" is the price at which the manufacturer holds his goods for sale in ordinary course of trade.—In re Six Cases of Silk Ribbons, Case No. 12,914.

In the absence of proof of sales or offers to sell, market value may be ascertained by cost of raw material at the time and place of manufacture, with the cost of manufacture and a manufacturer's profit.—In re Six Cases of Silk Ribbons, Case No. 12,914.

The owner, consignee, or agent may make addition in the entry to the invoice cost or value to raise the same to the true market value.—Harding v. Whitney, Case No. 6,052.

A manufacturing importer is one who controls, directs, or superintends the artisans whose skill and labor are used in preparing an article for sale or use, or who is the general head or proprietor of an establishment in which articles are manufactured.—United States v. Five Casks of Files, Case No. 15,112.

In arriving at market value at port of exportation, purchaser can only be required to adopt methods usually adopted by merchants in making purchases.—Bartlett v. Kane, Case No. 1,077.

Fraud will not be imputed to an importer in invoicing goods at the weight as given by the customary method of weighing, but the appraisers are not bound thereby.—United States v. Nash, Case No. 15,856.

An accepted order for goods to be manufactured, although a purchase in the usage of trade as between the parties, is not a purchase under section 16, Act Aug. 30, 1842, so as to authorize the entry of goods, when imported, at a dutiable value fixed at the current price of like goods at the time the order was accepted, where the goods are to be manufactured after the acceptance of the order.—Pierson v. Lawrence, Case No. 11,158; Same v. Maxwell, Id. 11,159.

The lowest cash price given by a merchant in a regular proposition for wine for export in quantities will fix a market value for the purpose of invoicing wines in substance the same as those offered.—In re Three Thousand One Hundred and Nine Cases of Champagne, Case No. 14,012.

Any money which is in common use as a medium of purchase and sale, though not of the coinage of the country, is a currency of the country within Act March 3, 1801.—United States v. Dry Ox and Cow Hides, Case No. 14,995.

The "actual market value" of wines at the "place" where they were procured or manufactured determined in the case of wines dosed and prepared for export.—In re Three Thousand One Hundred and Nine Cases of Champagne, Case No. 14,012.

How actual market value determined in the case of wines sold by agents here for delivery at a certain sum, duty free.—In re Twelve Hundred and Nine Quarter Casks, etc., of Wine, Case No. 14,279.

See, also, post, § 80.

§ 35. Ascertainment of value and amount—In general.

See, also, post, §§ 82, 109.

Values of imported goods subject to specific duties are ascertained in the same manner as those subject to ad valorem duties. Act 1820. —Bailey v. Goodrich, Case No. 735.

Act July 30, 1846, did not vary the law previously in force regulating the method of ascertaining the quantity of merchandise imported. —Wilson v. Maxwell, Case No. 17,824.

§ 36. —— "Actual cost" or "market value" in general.

Under Act April 20, 1818, c. 74, the actual cost is still the true basis of valuation.—Tappan v. United States, Case No. 13,749.

"Actual cost" in Act 1799, c. 128, means bona fide purchase price, not market value.—Alfonso v. United States, Case No. 188.

Rate of duty on wine imported in bottles, each containing more than a pint and less than a quart, is controlled by actual cost of the wine, and not by its cost estimated on the supposition that each bottle contained a quart.—Cavaroc v. Collector, Case No. 2,529.

§ 37. —— Time to which valuation relates.

The term "ad valorem," as used in the customs laws, does not always mean the actual value of the article at the place of exportation. —United States v. Clement, Case No. 14,815.

Under Act Aug. 30, 1842, § 16, the value of the goods at the time of their purchase, and not that at the time of their exportation, is the dutiable value.—Morlot v. Lawrence, Case No. 9,816; Griswold v. Same, Id. 5,837.

Time of shipment abroad will be taken as the time of purchase, unless the collector is notified to the contrary. Act Aug. 30, 1842.—Crowley v. Maxwell, Case No. 3,449; Focke v. Lawrence, Id. 4,894; Harriman v. Maxwell, Id. 6,105.

The date of an invoice is prima facie evidence, as against the purchaser making the entry, of the time of their purchase, and conclusive until a mistake in the date is proved.—Pierson v. Lawrence, Case No. 11,158; Same v. Maxwell, Id. 11,159.

Purchases are considered as made at the date of the invoices, and not when the orders for goods were accepted when the market rate has advanced.—Wilson v. Lawrence, Case No. 17,816.

Iron purchased in Wales, and transshipped at Liverpool, will be appraised at its market value in Liverpool. Act Aug. 30, 1842, § 16.—Goddard v. Maxwell, Case No. 5,492.

Market value of sugars transported from Cuba to Halifax, and thence imported, how ascertained. Act Aug. 30, 1842.—Barnard v. Morton, Case No. 1,006.

Rule for ascertaining ad valorem dutiable value of merchandise procured by purchase prescribed by Act 1842, § 16, not repealed by Act 1846.—Barnard v. Morton, Case No. 1,005.

The valuation of goods as at the time of their exportation, instead of the time of their purchase, is illegal. Act 1846.—Maillard v. Lawrence, Case No. 8,972.

Act March 3, 1851, § 1, varies Act July 30, 1846, § 8, only so far as concerns the period of time for valuing imports.—Morris v. Maxwell, Case No. 9,834.

In the case of iron purchased in Wales, and transshipped at Liverpool, *held*, that the "period of exportation" was the time when the iron left Liverpool. Act March 3, 1851.—Forman v. Peaslee, Case No. 4,941.

All goods subject to an ad valorem duty, though obtained otherwise than by purchase, are to be appraised at the period of exportation under Act March 3, 1851.—Forman v. Peaslee, Case No. 4,941.

Sugar should be appraised at market value on the date of actual loading, and not at the date of sailing.—United States v. McKean, Case No. 15,681a.

The actual value of the articles at the time and place of shipment will control in fixing the duty. Act June 30, 1864.—Davidson v. Draper, Case No. 3,604.

Under Act March 3, 1865, the dutiable value of merchandise is the actual market value or wholesale price at period of exportation in country from which it was exported.—Cobb v. Hamlin, Case No. 2,922.

§ 38. —— Effect of invoice valuation.

The collector is not bound to take the invoice valuation of goods, supported by the owner's oath on the entry, as their dutiable value.—Focke v. Lawrence, Case No. 4,894.

Effect of invoice valuation in fixing duty.—Davidson v. Draper, Case No. 3,604.

Importers cannot qualify the effect of their act in adding to the invoice value by stating that it was made to prevent a seizure.—Haas v. Arthur, Case No. 5,885.

§ 39. —— Costs and charges in general.

The charge for "costs and charges" must include only those actually paid.—Hutton v. Schell, Case No. 6,961.

Costs and charges actually paid should be added to the invoice, and not arbitrarily fixed.—Benkard v. Schell, Case No. 1,307.

Under Act Aug. 30, 1842, § 16, assessing duties, all costs and charges are to be included in actual market value.—Cobb v. Hamlin, Case No. 2,922.

Charges and expenses not to be added to determine whether wool is dutiable. Act 1832.—Armstrong v. Hoyt, Case No. 544a.

The additional charges authorized by law to be added to the appraised value of dutiable merchandise may be added by the appraisers, with the sanction of the collector.—Gibb v. Washington, Case No. 5,380.

§ 40. —— Cost of transportation.

Freight is not a dutiable charge under Act March 3, 1851.—Benkard v. Schell, Case No. 1,307; Bliss v. Redfield, Id. 1,549; Vaccari v. Maxwell, Id. 16,810.

Costs of transportation of goods from the interior to the place of exportation are not included in charges to be added to the appraised value of dutiable merchandise. Act March 3, 1851.—Forman v. Peaslee, Case No. 4,941; Gibb v. Washington, Id. 5,380; Hutton v. Schell, Id. 6,961. CONTRA, see Warren v. Peaslee, Case No. 17,198.

Where merchandise is shipped from Smyrna, and transshipped at Liverpool, the estimated freight between such places cannot be added to the market value and charges at Smyrna to make up the dutiable value. Act 1851.—Gant v. Peaslee, Case No 5,212.

Where goods are to be valued "at the place from whence exported," the value of goods manufactured in one city, and sent to another for exportation, will include the costs of transportation between such places. Act July 14, 1832.—Hoffman v. Williams, Case No. 6,579.

Transportation from port of shipment is not a dutiable charge, under Act March 3, 1851.—Benkard v. Schell, Case No. 1,307.

Where sales are free on board, the addition of transportation charges from the place of production is illegal.—Bliss v. Redfield, Case No. 1,549.

The costs and charges of transportation from a blockaded port in lighters to another port, from which shipment can be made, cannot be added as part of the dutiable value.—Wilbur v. Lawrence, Case No. 17,635.

A separate freight paid from Canton to Manilla, where the cargo was transshipped, cannot be added in ascertaining dutiable value. Act 1842.—Millar v. Millar, Case No. 9,546.

Where goods are shipped from China to New York via London, the freight from China to London cannot be added as part of the dutiable value.—Grinnell v. Lawrence, Case No. 5,831; Griswold v. Maxwell, Id. 5,838.

§ 41. —— Export duties.

The addition to the invoice value of an arbitrary and fictitious charge for export duty at the place of exportation is erroneous.—Riess v. Redfield, Case No. 11,821.

§ 42. —— Insurance.

Under Act April 20, 1818, § 4, in calculating ad valorem duties insurance is not a part of the dutiable value.—United States v. May, Case No. 15,752.

§ 43. —— Commissions.

Under Act April 20, 1818, § 4, in calculating ad valorem duties commissions do not constitute a part of the dutiable value.—United States v. May, Case No. 15,752.

This is the rule under Act March 3, 1865.—Cobb v. Hamlin, Case No. 2,922.

A commission must in all cases be added to the invoice value, though none is in fact paid, and the importers of such article do not customarily pay any commission. Act Aug. 30, 1842.—Norcross v. Greely, Case No. 10,294.

Same rule under Act March 3, 1851.—Hutton v. Schell, Case No. 6,961.

Commissions on importations; amount chargeable. Act March 3, 1851.—Benkard v. Schell, Case No. 1,307.

The rates of commissions to be charged to goods to make up their dutiable value (Act Aug. 30, 1842, § 16) must be ascertained in the same manner as the value of the goods. The collector has no power to charge an arbitrary rate.—Munsell v. Maxwell, Case No. 9,932.

It is error to charge a greater sum for commissions than the usual charge in the place of exportation. Act March 3, 1851.—Riess v. Redfield, Case No. 11,821.

Whether the commission, which is to be added as a dutiable charge, is to be cast on the foot of the invoice, with or without the addition of the charges, depends on usage, and is not fixed by law. Act March 3, 1851.—Warren v. Peaslee, Case No. 17,198.

§ 44. —— Discounts.

The amount of "discount for cash" shown on invoice must be deducted from the gross amount in estimating duties.—Goddard v. Arthur, Case No. 5,489; Gray v. Lawrence, Id. 5,722. But, see Riess v. Redfield, Case No. 11,821.

§ 45. —— Packages and packing.

Under Act April 20, 1818, § 4, the cost of outside packages is not a part of the dutiable value.—United States v. May, Case No. 15,752.

The weight of the boxes, cases, or packages in which goods are imported is not the subject of appraisement, within the meaning of Act July 30, 1846, § 8.—Wilson v. Maxwell, Case No. 17,824.

Where the purchase price included the package or covering, charges therefor are not to be added by the appraiser.—Harding v. Whitney, Case No. 6,052.

Where wool is packed in hides of equal value therewith, which are an article of value in the market, the weight of the hides will not be deducted in ascertaining the cost of the wool per pound.—Saxonville Mills v. Russell, Case No. 12,413.

Expense of salt sacks is embraced in "all costs," and is to be added to market value of salt.—Barnard v. Morton, Case No. 1,005.

A pro rata abatement is made upon the amount of incidental charges at port of shipment, and upon the value of the hogsheads, etc.—Brune v. Marriott, Case No. 2,052.

The cost of packages in which molasses was imported *held* to form a proper item of its value on which to charge ad valorem duties.—United States v. Clement, Case No. 14,815.

Both "draft" and "tare" are allowable on sugar imported in bags, and subject to duty by weight. Act March 2, 1799, § 58.—Napier v. Barney, Case No. 10,009.

Ascertaining weight of teas exported, where the chests were of different weights and tares, and teas of different values.—United States v. Aymar, Case No. 14,483.

Value of goods purchased in bulk, and afterwards put in a packing house for convenience, does not include cost of packing.—Cobb v. Hamlin, Case No. 2,922.

§ 46. —— Allowance for difference in currency.

Act March 2, 1799, § 61, in relation to regulations for estimating duties where cost is exhibited in foreign depreciated currency, is not repealed by Act May 22, 1846.—Grant v. Maxwell, Case No. 5,699.

Under the power to make regulations for estimating duties in the case of depreciated foreign currency (Act March 2, 1799, § 61), the president cannot fix an arbitrary value for foreign currency, without regard to its intrinsic value.—De Forest v. Redfield, Case No. 3,746.

Deductions should be allowed from nominal value of imports for foreign depreciated currency.—Alsop v. Maxwell, Cases Nos. 263, 264; Loewenstein v. Same, Id. 8,462.

An importer is not entitled to an allowance for depreciation of the Austrian currency, unless his invoice is accompanied by a consular certificate of the value of such currency. Act March 2, 1799.—Rich v. Maxwell, Case No. 11,759; Dutilh v. Same, Id. 4,207, 4,208.

The presentation of the consular certificate subsequent to payment of the duties is ineffectual.—Dutilh v. Maxwell, Case No. 4,208.

The collector need not demand such certificate, but it must be offered by the importer, or a bond to produce it.—Rich v. Maxwell, Case No. 11,759.

In the case of importations about a month apart, *held* sufficient where a consular certificate was presented with the first importation only.—Reynolds v. Maxwell, Case No. 11,731.

A consular certificate as to the value of foreign currency, attached to an invoice, may be contradicted by the importer.—De Forest v. Redfield, Case No. 3,746.

Where the invoice and entry are made out in a denomination of foreign money not enumerated in the statute, the value of the goods must be estimated according to the intrinsic value of such foreign money, compared with money of the United States. Act March 2, 1799, § 61; Act March 3, 1801, § 2.—De Forest v. Redfield, Case No. 3,746.

§ 47. —— Allowance for loss.

The actual amount arriving, and not the amount shipped, is liable for duty, in the absence of proof that the loss in transit improved the quality of the goods.—Austin v. Peaslee, Case No. 666; Brune v. Marriott, Id. 2,052; Schuchardt v. Lawrence, Id. 12,484; United States v. Nash, Id. 15,856.

The dutiable value in case of loss by leakage is ascertained by deducting from the dutiable value of the invoice amount the amount of deficiency shown by the returns of the official weigher and gauger.—Brune v. Marriott, Case No. 2,052.

A survey of goods damaged on the voyage need not be made previous to an appraisement of the damages for the purpose of an abatement of duties.—Wight v. Curtis, Case No. 17,628.

An error of the importers in designating the appraising officers in an application for an appraisement will be disregarded.—Wight v. Curtis, Case No. 17,628.

The collector is bound to order an appraisement of the damage of goods on the voyage on reasonable evidence of such damage.—Wight v. Curtis, Case No. 17,628.

Under Rev. St. §§ 2927, 2928, there can be an appraisement for an abatement of duties for damage sustained to the goods during the voyage after entry and payment of the estimated amount.—United States v. Phelps, Case No. 16,040.

§ 48. Time and mode of appraisal.

Under Act March 3, 1851, goods are to be appraised as at the time of their exportation.—Morris v. Maxwell, Case No. 9,834.

An appraisement by part only of the public appraisers is valid unless protested against; and it is only necessary that those who certify to the appraisal should actually have made it.—McCall v. Lawrence, Case No. 8,672.

The assistant appraisers, under Act May 28, 1830, are in aid of those under Act March 1, 1823, and an appraisement by each set is not necessary.—United States v. Fourteen Packages of Pins, Case No. 15,151.

Official appraisers, even after appeal taken, have right to production of all documents connected with importation.—Bartlett v. Kane, Case No. 1,077.

Merchant appraisers need not act in presence of importer.—Bangs v. Maxwell, Case No. 841.

The merchant appraisers in whose presence the packages must be examined by the custom-house officer under Act 1799, c. 22, § 67, must be in a situation to be able to witness the examination, and to see and testify to a part, at least, of the contents of each package.—United States v. One Thousand Three Hundred and Eighty-Two Hogsheads of Sugar, Case No. 15,962.

Where sheepskins are imported with the wool on, the wool and pelt cannot be separated, and appraised separately.—Coggill v. Lawrence, Case No. 2,956.

The appraisers are not bound by prior appraisals of the value of goods of the same kind imported by the same party.—Goodsell v. Briggs, Case No. 5,548.

Where samples are fairly selected from one in ten of the packages, and are fully identified, it is of no importance whether they were drawn from the packages by the appraisers themselves, or by the official sampler of the appraisers' department.—Yznaga v. Peaslee, Case No. 18,196.

Where the importer does not object, an appraisal by samples taken by a sampler where the appraisers did not see the packages, *held* sufficient.—Yznaga v. Peaslee, Case No. 18,196.

An examination of goods by the appraisers is indispensable, but a personal examination of each article is not necessary. A fair selection of samples is sufficient.—Gibb v. Washington, Case No. 5,380.

The appraisement is void, where the appraisers do not, in substance and effect, open and examine at least one package in every ten.—Burgess v. Converse, Case No. 2,154.

An appraisement of a cargo of sugar, based solely on samples taken after most of the cargo had been sold and delivered, *held* insufficient.—United States v. McKean, Case No. 15,681a.

The appraisement by merchant appraisers under Act Aug. 30, 1842, is final, and it is not necessary that their award should set forth the principles upon which they acted or the evidence by which they were governed.—Tucker v. Kane, Case No. 14,220.

The validity of such appraisement can be impeached outside the award only by testimony showing that the question referred was not decided, or some misconduct in the appraisers.—Tucker v. Kane, Case No. 14,220.

The circuit court has no authority to enjoin the appraisers from taking evidence anywhere as to the value of an importation, or carrying the goods out of the district for that purpose.—Goodsell v. Briggs, Case No. 5,548.

§ 49. Effect of appraisal.

The value of an import is determined by the appraisal, and the duty fixed by law must be assessed by the collector upon the value so determined.—Wills v. Russell, Case No. 17,773.

And this is the rule notwithstanding there is an invoice sworn to by the owner.—Thomson v. Maxwell, Case No. 13,983.

The collector may cause a re-examination and valuation of goods after an appraiser has passed the same.—United States v. Eighty-Two Packages of Glass, Case No. 15,038.

An appraisement regularly made for the purpose of ascertaining the value of goods subject to an ad valorem duty is conclusive as to the value on which the duty is estimated. Act April 20, 1818.—Tappan v. United States, Case No. 13,749.

The rule is the same under Acts 1823 and 1851.—Bailey v. Goodrich, Case No. 735.

Otherwise as to goods subject to specific duties.—Bailey v. Goodrich, Case No. 735.

The appraisement by the official appraiser will be *held* conclusive, notwithstanding a protest, where the importer asserted that he did not desire a reappraisement, and did not offer the fees therefor.—Fielden v. Lawrence, Case No. 4,774.

§ 50. Reappraisement.

A notice that the appraisement is not satisfactory, and the importers will give evidence "if desired," is not sufficient to entitle them to a reappraisement.—Lehmaier v. Maxwell, Case No. 8,214.

Objections to the qualifications of the merchant appraiser, not made at the time of the reappraisement, will be deemed waived.—Falleck v. Barney, Case No. 4,625.

There cannot be a reappraisement, on appeal, unless there has been an entry of the goods, and such entry may be presumed from the circumstances on reappraisal.—In re Twenty-Eight Cases of Wine, Case No. 14,281.

A reappraisement made under Act Aug. 30, 1842, § 17, is illegal and void where the merchant appraiser was sworn by the official appraiser.—Vaccari v. Maxwell, Case No. 16,810.

An appraisement becomes of no effect only when there is another appraisement.—Lehmaier v. Maxwell, Case No. 8,214.

Act March 3, 1851, § 3, in regard to reappraisals, applies to goods imported by their manufacturer.—Bannendahl v. Redfield, Case No. 964.

§ 51. Appeal from appraisement.

The secretary of the treasury has no power to review an appraisement by merchant appraisers.—Tucker v. Kane, Case No. 14,220.

The appraisal is not set aside by an appeal, though the collector illegally refuses to order a reappraisal.—Schmaire v. Maxwell, Case No. 12,460.

The appeal to the secretary from a decision of the collector (Rev. St. § 2931) must be taken after such an ascertainment and liquidation of the duties as would be final and conclusive if no appeal had been taken.—Watt v. United States, Case No. 17,292.

An objection that the samples produced before the merchant appraisers on appeal were not identified must be taken on the appeal.—Yznaga v. Peaslee, Case No. 18,196.

Importers, by withdrawing their appeal to the merchant appraisers, and refusing to produce the documents connected with the importation as called for by the official appraisers, fix the correctness of the appraisement.—Bartlett v. Kane, Case No. 1,077.

See, also, post, § 63.

§ 52. Reliquidation of duties.

The year within which the collector can reliquidate the duty (Act 1874, c. 391, § 21) runs from the time of the presentation to the collector of the entry by the importer, and not from the time of the first liquidation of the duty.—United States v. Frazer, Case No. 15,161.

Within a year from the entry a collector may make a reliquidation, notwithstanding a previous liquidation and payment of the duties, which will be binding upon the importer in the absence of an appeal.—United States v. Phelps, Case No. 16,039.

After the duties have been liquidated and paid, and the goods delivered, the collector cannot make a reliquidation upon the subsequent report of an appraiser who never saw the goods.—United States v. Frazer, Case No. 15,161.

§ 53. Bonds for duties.

An instrument not in the form of a bond with a penal sum and condition, but containing the requirements of the statute (1854, c. 30), where the obligors were not prejudiced by the form, *held* a sufficient bond under the statute.—United States v. Pingree, Case No. 16,050.

Only the owner or consignee, or his agent or factor, can enter and bond goods at the customhouse. A subpurchaser, after importation, has no such right; and the collector has no authority to receive the bond of any person except those legally entitled to enter the goods.—United States v. Lyman, Case No. 15,647.

Original importers are liable on their warehouse bond where goods are withdrawn by their vendees without payment of the proper duties.—United States v. Minturn, Case No. 15,783.

Where a consignee gives bond for duties under the act of 1799, and fails to pay them, the United States has no remedy against the owner for whom the consignee acts as agent or trustee.—Knox v. Devens, Case No. 7,905.

Under Act July 14, 1832, § 5, a surety is liable on a duty bond, though the amount is less than $200.—United States v. Linn, Case No. 15,605.

Where the goods are fraudulently relanded, and the marks changed, so as to show a greater amount than that actually put on board, the transaction is a relanding, within the meaning of the bond.—United States v. Heckscher, Case No. 15,338.

A surety on a customhouse bond, after paying it, has the same priority as the United States against the estate of his principal in the hands of an assignee.—United States v. Hunter, Case No. 15,426.

A surety who has discharged a duty bond to the United States is entitled to be subrogated only to the preference and priority of the United States to be first paid out of the estate of the principal. Act March 2, 1799, § 65.—United States v. Preston, Case No. 16,087.

A surety in such case cannot maintain assumpsit in the name of the United States against the assignees of the principal.—United States v. Preston, Case No. 16,087.

Where a surety pays the bond, he cannot maintain an action on it in the name of the obligee against his co-obligors, nor an action for money laid out and advanced, except in his own name.—United States v. Preston, Case No. 16,087.

Where goods are shipped in the importer's vessel, consigned to a person who gave bonds for the duties, the invoice showing the goods to be the property of the importer, the sureties of the consignee cannot recover from the importer the amount paid by them.—Childs v. Shoemaker, Case No. 2,681.

Unless the owner requested him to sign the bond.—Knox v. Devens, Case No. 7,905.

Sureties of an insolvent debtor, in a bond for duties to the United States, are not entitled to judgment against their principal at the first term.—Johns v. Brodhag, Case No. 7,362.

The receipt of a collector acknowledging payment is only prima facie evidence.—Johnson v. United States, Case No. 7,419.

Where a check taken in payment is not paid, the bond is not discharged.—Johnson v. United States, Case No. 7,419; United States v. Williams, Id. 16,724.

A bond for duties in the alternative may be discharged by payment of the sum named in the condition, though less than the duties. Act March 2, 1799, c. 128.—United States v. Thompson, Case No. 16,486.

The cancellation of a bond for duties without receiving payment, in connivance with the debtor, is void.—Johnson v. United States, Case No. 7,419.

The "additional duty of 100 per cent." secured by transportation bonds under Act 1854, c. 30, § 6, is 100 per cent. on the original duty, and not on the invoice value of the goods.—United States v. Pingree, Case No. 16,050.

The transportation bond, under such section, properly includes the original duty as well as the additional duty, the bond first given for the original duty being canceled.—United States v. Pingree, Case No. 16,050.

An error in the liquidation of duties, under 1 Stat. 627, § 65, may be predicated upon the fact that the vessel belongs to citizens of the United States and not to foreigners.—United States v. Willing, Case No. 16,727.

The United States are entitled to judgment at the return term upon revenue bonds; and the court will, on motion, rule the marshal to return the writ on some day during the term. Act March 2, 1799, § 65.—United States v. Johns, Case No. 15,480; Same v. May, Id. 15,751.

In a several action against one of the obligors in a joint and several bond given for duties, it is no objection that a co-obligor has been taken in execution on a judgment on the

same bond, and discharged under Act June 6, 1798, c. 66.—Hunt v. United States, Case No. 6,900.

It is no defense to a bond for customs duties that it was given by the obligors, without knowledge of an alleged defense, arising from delay in demanding payment.—United States v. McKewan, Case No. 15,692.

It is no defense to an action on a duty bond for goods deposited in a public storehouse in Savannah that the principal actually paid, under compulsion, the duties to the Confederate collector.—United States v. Low, Case No. 15,634.

Nor is it a defense that there was no United States collector to whom payment could be made during the three years within which the duties were to be paid by the terms of the bond.—United States v. Low, Case No. 15,634.

A bond to secure duties is not an extinguishment of the debt, but merely a collateral security therefor.—United States v. Lyman, Case No. 15,647.

See, also, post, § 96.

§ 54. Warehouse and storage fees.

Under the treasury regulations of February 17, 1849, an importer, before he can use his own store for the deposit of importations, must indorse on the entry an agreement to pay an amount equal to the salary of the inspector, or one-half storage.—Clark v. Peaslee, Case No. 2,831.

The collector may enforce payment of half fees on entry and appraisal of goods in bond and storage in private warehouses.—Atkins v. Peaslee, Case No. 603.

Where importations are deposited by the importer in his own store, under Act March 28, 1854, he is liable for half storage.—Clark v. Peaslee, Case No. 2,831.

A charge for half storage cannot be made against an importer for keeping goods in his own vessel under the entry "Vessel as warehouse."—Ogden v. Barney, Case No. 10,454.

The owner of a bonded warehouse (Act Aug. 6, 1846) cannot be required to pay the salary of an inspector.—Corkle v. Maxwell, Case No. 3,231.

V. PAYMENT AND COLLECTION, REFUNDING OR RECOVERY, AND DRAWBACK.

§ 55. Who liable for duties.

The importer or consignee of imported goods is personally liable for the duties charged thereon.—United States v. Dodge, Case No. 14,973.

§ 56. What constitutes payment.

Payment of duties into the state treasury or to the Confederate government, on goods imported at a place entirely in control of the rebel forces during the war of the Rebellion, will not discharge the duties.—United States v. Pensacola & G. R. Co., Case No. 16,028; Same v. Seventeen Packages, etc., Id. 16,256.

When goods are withdrawn from a warehouse, the collector may exact the proper rate of duty, where they have been entered at too low a rate.—Reimer v. Schell, Case No. 11,676.

§ 57. When duties become due.

The duties accrue at the time of the arrival of the goods at their proper port of entry, and not at the time of the subsequent entry at the custom house.—United States v. Dodge, Case No. 14,973; Same v. Lindsey, Id. 15,603; Same v. Lyman, Id. 15,647.

Duties accrue when the goods are imported, though brought in as prize.—Prince v. United States, Case No. 11,425.

§ 58. Release of duties.

The release of duties on goods captured by an armed vessel *held* not to apply to a vessel captured before, but not condemned until after, passage of Act Aug. 2, 1813, c. 48.—Prince v. United States, Case No. 11,425.

§ 59. Lien for duties.

The United States is not deprived of its lien for duties unpaid by an adverse decision on an information in rem on a seizure for an alleged violation of law.—United States v. Five Hundred Boxes of Pipes, Case No. 15,116.

The lien on imported goods for duties is relinquished by the taking of bond and security therefor, and delivery to the consignee.—United States v. Murdoch, Case No. 15,836.

§ 60. Actions for duties.

Duties are a personal debt against the importer which may be collected by civil action.—United States v. George, Case No. 15,198.

An importer who offers for sale goods entered free of duty as sea stores is liable to an action of debt for the duties.—In re An Ullage Box of Sugar, Case No. 14,324.

The United States may maintain assumpsit for duties not bonded.—United States v. Howland, Case No. 15,406; Same v. Lyman, Id. 15,647.

Debt lies against the importer for duties on smuggled goods; also where short duties only have been paid.—United States v. Lyman, Case No. 15,647.

In such cases an information of debt, or an information in the nature of a bill of discovery and account, is a proper remedy.—United States v. Lyman, Case No. 15,647.

Under Rev. St. § 2931, the decision of the collector is final and conclusive against all persons interested upon the questions necessarily decided, and irregularities in the mode of appraisement cannot be shown in a suit for duties.—Watt v. United States, Case No. 17,292.

In an action against importers to recover the difference between the estimated and liquidated duties, evidence is not admissible to show that the goods were not of the kind as returned by the appraisers, where there had been no appeal to the secretary of the treasury.—United States v. Cousinery, Case No. 14,878.

Under Rev. St. § 724, the United States may be compelled to produce the official weigher's returns on motion of a defendant sued for a balance of duties alleged to be due on the goods, to enable him to prepare for trial.—United States v. Youngs, Case No. 16,783.

In suit by the United States to recover duties as liquidated, proof of an appeal before the liquidation cannot affect the operation of the liquidation, nor can proof of a protest, unless followed by an appeal taken after the liquidation.—Watt v. United States, Case No. 17,292.

§ 61. Sale of goods for duties.

The 10 per centum additional duty imposed on goods withdrawn from the warehouse after one year from their importation (Act March 14, 1866) is also to be assessed upon goods never withdrawn, but sold to satisfy duties.—United States v. Unger, Case No. 16,595.

§ 62. Actions to recover back duties and charges—Right of action in general.

See, also, ante, § 22.

A collector who demands and receives illegal duties, which are paid to him under protest, is liable in an action of assumpsit. Act Feb. 26, 1845.—Schmeider v. Barney, Case No. 12,462.

The common-law right to bring suits against a collector to recover back duties was restored by the act of February 26, 1845, and under it

an execution will issue against the collector personally.—Knoedler v. Schell, Case No. 7,889.

An action to recover back duties is not maintainable where the payment thereof was voluntary.—Marshall v. Redfield, Case No. 9,131.

Payment under protest of duties on goods never imported, to avoid suit on a warehouse bond, is a voluntary payment.—Marshall v. Redfield, Case No. 9,131.

The payment of duties under protest on adding to the invoice value, to obtain possession and to avoid a penalty, *held* not voluntary.—Griswold v. Lawrence, Case No. 5,837.

Additions to entry made by importer to obtain possession of goods are not voluntary, and appraisement is not conclusive.—Benkard v. Schell, Case No. 1,307.

Duties deposited on the valuation in the invoice may be recovered back as to the excess where a fraud was committed on the importer by the manufacturer of the goods by invoicing them erroneously as to their grade.—Lillie v. Redfield, Case No. 8,351.

On the warehousing and re-exporting of imported goods the importer is not entitled to recover back amount of the penalty paid because of an undervaluation.—Bartlett v. Kane, Case No. 1,077.

Defects in the proceedings of government appraisers are immaterial, where the importer claims an appeal to merchant appraisers.—Burgess v. Converse, Case No. 2,154.

The acts of 1799 and 1845 do not prevent the actual owner of the goods from recovering duties paid under protest by the consignee.—Mason v. Kane, Case No. 9,241.

The common-law right to sue a collector, by action for money had and received, for exacting illegal duties before surrendering goods, was taken away by the act of March 3, 1839.—Knoedler v. Schell, Case No. 7,889.

An excess of duties paid under protest after the importer obtained possession of the goods cannot be recovered back.—Drake v. Redfield, Case No. 4,065.

A collector is not justified by the instructions of the treasury department in imposing duties not warranted by law, and an action will lie to recover them back.—Lennig v. Maxwell, Case No. 8,243.

Where but one permit to land the baggage of all the passengers on a vessel is granted, but one fee can be charged, and the exaction of a fee for every five passengers, though customary, is illegal, and may be recovered back.—Ogden v. Maxwell, Case No. 10,458.

Moneys paid for the services of an inspector at plaintiff's private bonded cellar *held* not recoverable.—Harriman v. Maxwell, Case No. 6,105.

§ 63. —— Necessity of appeal to secretary of treasury.

The importer cannot sue the collector to recover an excessive duty, or a penalty paid for alleged undervaluation, without having first appealed to the secretary of the treasury. Act March 3, 1857, § 5.—Reimer v. Schell, Case No. 11,676; United States v. Sowers, Id. 16,363. CONTRA, see Benkard v. Schell, Case No. 1,307.

Act March 3, 1857, § 5, providing that the decision of the collector, unappealed from, shall be final as to "liability to duty, or exemption therefrom," does not apply to a case of additions to the invoice of illegal charges.—Hutton v. Schell, Case No. 6,961.

An appeal under Act March 3, 1857, § 5, to the secretary of the treasury, is not a condition precedent to a right of action against the collector to recover back duties illegally exacted, where the question is only as to the rate or amount of duty, and not as to exemption therefrom.—Schmeider v. Barney, Case No. 12,462.

As to the necessity of an appeal under Rev. St. § 2931.—United States v. Chase, Case No. 14,787.

The decision of the collector as to the amount of duty to be paid is final in all cases except where there is an appeal to the secretary of the treasury, and suit brought to recover back the duty as provided in Act June 30, 1864, § 14.—United States v. Cousinery, Case No. 14,878.

The fact that the exaction of duties was not warranted by law will not prevent the decision of the collector being final and conclusive, under Act June 30, 1864, § 15, where there was a failure to appeal to the secretary of the treasury.—Shaw v. Grinnell, Case No. 12,719.

The decision of the collector as to the rate and amount of duties is final and conclusive, under Rev. St. § 2931, unless the owner, within 10 days after the ascertainment and liquidation, appeal therefrom to the secretary of the treasury.—United States v. Sowers, Case No. 16,363.

§ 64. —— Necessity of protest.

Duties wrongly imposed, if paid by the importer voluntarily, and without protest or remonstrance, cannot be recovered from or set off against the United States.—United States v. Clement, Case No. 14,815.

Where the assessor computes foreign money at a higher rate than that fixed, the excessive duties, if paid under protest, may be recovered back.—Roosevelt v. Maxwell, Case No. 12,034.

The fact that the collector exacts duties in violation of instructions does not supply the want of a protest.—Moke v. Barney, Case No. 9,698.

A protest against the illegal exaction of the penalty of 50 per cent., under Act Aug. 30, 1842, § 17, is necessary in order to recover it back.—Maillard v. Lawrence, Case No. 8,972.

The statutory provision requiring the appraiser to view the property when the appraisement is made upon an increased valuation is waived by failure to protest.—Boker v. Redfield, Case No. 1,606a.

The collector's decision is final in the absence of payment and protest, both in the case of an error of judgment as to the rate and amount of duties, and as to informalities and irregularities respecting the appraisal. Rev. St. § 2931.—United States v. Chase, Case No. 14,787.

Under Act Aug. 30, 1842, §§ 16, 17, an appraisal by public appraisers is final and conclusive, unless the importer gives to the collector an absolute and unconditional notice of his dissatisfaction with such appraisal.—Schmaire v. Maxwell, Case No. 12,460.

A protest according to the act of February 26, 1845, is necessary to sustain an action to recover back the additional duty of 20 per cent. assessed by way of penalty under the act of 1846.—Kriesler v. Morton, Case No. 7,934.

No written protest against the illegal exaction of fees for permits for landing baggage of passengers is necessary to entitle the vessel owner to recover it back.—Ogden v. Maxwell, Case No. 10,458.

§ 65. —— Who may make protest.

An entry or protest made by an agent is, in law, made by his principal, and is sufficient.—Gray v. Lawrence, Case No. 5,722.

§ 66. —— Time of making or filing protest.

Protest is not required to be made before the payment of the estimated duties.—Brune v. Marriott, Case No. 2,052. CONTRA, see Crocker v. Redfield, Case No. 3,400.

The time for filing a protest in the case of goods imported for warehousing is computed from the date of the original liquidation, which is made at the same time and in the same manner as when the entry is for immediate consumption.—Foster v. Simmons, Case No. 4,982a.

The entry for withdrawal from the warehouse, and not the entry for warehousing, fixes the time from which the 10-days limitation of time for giving notice of dissatisfaction runs. Act March 3, 1857, § 5.—Iselin v. Barney, Case No. 7,103.

A protest when duties are ascertained, where money is deposited with the collector to pay duties when ascertained, is too late.—Crocker v. Redfield, Case No. 3,400.

A protest within 10 days after liquidation of duties, and appeal within 30 days thereafter, is good, although the liquidation is subsequently revised.—Keyser v. Arthur, Case No. 7,749.

The protest is legally made when the duties are finally determined and the amount assessed by the collector.—Brune v. Marriott, Case No. 2,052.

To recover back unascertained and estimated duties, which are to be afterwards liquidated, a protest is necessary; but it may be made at the time of final liquidation. Act 1845.—Moke v. Barney, Case No. 9,698.

§ 67. —— Requisites and sufficiency of protest in general.

Requisites of a protest under Act Feb. 26, 1845.—Goddard v. Maxwell, Case No. 5,492.

A protest *held* not sufficiently signed, where the importer's signature was on a distinct paper annexed by a wafer, not referring to the protest, nor in any manner made a part thereof.—Florio v. Peaslee, Case No. 4,890.

In an action to recover back duties, no objection can be taken which was not made in the protest.—Boker v. Redfield, Case No. 1,606a; Burgess v. Converse, Id. 2,154; Durand v. Lawrence, Id. 4,187; Kriesler v. Morton, Id. 7,933; McCall v. Lawrence, Id. 8,672; Maillard v. Same, Id. 8,972; Norcross v. Greely, Id. 10,294; Roller v. Maxwell, Id. 12,025; Swanston v. Morton, Id. 13,677; Thomson v. Maxwell, Id. 13,983; Willison v. Hoyt, Id. 17,772; Wilson v. Lawrence, Id. 17,816.

General expressions in protest which may include specific objections are not sufficient as the basis of an action to recover back duties illegally exacted. The protest must point out specifically the omission or irregularity complained of.—Bangs v. Maxwell, Case No. 841; Christ v. Same, Id. 2,698; Cornett v. Lawrence, Id. 3,241; Crowley v. Maxwell, Id. 3,449; Durand v. Lawrence, Id. 4,187; Fielden v. Same, Id. 4,774; Focke v. Same, Id. 4,894; Hertz v. Maxwell, Id. 6,432; Mason v. Kane, Id. 9,241; Pierson v. Lawrence, Id. 11,158; Same v. Maxwell, Id. 11,159; Sadler v. Same, Id. 12,207; Schmaire v. Same, Id. 12,460.

A protest is not required to be made with technical precision.—Burgess v. Converse, Case No. 2,154.

Protest not required as to each particular entry, but may be prospective and continuous, Act March 3, 1857.—Benkard v. Schell, Case No. 1,307.

Prospective protests may be sufficient.—Fowler v. Redfield, Case No. 5,003.

A notice at the close of a protest that it is to apply to all future similar importations does not dispense with the necessity of a protest in reference to those importations. Act Feb. 26, 1845.—Warren v. Peaslee, Case No. 17,198. CONTRA, see Wetter v. Schell, Case No. 17,470; Steegman v. Maxwell, Id. 13,344.

A protest stating that it is intended "to apply to all future similar importations" is valid as a prospective protest. Act March 3, 1857.—Hutton v. Schell, Case No. 6,961; Wetter v. Same, Id. 17,470.

An indorsement on a protest on file: "I intend this protest to apply to all future similar importations by me," *held* not a sufficient protest as to future importations, under Act June 30, 1864, § 14.—Ullman v. Murphy, Case No. 14,325.

Addition at end of protest, "and hereby protest on all future entries of the same goods," is ineffectual as a prospective protest to aid an insufficient specific protest.—Baxter v. Maxwell, Case No. 1,126.

That the deputy collector dictated the form of protest does not estop the collector from denying its sufficiency for a purpose not brought to the deputy's notice.—Kriesler v. Morton, Case No. 7,933.

Where the protest is written on the entry, the description given of the goods in the entry need not be repeated in the protest.—Thomson v. Maxwell, Case No. 13,983.

The invoice and entry in a case may ordinarily be regarded as composing part of the protest.—Vaccari v. Maxwell, Case No. 16,810.

§ 68. —— Particular instances of protest.

Sufficiency of protest as to the appraisement of goods.—Scheerdt v. Schell, Case No. 12,444.

A clause in the protest "that the merchant appraiser was not legally sworn in" is sufficient where the annexed oath shows the illegality on its face.—Vaccari v. Maxwell, Case No. 16,810.

A protest that "the appraisers had not used or employed sufficient means, or made sufficient examination," to determine value, *held* sufficient.—Boker v. Bronson, Case No. 1,605.

Where the protest stated only that the invoice value was correct, *held* that plaintiff could not show an illegal appraisement.—Kriesler v. Morton, Case No. 7,933.

Objection to the regularity of the appraisal proceedings is not raised by a protest "against paying additional duty and penalty on" the goods described, "they being appraised too high."—Thomson v. Maxwell, Case No. 13,983.

Where the appraisers do not in substance and effect open one package out of ten, a failure in such respect is available under a protest that "the goods were not fairly and faithfully examined."—Burgess v. Converse, Case No. 2,154.

A protest against the additional valuation made by adopting the market value of goods in a depreciated paper currency, and a claim to enter the goods according to the invoice and actual cost, is a sufficient protest, without a specification as to how the appraisement was made to exceed the true value of the goods.—Loewenstein v. Maxwell, Case No. 8,462.

Sufficiency of protest "that no penalty of 20 per cent., under section 8 of the act of 1846, can be exacted except where the importer has added to his invoice price on entry."—Vaccari v. Maxwell, Case No. 16,810.

An objection in a protest on the payment of duties on commission that the merchant "pays no such commission" *held* insufficient.—Norcross v. Greely, Case No. 10,294.

A protest to "extend to all our importations of * * * since the operation of the present tariff" *held* to apply to all subsequent importations of like character, but not to duties previously paid.—Brune v. Marriott, Case No. 2,052.

The importer cannot insist that the purchase price should govern, and not the price at the date of the invoice, where the only ground of protest was that the invoice exhibited the true

market value of the goods.—Cornett v. Lawrence, Case No. 3,241.

Though the collector improperly classified the goods, excess duties cannot be recovered where the importer also improperly classified them in his protest.—Davies v. Arthur, Case No. 3,611.

Protest *held* sufficient to raise the objection that the goods were erroneously valued as of the time of their exportation, instead of the time of their purchase.—Maillard v. Lawrence, Case No. 8,972.

Statement in protest *held* to amount to averment of the presentation of a proper consul's certificate as to the value of foreign paper, or that the importer was able and offered to produce one.—Craig v. Maxwell, Case No. 3,334.

A protest against paying 25 per cent. duty on thread lace because the article is provided for under a certain schedule at a duty of 20 per cent. is a sufficient protest.—Steegman v. Maxwell, Case No. 13,344.

In the case of spirituous liquors erroneously assessed on the invoice quantity, a protest written on the face of the entries, "The actual gauge and two per cent. claimed for leakage," *held* sufficient.—Schuchardt v. Lawrence, Case No. 12,484.

A protest against paying duties on costs and charges, because the goods were invoiced "free on board," is insufficient, unless those words are found in the invoice.—Hutton v. Schell, Case No. 6,961.

Under a protest against paying a given duty on "rosewood furniture," the rates levied on furniture in the same entry made only in part or not at all of rosewood cannot be considered.—Pousot v. Lawrence, Case No. 11,352.

A protest "against paying 40 per cent. on rosewood furniture, believing it should pay 30 per cent. as cabinet furniture," will not embrace furniture composed so largely of other woods as not to come under the commercial designation of "rosewood" furniture.—Ponsot v. Maxwell, Case No. 11,267.

Specific protest, which does not refer to or affirm a prior prospective protest, must be regarded as evidence of abandonment of all grounds of objection.—Baxter v. Maxwell, Case No. 1,126.

Protest claiming article as nonenumerated, when in fact it was enumerated, though wrongly classed, is insufficient.—Baxter v. Maxwell, Case No. 1,126.

Under the description "goods consigned to me by the manufacturer thereof, maintaining that they are not liable to a penalty under the laws for the reasons stated," *held*, that the importer could not show that the goods were owned and imported by the manufacturer, and so not liable to the penalty for an undervaluation.—Warburg v. Maxwell, Case No. 17,142.

Under protest that the invoice entry "is in all respects correct and just," and that "no legal forfeiture or penalty has been incurred," the only question that can be raised is the difference between the appraised and market value of the goods at the place of shipment at the date of the invoice.—Tucker v. Maxwell, Case No. 14,224.

Sufficiency of protest where a fraud was committed on the importer by the manufacturer by invoicing them erroneously as to their grade.—Lillie v. Redfield, Case No. 8,351.

§ 69. —— Limitations.

Limitation of actions for excess duties paid.—Crooke v. Maxwell, Case No. 3,413.

An action for the repayment of duties paid by the collector into the treasury intermediate the passage of the acts of March 3, 1839, and February 26, 1845, if commenced within six years of the latter date, is not barred by the New York statute.—Richardson v. Curtis, Case No. 11,781.

§ 70. —— Pleading.

Counts for duties and for double values may be joined in the same case.—Stockwell v. United States, Case No. 13,466.

In a suit to recover back duties, the court may allow a bill of particulars to be served after the expiration of 30 days after notice of appearance of defendant, and may allow a defective bill of particulars to be amended. Rev. St. § 954.—Pott v. Arthur, Case No. 11,319.

§ 71. —— Evidence.

A collector who has compelled an importer to pay a higher rate of duty than that imposed by law on such articles as are named in the invoice has the burden of proof to show the authority under which such higher duty was exacted.—Wilkinson v. Greely, Case No. 17,672.

The presumption of the correctness of the decisions of customs officers must be overcome by a fair preponderance of proof as to the commercial use of the term at the date of the act.—Hutton v. Schell, Case No. 6,962.

Illegal exaction cannot be proved by adjustment by customs official on incomplete statement.—Benkard v. Schell, Case No. 1,307.

Proof of a protest, as required by law, is indispensable in a suit to recover back duties paid.—Greenleaf v. Schell, Case No. 5,782.

Plaintiff, to recover back money paid as duties, must show that the duties were not authorized by law; that at or before payment he distinctly specified, by protest in writing, the grounds of objection; and that the payment was made to enable him to obtain possession of the goods.—Drake v. Redfield, Case No. 4,065.

Plaintiff must satisfy the jury that he has fully complied with all the requirements of the statute both as to form and substance.—Gamble v. Mason, Case No. 5,209.

Where appraisement is refused, the deterioration of the goods may be proved by witnesses in an action for the excess duties.—Wight v. Curtis, Case No. 17,628.

Report made at request of customs officials, without instructions from treasury department, inadmissible as evidence of proper charges.—Benkard v. Schell, Case No. 1,307.

The objection that plaintiffs did not prove that they were the actual parties in interest cannot be taken after verdict.—Greenleaf v. Schell, Case No. 5,782.

§ 72. —— Trial and reference.

A question of classification of certain laces *held* one of fact for the jury upon the testimony of merchants dealing in such goods.—Duden v. Arthur, Case No. 4,112; Same v. Murphy, Id. 4,113.

The question of similitude is one of fact for the jury.—Gamble v. Mason, Case No. 5,209; Greenleaf v. Goodrich, Id. 5,778.

Customs laws construed by jury.—Bacon v. Bancroft, Case No. 714; Hutton v. Schell, Id. 6,962.

Action to recover excessive duties will be referred where it involves numerous items.—Benkard v. Schell, Case No. 1,307.

§ 73. —— Costs.

No fees or costs are taxable, in a suit to recover back an excess of duties, on a reference to the collector to adjust the amount of the recovery.—Field v. Schell, Case No. 4,771.

A removal from the state court of an action against a collector to recover excess duties paid does not bring with it the state law as to costs.—Coggill v. Lawrence, Case No. 2,957.

Plaintiff in a suit against a collector to recover back excess duties removed to the federal court is not entitled to costs where he recovers less than $500. Act March 2, 1833, § 3.—Coggill v. Lawrence, Case No. 2,957. CONTRA, see Field v. Schell, Case No. 4,771.

Defendant should be allowed costs where plaintiff obtained a verdict for $9.50.—Coggill v. Lawrence, Case No. 2,957.

§ 74. —— Judgments and enforcement thereof.

Interest may be allowed from the time of rendering the verdict until the judgment.—Fowler v. Redfield, Case No. 5,003.

Under Act Feb. 26, 1845, in an action to recover back duties, execution will issue against the collector personally.—Knoedler v. Schell, Case No. 7,889.

§ 75. —— New trial.

New trial granted on payment of costs where papers were lost in customhouse, and there was a question whether all the facts were presented.—Boker v. Bronson, Case No. 1,605.

§ 76. Drawback.

Construction of statutes in relation to the drawback or bounty on exportation of refined sugars.—United States v. Eighty-Five Hogsheads of Sugar, Case No. 15,037.

The surety on a bond given on the entry for exportation of goods entitled to a drawback is estopped to deny that the quantity specified therein was in fact laden upon the vessel.—United States v. Heckscher, Case No. 15,338.

Where goods entered in bond for re-exportation have been exported, passed through a foreign customhouse, and are subject to retail trade, they are mixed with the common merchandise of the country, and may be again imported into this country.—United States v. Whidden, Case No. 16,670.

See, also, post, § 89.

VI. VIOLATIONS OF CUSTOMS LAWS.

(A) IN GENERAL.

§ 77. Seizure and inspection of books and papers.

The provision of Act March 2, 1867, § 2, relating to the seizure of books, papers, and invoices in cases of alleged fraud on the revenue, *held* not unconstitutional.—In re Platt, Case No. 11,212.

The regulations forbidding inspection of customhouse books and papers, except on written application to the collector, are reasonable if construed to provide an orderly mode for the exercise of the right of access by importers, but are unreasonable and void if construed to deny all access by importers.—United States v. Hutton, Case No. 15,433.

Sufficiency of warrant for the seizure of papers.—In re Jordan, Case No. 7,512; Stockwell v. United States, Id. 13,466.

The mode of separating and examining such papers determined.—In re Jordan, Case No. 7,512.

A district court judge has power on complaint or affidavit to issue a warrant for the seizure and production of books or papers relating to merchandise, in respect to which a fraud on the revenue is alleged to have been committed.—Stockwell v. United States, Case No. 13,466.

The objections to books, etc., offered in evidence on the ground that there was no authority to issue or serve the warrant, is insufficient to raise the question of defects therein at the hearing.—Stockwell v. United States, Case No. 13,466.

The secretary's regulations in respect to an inspection of customhouse books and papers does not make it unlawful for the collector to produce them in court under subpœna, or at the request of the district attorney.—United States v. Hutton, Case No. 15,433.

Invoices and like papers belonging to importers continue to be their property, though required by law to be impounded at the customhouse, and they have a right to inspect them under reasonable restrictions.—United States v. Hutton, Case No. 15,433.

(B) FORFEITURES.

§ 78. Grounds of forfeiture—In general.

The court will not impose a forfeiture by implication. It must be found in the plain letter of the statute. And an importer who offers goods free of duty as sea stores is liable for a penalty, but the goods are not forfeited, under Act 1799, § 45.—In re An Ullage Box of Sugar, Case No. 14,324.

A new penalty, imposed for a violation of laws previously defined, may be enforced, though unknown to the claimant at the time of the violation.—United States v. Fourteen Packages of Pins, Case No. 15,151.

§ 79. —— False entries as to quality and misdescription of goods.

The hurried entry of goods in the absence of the owner, where pillage by the enemies' soldiers was threatened, *held* a sufficient excuse for a mistake.—United States v. Nine Packages of Linen, Case No. 15,884.

A misdescription of the whole package is not a cause of forfeiture under Act July 14, 1832, § 14, cl. 2.—United States v. Ten Cases Shawls, Case No. 16,448.

Under Act July 14, 1832, § 14, it is not a distinct and substantive ground of forfeiture that on the opening, etc., of a package of imported goods, etc., the same are not found to correspond with the entry at the customhouse.—Wright v. United States, Case No. 18,099.

An attempt to enter anchors or bar iron as "anchor iron," parts of chain cables as "links," and boat iron as "straight links," if done with attempt to evade the revenue law will subject them to forfeiture. Act May 28, 1830, § 4.—United States v. Thirty-One Boxes, etc., Case No. 16,465a.

To justify the forfeiture of a package of goods under section 4, Act May 28, 1830, either the package must contain an article not described in the invoice, or the package or invoice must be made up with intent to evade or defraud the revenue.—United States v. Package of Lace, Case No. 15,985.

§ 80. —— Entry by means of false paper or appliance in general.

An action lies against the person making the entry for the recovery of the value of the goods where the entry was by means of false papers, under Act March 3, 1863, § 1.—United States v. Baker, Case No. 14,500; Same v. Willetts, Id. 16,699.

The bribing of a weigher by an importer at any time before the final payment of duties with the intent of procuring a false return, where a false return is procured, will subject the goods or their value to forfeiture, under Act March 3, 1863, § 1.—United States v. Baker, Case No. 14,500.

The making of a false affidavit of damage, with intent to defraud the revenue, is sufficient to incur the forfeiture.—United States v. Six Hundred and Sixty-One Bales of Tobacco, Case No. 16,297.

An attempt to make an entry by means of any false or fraudulent invoice, affidavit, etc., with intent to defraud, completes the ground of forfeiture, though the fraudulent entry is not

carried out. Act June 22, 1874, § 12.—United States v. Six Hundred and Sixty-One Bales of Tobacco, Case No. 16,297.

Where goods are refused an entry for want of an invoice, they are forfeited if the owner attempts to procure an entry by any false and fraudulent practice or appliance whatever.—United States v. Thirty-Nine Thousand One Hundred and Fifty Cigars, Case No. 16,464.

An oath taken under Act March 1, 1823, not so modified as to conform to the provisions of Act March 3, 1863, is not sufficient to support an entry, and will work a forfeiture of the goods. —United States v. Seventy-Eight Casks of White Wine, Case No. 16,259.

A false entry does not subject the goods to forfeiture under Act July, 1866, § 4, "to prevent smuggling and for other purposes."—United States v. Fifty-Three Boxes of Havana Sugar, Case No. 15,098.

The mixing of charcoal with sugar, for the purpose of reducing its grade, where the fact is not disclosed, will subject the same to forfeiture, though the importer acted in good faith.—United States v. Cargo of Sugar, Case No. 14,722.

§ 81. —— Absence and insufficiency of manifest and failure to produce.

Goods will be forfeited for nonproduction of manifest not satisfactorily accounted for.—The Ariel, Case No. 527.

A forfeiture is incurred if no manifest is presented, immediately on the arrival of the vessel. Act March 2, 1821, § 1.—One Hundred and Thirty-Four Thousand Nine Hundred and One Feet of Pine Lumber, Case No. 10,523.

Goods will not be forfeited because of the absence of the manifest, where it appears that the same was inadvertently lost by the master before the vessel sailed, and that no part of the cargo had been unshipped after it was taken on board. — United States v. Certain Cigars, etc., Case No. 14,765.

It would seem that, in all cases of importation in vessels, a forfeiture is not to be inferred by a mere mistake in the manifest, report, or entry, without fraud, misconduct, or culpable negligence.—United States v. The Margaret Yates, Case No. 15,720.

The penalty of section 24 (Act 1799, c. 22) applies only to articles imported in a vessel owned in whole or in part by citizens or inhabitants of the United States.—United States v. Twenty-Six Diamond Rings, Case No. 16,572.

A forfeiture is not saved by making a manifest after the arrival of the vessel within the limits of a port of entry with the intention of landing them there, though before it is demanded by the customs officer. Act 1799, § 24.—United States v. Ten Thousand Cigars, Case No. 16,450.

The master who takes goods on board without any bill of lading or invoice, with the intention to smuggle them, or duly enter them, as he may elect, must be deemed the consignee, though the goods were to go to the use of a third person. Act 1799, § 14.—United States v. Ten Thousand Cigars, Case No. 16,450.

A forfeiture is incurred where a false manifest is presented.—One Hundred and Thirty-Four Thousand Nine Hundred and One Feet of Pine Lumber, Case No. 10,523.

Information of forfeiture for importing goods not entered on the manifest, sustained as to the vessel, and dismissed as to the master. Case No. 16,107, followed.—United States v. The Irma, Case No. 15,444.

Merchandise brought in trunks with personal baggage not entered on the ship's manifest *held* properly forfeited, as imported with an intent to defraud the United States.—Lewey v. United States, Case No. 8,309.

Coasting vessel not forfeitable for carrying foreign goods without manifest.—The America, Case No. 287.

See, also, ante, § 32.

§ 82. —— Undervaluation.

Any intentional undervaluation is cause of forfeiture.—In re Six Cases of Silk Ribbons, Case No. 12,914; United States v. Fifty-Three Boxes of Havana Sugar, Id. 15,098; Same v. One Case of Cashmere Shawls, Id. 15,923.

The goods or their value are forfeited where the importer makes oath to the truth of the invoice, and the cost stated therein is not the actual cost, though the cost is not required to be stated in the invoice.—United States v. Barnes, Case No. 14,523.

Goods are not fraudulently entered if the entry is made according to the actual cost, no matter how fraudulent the invoice may be.—Goodwin v. United States, Case No. 5,554.

Where the invoice is made out in a currency other than that of the purchase with intention of taking advantage of a usage of the treasury officers, whereby less duties would be paid than those exacted if the currency actually used was stated, the invoice is falsely made up under Act May 28, 1830, § 4.—United States v. Dry Ox and Cow Hides, Case No. 14,995.

A purchaser whose invoice truly states the actual cost is not subject to any forfeiture where the valuation is raised by the customs officers for the purposes of imposing duty.—United States v. Five Casks of Files, Case No. 15,112.

Where the invoice by which an entry is made states the value in two kinds of foreign coin, there is no fraud justifying a forfeiture where the real value of the coin is underestimated, under the federal laws.—United States v. Three Hundred and Twenty-Six Cases of Hosiery, Case No. 16,507.

To subject goods to forfeiture for a false valuation in an invoice, it must have been produced at the customhouse for the purposes of an entry. —United States v. Twenty-Eight Packages of Pins, Case No. 16,561.

Goods invoiced at the price paid on a bona fide sale are not subject to forfeiture, though it be below the ordinary market price. Act 1799, c. 128, § 66.—United States v. Sixteen Packages, Case No. 16,303.

But the terms "actual cost" do not apply to the case of a voluntary gift or conveyance, where the substantial consideration is not money, or its equivalent estimated at a money price, nor where the consideration is partly money, and partly love and affection.—United States v. Sixteen Packages, Case No. 16,303.

Goods invoiced at their actual market price cannot be forfeited for undervaluation, although in fact the price stated was below the market value at the place of exportation.—United States v. One Hundred Fifty Bales Unwashed Wool, Cases Nos. 15,932a, 15,932b.

Goods are forfeitable for an undervaluation in the invoice, though not discovered until after they have passed inspection.—United States v. Eighty-Two Packages of Glass, Case No. 15,038.

Under Act March 1, 1823, § 4, where cloth was purchased abroad through an agent who there had it dyed and made up, *held*, that the same should have been invoiced according to fair market value, and that an invoice at cost, including the dyeing and making up and the agent's commission, was ground of forfeiture.—Sinn v. United States, Case No. 12,906.

Goods are not subject to forfeiture because the importer has attempted to enter them at a rate of duty less than that to which they are ultimately found to be liable, when there is in fact no false description of them with intent to defraud the revenue.—United States v. Thirty-

One Boxes & Packages of Imported Articles, etc., Case No. 16,465a.

A false valuation in an invoice of goods subject to ad valorem duty is a price charged in the invoice less than the fair and just buying and selling prices at the time and place where the invoice was made up.—United States v. Fourteen Packages of Pins, Case No. 15,151.

See, also, ante, §§ 35–47.

§ 83. —— Unlading without permit.

What constitutes a violation of Act March 2, 1799, c. 128, § 50, in unloading goods without a permit.—United States v. The Virgin, Case No. 16,625.

A discharge of cargo into lighters is not an unloading of them. Act March 2, 1799, § 50.—United States v. The Express, Case No. 15,066.

The transshipment of a cargo from one vessel to another, while lying at a wharf in port, is an unlading and delivery within Act 1799, § 50.—The Fame, Case No. 4,633.

Vessel forfeited for unlading foreign goods without a permit, etc., although not actually brought by her from a foreign port, but transshipped into her on the homeward voyage. Act March 2, 1799, c. 128, § 50.—The Harmony, Case No. 6,081.

A vessel is not forfeited by the landing without a permit of two gallons of brandy, taken on board by a seaman for his own use on the voyage home.—The Sarah Bernice, Case No. 12,343.

A vessel, arriving from a foreign port, is forfeited by landing goods without a permit from the collector after her arrival in the port of discharge.—The John C. Brooks, Case No. 7,336.

The prohibition of unlading without a permit (Act March 2, 1799, c. 128, § 50) applies though the port is not that originally intended for the port of discharge.—The Industry, Case No. 7,028.

Cases of goods landed with the owner's personal baggage are subject to forfeiture. Act 1799, § 50.—United States v. Three Cases, Marked A. D. 1, 2, and 3, Case No. 16,498.

Goods landed under a permit obtained by collusion with a deputy collector are forfeited, as such permit is void. Act 1799.—Bottomley v. United States, Case No. 1,688.

A permit obtained by fraud or an oral permit from the custom officer to land goods will not save a forfeiture, under Act 1799, § 50.—The Sarah B. Harris, Case No. 12,344.

Dutiable goods, imported as passenger's baggage, where no attempt was made to have them passed as such, and the owner, without knowledge of their seizure, offered them with correct bills of lading and moneys for entry at the customhouse, *held* not forfeitable, either under Act March 2, 1799, § 50, Act March 3, 1863, § 1, or Act July 18, 1866, § 4.—United States v. Ninety-Five Boxes, etc., Case No. 15,891.

The removal of dutiable goods from the vessel to the wharf is an unlading, within Act July 18, 1866, and, where no permit was granted, will subject them to a forfeiture.—United States v. Nine Trunks, Case No. 15,885.

See, also, ante, § 33.

§ 84. —— Unlading goods before arriving at port of discharge.

What constitutes a violation of Act March 2, 1799, § 27.—United States v. The Virgin, Case No. 16,625.

A forfeiture for unlading imported goods before reaching port of discharge (Act March 2, 1799) applies to both foreign and American vessels.—The Betsy, Case No. 1,365.

Section 27 and not section 50 (Act March 2, 1799) applies where the goods imported are unladen before the vessel has arrived within a collection district.—The Active, Case No. 33.

Act March 2, 1799, § 27, applies to vessels which have not reached their port of destination and discharge.—The Industry, Case No. 7,028.

§ 85. —— Receiving smuggled goods.

In a prosecution for a violation of the revenue laws under Act 1799, § 28, the facts that efforts were made to find an officer, which were unsuccessful on account of the lateness of the hour, and that the master was impatient to proceed, furnish no legal excuse.—The Ploughboy, Case No. 11,229.

A vessel receiving smuggled goods is not liable to forfeiture.—Clark v. Protection Ins. Co., Case No. 2,832.

§ 86. —— Concealment of dutiable goods.

The concealment which works a forfeiture need not be with the concurrence, knowledge, or consent of the owner or consignee. Act March 2, 1799, c. 128, § 68.—United States v. Fifty-Eight Thousand Eight Hundred and Fifty Cigars, Case No. 15,092.

Such forfeiture may be enforced before the time has passed for the owner to enter the goods, and is unaffected by a subsequent offer, made as soon as the owner was aware of the arrival of the goods.—United States v. Fifty-Eight Thousand Eight Hundred and Fifty Cigars, Case No. 15,092.

What constitutes a concealment of goods within such act.—United States v. Farnsworth, Case No. 15,072.

The concealment in such case must be a concealment from the customs officers.—United States v. Twenty-Six Diamond Rings, Case No. 16,572.

Trunks containing dutiable goods, found in a stateroom after all the passengers and baggage had been landed, marked in the purser's name, without his authority, and not entered on the manifest, *held* subject to forfeiture as concealed. Act March 2, 1799, § 68.—United States v. Two Trunks, Case No. 16,591.

§ 87. —— Importation of indecent or obscene articles.

Articles imported in boxes embellished with indecent and obscene prints are subject to forfeiture.—Anonymous, Case No. 470.

§ 88. —— Removal of customhouse seal.

The removal of the customhouse seal must be shown to have been willful to warrant a forfeiture of the property under Act June 27, 1864, § 5.—United States v. Three Railroad Cars, Case No. 16,513.

Such goods are subject to forfeiture, though they were the product of the United States, and simply transported to a foreign country, and were exempt from duty, and all the laws and regulations relating to such transit had been complied with.—United States v. Twenty Cases of Matches, Case No. 16,559.

§ 89. —— Relanding of goods intended for export.

Goods on board a ship, which have been entered for exportation, are forfeited by being put on board a lighter alongside the ship, though no bond has been given or debenture issued. Act March 2, 1799.—In re Two Thousand Tin Cans, Case No. 14,303.

It is no defense that claimant caused the goods to be relanded simply to correct a mistake in entering the wrong quality of goods for export.—In re Two Thousand Tin Cans, Case No. 14,303.

§ 90. —— Unlawful packing.

A violation of an act requiring that certain goods shall be packed in a certain way does not subject goods not so packed to forfeiture, in

the absence of a statute declaring such forfeiture.—United States v. Ninety Demijohns Aquadiente, Case No. 15,887.

§ 91. —— Forfeiting spirits, wine, and tea.

"Possession of any person," as used in Act 1799, § 43, means the possession of the purchaser, to whom the certificates are required to be delivered, and not the possession of a wrongdoer.—Six Hundred and Fifty-One Chests of Tea v. United States, Case No. 12,916.

Spirits, wines, and teas are not forfeitable under Act 1799, § 43, unless the certificates and marks are both wanting.—Six Hundred and Fifty-One Chests of Tea v. United States, Case No. 12,916.

Effect of the change of the contents of a cask of imported spirits without first obliterating the marks and surrendering the certificate required by law.—United States v. Eighteen Pipes Distilled Spirits, Case No. 15,033a.

Casks in which foreign distilled spirits have been imported cannot be used to contain domestic distilled spirits, though the stamps thereon have been effaced and destroyed. Act March 1, 1879, § 12.—United States v. Half Barrel, etc., Case No. 15,280.

It is unlawful to fill with domestic tax-paid spirits any casks in which foreign spirits have been imported, even where the brands, stamps, and marks required by law have been removed. Act March 1, 1879, § 12.—United States v. One-Half Barrel Brandy, Case No. 15,931.

An importer's general bond for duties on teas, under Act 1799, § 62, is a securing of the duties, within the meaning of section 43.—Six Hundred and Fifty-One Chests of Tea v. United States, Case No. 12,916.

§ 92. What constitutes value of goods.

On a forfeiture of goods by reason of the falsity of the original warehouse entry, the value of the goods at the time of such entry is recoverable.—United States v. Baker, Case No. 14,500.

On a forfeiture of goods by reason of false practice subsequent to the original entry, the value of the goods at the time of the payment of the duties is recoverable.—United States v. Baker, Case No. 14,500.

In a suit for the value of goods fraudulently entered under Rev. St. § 2864, the recovery is not limited to the sum which defendant received on the sale of the goods by him.—United States v. York Street Flax Spinning Co., Case No. 16,781.

§ 93. Knowledge or intent.

An actual intention to defraud is an essential question in a suit to enforce a forfeiture. Act June 22, 1874.—Lewey v. United States, Case No. 8,309.

Innocence of an intent to defraud the revenue will not prevent a forfeiture where a violation of the statute is clearly proven.—The Fame, Case No. 4,633.

To subject goods to forfeiture for fraudulent undervaluation, it must be shown that the goods were invoiced below their value, with an intent to defraud the United States.—United States v. Seventy-Eight Cases of Books, Case No. 16,258a; Same v. One Hundred Fifty Bales Unwashed Wool, Id. 15,932b; Same v. Three Hundred Bales of Wool, Id. 16,508.

Innocence of intention cannot, any more than ignorance of law, afford a defense to the master or owner of a vessel for a violation of Act March 2, 1799, § 50.—United States v. The Sarah B. Harris, Case No. 16,223; Same v. The Cuba, Id. 14,898.

Under Act 1799, § 28, the reception by one vessel of goods unladen from another without a permit subjects the receiving vessel to forfeiture, irrespective of a fraudulent intent on the part of her officers.—The Ploughboy, Case No. 11,229.

Neither accident, mistake, nor innocence of fraudulent intention is a sufficient defense to an information for forfeiture of a package of goods containing an article not described in the invoice. Act May 28, 1830.—United States v. Package of Lace, Case No. 15,985.

An intent to defraud will be imputed to manufacturers who invoice goods at the cost price under a misapprehension of the law, supposing themselves to be purchasers, where such invoicing tended to evade or defraud the revenue, though they in fact had no such intent.—United States v. Five Casks of Files, Case No. 15,112.

The word "knowingly" (Act March 3, 1863), and the expression, "with intent to defraud the revenue" (Act May 28, 1830), in reference to undervaluation, have the same meaning.—In re Twelve Hundred and Nine Quarter Casks, etc., of Wine, Case No. 14,279.

Goods landed without a permit, though by the unlawful act of the master, and without the knowledge or consent of the owner or consignee, are subject to forfeiture.—United States v. Twenty Cases of Matches, Case No. 16,559.

The illegal act of one partner without the knowledge or consent of the others is sufficient to forfeit the partnership goods.—United States v. Six Hundred and Sixty-One Bales of Tobacco, Case No. 16,297.

Act June 22, 1874, § 16, which makes the finding of an intent to defraud a prerequisite to a forfeiture of goods, though in terms restricted to cases in which issue of fact is joined, is applicable to suits in rem in admiralty, even where there is no answer or appearance.—United States v. Ninety Demijohns Aquadiente, Case No. 15,887.

§ 94. Property forfeited.

The mingling of unlawful and lawful importations in the same invoice is ground of forfeiture of the whole importation.—Locke v. United States, Case No. 8,442.

Where goods subject to duty are mixed with other goods upon which duties have been paid at an earlier port of entry with an intention to smuggle them, the latter are not subject to forfeiture, unless there was an intent to defraud by importing them.—United States v. Two Thousand Four Hundred and Nineteen Sheepskins, Case No. 16,589a.

Domestic goods shipped from foreign port to aid in concealing foreign goods, liable to forfeiture.—The Ariel, Case No. 527.

Property stolen from a friendly foreign sovereign, and smuggled into the United States, is not subject to forfeiture for illegal importation.—In re Princess of Orange, Case No. 11,431.

Goods of whatever growth or manufacture, brought from a foreign port or place, and landed at a port or place within the United States without a permit, are forfeited.—In re Ten Cases of Opium, Case No. 13,828.

An attempt to practice fraud upon the revenue as to a portion of a cargo is ground of forfeiture of the whole cargo belonging to the same person.—Two Hundred and Fifty Barrels of Molasses v. United States, Case No. 14,293.

An intentional undervaluation of one item of an invoice authorizes forfeiture of the whole.—In re Six Cases of Silk Ribbons, Case No. 12,914.

Goods landed at different times, but from the same cargo and vessel, may be added together to make up the requisite amount to forfeit the vessel, under Act 1799, § 50.—The Sarah Bernice, Case No. 12,343.

Goods found concealed on board after the master has declared that the whole cargo is

discharged are not protected from forfeiture by the proviso in section 57.—United States v. Cave, Case No. 14,760.

Where an article not described in the invoice is found in a package, the whole package, and not the article alone, is forfeited. Act May 28, 1830.—United States v. Package of Wool, Case No. 15,986.

The whole package is not forfeited for the omission from the entry of an article therein, unless it appear that the package or invoice was made up fraudulently. Act July 14, 1832, § 14.—United States v. Ten Cases of Merchandise, Case No. 16,447; Same v. Ten Cases Shawls, Id. 16,448.

On an information against specific articles as "sea stores" forfeited, they cannot be adjudged to be forfeited as a part of the cargo or merchandise, or as a part of the tackle, etc., of the ship.—United States v. Twenty-Four Coils of Cordage, Case No. 16,566.

Secret introduction of prohibited articles on board ship by hands, in defiance of regulations, no ground of forfeiture of vessel, as the owners of the vessel are not liable for the acts of persons employed by the master.—The Governor Cushman, Case No. 5,646.

Unloading goods without a permit before reaching port of destination does not cause a forfeiture of the ship, under Act March 2, 1799.—United States v. The Hunter, Case No. 15,428.

Under Act March 2, 1857, c. 63, if an invoice or package of imported goods contains some articles which are indecent or obscene, and others which are not so, the whole are liable to forfeiture; the unlawful ones being destroyed, and the others sold.—United States v. One Case Stereoscopic Slides, Case No. 15,927.

The provision of the tariff law of 1842, making the importation of indecent and obscene paintings cause for forfeiture of the entire invoice, is applicable, though the painting is not a distinct article, but is affixed to another article, such as a snuff box.—United States v. Three Cases of Toys, Case No. 16,499.

Nor is the balance of the invoice exempted from confiscation by the fact that the owners thereof were unaware of the character of the paintings.—United States v. Three Cases of Toys, Case No. 16,499.

Property returned on bond after seizure is subject to forfeiture for causes subsequently arising, but its liability to condemnation in the suit in which it was bonded is not affected by the fact of its condemnation for the subsequent forfeiture.—United States v. Eighteen Bales of Blankets, Case No. 15,032.

§ 95. Rights of third persons.

A bona fide purchaser of goods imported at a fraudulent valuation before the United States has elected its remedy will be protected.—United States v. Fifty-Three Boxes of Havana Sugar, Case No. 15,098; Same v. Sundry Boxes of Havana Sugar, Id. 16,418.

The consignee of goods imported at a fraudulent valuation, who, having no knowledge of the fraud, made advances and incurred expenses in relation thereto, will be protected.—United States v. Fifty-Three Boxes of Havana Sugar, Case No. 15,098.

A transfer of goods entered under a false invoice after the passage of the Revised Statutes and before the passage of Act Feb. 18, 1875, amending section 2864, gives no title as against the United States.—United States v. Four Cases of Lastings, Case No. 15,145.

A carrier which transported smuggled goods has no lien on them for the freight, as against the government, though innocent of the fraud.—United States v. Fifty-Three Bales of Rags, Case No. 15,097.

Advances made in good faith, by auctioneers in possession, upon goods entered at a fraudulent undervaluation, before the government had elected to proceed for a forfeiture, or to sue for the value, are a lien upon the proceeds.—United States v. Seventy-Eight Cases of Books, Case No. 16,258b.

Imported goods may pass by sale, though duties are due thereon. They are not liable for other duties due from the consignee, but only for the duties due on such goods.—Howland v. Harris, Case No. 6,794.

§ 96. Release of property on bond.

The owner of property seized as smuggled is not entitled to have the same bonded under Act March 2, 1799, § 89; but a delivery on bail is discretionary with the court.—In re Fifteen Pieces of Black Silk, Case No. 4,779.

A bail bond given by the claimant is good, though the condition does not exactly conform to Act March 2, 1799, c. 128, § 89.—The Struggle, Case No. 13,550.

Such section does not extend to delivery on bail on seizures under other acts.—The Struggle, Case No. 13,550.

A bond for the delivery of goods seized must be for the market value of the goods, without any deduction for the amount of duties.—United States v. Cargo of Sugar, Case No. 14,721; Same v. One Thousand Two Hundred and Ninety-One Bales of Tobacco, Id. 15,965; Same v. Segars, Id. 16,249; Same v. Three Horses, Id. 16,500; Same v. Twelve Thousand Three Hundred and Forty-Seven Bags of Sugar, Id. 16,555. CONTRA, see In re Four Cases of Silk Ribbons, Case No. 4,986; United States v. One Thousand Three Hundred and Eighty-Two Hogsheads of Sugar, Id. 15,962.

Where a stipulation for value is given in a sum agreed upon, the stipulators are not entitled to any reduction for erroneous estimation of value, or for injury by careless handling of the goods by the collector's employés.—United States v. Two Trunks, Case No. 16,592.

The bond for the return of seized goods (Act 1799, § 89) should include the additional sum imposed by Act March 3, 1865, as a penalty for undervaluation.—United States v. Three Horses, Case No. 16,500.

The amount of duties payable on giving bond for the value of goods seized is only that demandable if the fairness of the importation had not been impeached.—United States v. Segars, Case No. 16,249.

In cases within Act March 2, 1799, c. 128, § 89, judgment cannot be rendered on the bail bond until after 20 days from the day of condemnation, and then in open court.—McLellan v. United States, Case No. 8,895.

See, also, ante, § 53.

§ 97. Jurisdiction.

The court has jurisdiction in revenue causes, although the property seized may never have come into possession of its officers.—The Bolina, Case No. 1,608.

§ 98. Seizure and abandonment.

The provisions of Act May 8, 1792, § 4, requiring the marshal to take custody of all goods seized by revenue officers, were abrogated by Act July 18, 1866, § 31.—United States v. One Case of Silk, Case No. 15,925.

It is no abandonment of vessel seized on the high seas to permit her master and crew to alone navigate her to port.—The Abby, Case No. 14.

§ 99. Defenses.

A forfeiture is imposed only for fraud, misconduct, or negligence of the owner. He is not to suffer for the fraud, misconduct, or negligence

of the revenue officers alone.—Six Hundred and Fifty-One Chests of Tea v. United States, Case No. 12,916.

An irregularity in the seizure is not available to claimants in the suit for forfeiture for violation of the customs laws.—United States v. Twenty-Five Cases of Cloths, Case No. 16,563.

The fact that duties have been paid or secured, and the goods turned over to the importer, will not prevent a forfeiture for a fraudulent undervaluation in the invoice.—The Cloth Cases, Case No. 2,902.

§ 100. Limitations.

As the act of 1839 makes no exception to the limitation imposed by it in the case of concealed fraud, the court cannot ingraft such an exception upon it.—United States v. Maillard, Case No. 15,709.

The effect of the repealing provisions of Act March 3, 1863, § 14, in relation to forfeitures, is to leave in full force the limitation contained in Act Feb. 28, 1839, § 4, with its proviso.—United States v. Maillard, Case No. 15,709.

Under Act March 3, 1863, all forfeiture proceedings arising under the customs laws are subject to five years' limitation.—In re Landsberg, Case No. 8,041.

§ 101. Pleading.

A libel for a forfeiture for a violation of customs laws should substantially agree with the terms of the statute.—The Betsy, Case No. 1,365.

An averment that the requirements of the statute, which are merely directory to the revenue officers and the importer, have been complied with, is not necessary. Act March 3, 1863.—United States v. Seventy-Eight Cases of Books, Case No. 16,258.

In informations of forfeiture for false valuation of imported goods, it is sufficient to make the averments in the words of the statute.—United States v. Thirteen Packages of Plate Glass, Case No. 16,459; Same v. Eleven Packages of Plate Glass, Id.

A libel for forfeiture under Act March 2, 1799, c. 128, § 50, need not allege the goods to be of foreign growth.—The Betsy, Case No. 1,365.

The information under Act 1799, c. 128, § 50, must allege that the goods were unladen in some port or place within a collection district, without a permit from its collector, or that the port or district is unknown.—United States v. Burnham, Case No. 14,690.

A forfeiture for landing goods under a collusive permit may be enforced upon a general count charging that the goods were landed without a permit.—Bottomley v. United States, Case No. 1,688.

An allegation, in an information of forfeiture, that the master neither did nor would deliver a true manifest of merchandise, but, on the contrary, delivered a false and fraudulent invoice, with a view to evade the revenue laws, does not present a case within Act 1821, but within Act 1799, §§ 67, 106.—United States v. The Margaret Yates, Case No. 15,720.

The defense that the party has been prevented by inevitable accident, necessity, or distress from complying with the requisitions of Act March 2, 1799, c. 128, §§ 50, 92, is not admissible under a plea which simply puts in issue a denial of the facts constituting a forfeiture thereunder.—United States v. Hayward, Case No. 15,336.

A sentence of condemnation forfeiting a portion of a cargo from an omission to enter the same in the manifest is erroneous, unless the libel charge the particular omission.—The Thomas and Henry v. United States, Case No. 13,919.

In an information of forfeiture against a foreign-built vessel owned in the United States, under Act March 1, 1817, the exception in the proviso of the act must be negatived.—United States v. The Mary Merritt, Case No. 15,733.

Under a count alleging that certain articles imported were indecent and obscene, and asking that they be condemned and destroyed, the government cannot ask for a forfeiture and sale of other articles in the same case, which the verdict finds to be lawful.—United States v. One Case Stereoscopic Slides, Case No. 15,927.

A direct averment that the person making the fraudulent entry was either owner, consignee, or agent of the property (Act March 3, 1863, § 1) is not necessary where it appears from the statements of the information that the person was either the owner, or acted as agent of the owner.—United States v. Seventy-Eight Cases of Books, Case No. 16,258.

An information alleging fraud in the importation of merchandise at an undervaluation (Act March 3, 1799, § 66) must aver that the valuation was under cost at the place of exportation.—United States v. Seventy-Eight Cases of Books, Case No. 16,258.

In an information in rem under Act 1799, c. 22, § 66, it must be charged that the goods were entered under a false invoice, and that they were falsely invoiced to evade the duties.—United States v. Three Parcels of Embroidery, Case No. 16,512.

A libel in rem for a forfeiture under the customs laws must allege that the property has been seized by the collector. A plea of no forfeiture puts that allegation in issue.—The Silver Spring, Case No. 12,858.

Customs inspectors are authorized to receive imported goods found concealed on a vessel, and a libel alleging a seizure by the collector may be amended to show the facts.—United States v. Two Trunks, Case No. 16,591.

An information against a vessel charging the importation of merchandise not included in the manifest may be amended without terms in respect to allegations of ownership of the vessel.—United States v. The Queen, Case No. 16,107.

Allegations in the libel as to the goods landed and their value bind the government.—The Sarah Bernice, Case No. 12,343.

§ 102. Evidence—Presumptions and burden of proof.

Where probable cause is shown for the forfeiture of goods, the burden of proof is upon claimants to show their innocence.—In re Six Cases of Silk Ribbons, Case No. 12,914; In re Twelve Hundred and Nine Quarter Casks, etc., of Wine, Id. 14,279; United States v. Six Hundred and Sixty-One Bales of Tobacco, Id. 16,297; Same v. Sixteen Cases of Silk Ribbons, Id. 16,301; Same v. Twenty-Five Cases of Cloths, Id. 16,563.

Act 1799, c. 22, § 71, providing that the claimant has the onus probandi on seizures under the act, is not adopted by Act 1820, c. 122, § 4.—The Abigail, Case No. 18.

Where the claimant knew that his method of importation was contrary to law, the burden is upon him to show affirmatively that he did not adopt such method with intent to evade the payment of duties.—United States v. Nine Trunks, Case No. 15,886.

Where it was proved that the master had a quantity of cigars on board, and none were entered on the manifest, and no account was given of the quantity purchased, the evidence was sufficient to cast the burden of proof on the claimant, under Act March 2, 1799, § 71, and the failure to produce evidence of what was purchased or put on board was cause for condemnation.—The Busy, Case No. 2,232.

The claimant of liquors found stored in large quantities in the upper room of a private house

has the burden of showing that they were legally imported, and that the original packages had been inspected, marked, and branded as required by law.—United States v. Five Jugs of Brandy, Case No. 15,118.

Where the invoice price is shown to be far below the market price, the importer has the burden of showing the price actually paid.—United States v. Eight Cases of Lamps, Case No. 15,029.

On a libel for undervaluation, a fraudulent purpose will be implied upon proof of the undervaluation, which complainant must rebut by showing an innocent mistake.—United States v. Three Hundred and Thirty-Seven Cases of Wine, Case No. 16,506.

The marks and certificates being evidence only of a lawful importation, the want of them affords no presumption of the nonpayment of duties.—Six Hundred and Fifty-One Chests of Tea v. United States, Case No. 12,916.

If the entry does not contain a part of the goods consigned by the same invoice and bill of lading, it is prima facie evidence that the duties have not been paid.—United States v. Certain Hogsheads of Molasses, Case No. 14,766.

Where it appears that the goods were entered at only about one-half of the invoice price of like goods purchased by other importers at the same time, and imported by the same vessel, the claimants have the burden of substantiating the invoice by clear proofs.—United States v. Sixty-Five Packages of Glass, Case No. 16,305a.

Where an affidavit of damage is in fact false, there is a prima facie presumption of an intent to defraud the revenue.—United States v. Six Hundred and Sixty-One Bales of Tobacco, Case No. 16,297.

§ 103. —— Admissibility.

In a forfeiture proceeding for evading duties, evidence of other fraudulent transactions is admissible to show the intent with which the act was committed.—Alfonso v. United States, Case No. 188; United States v. One Hundred and Forty-Six Thousand Six Hundred and Fifty Clapboards, Id. 15,935; Same v. Sixteen Cases of Silk Ribbons, Id. 16,301; Same v. Six Hundred and Sixty-One Bales of Tobacco, Id. 16,297.

Upon a proceeding for a forfeiture of a package of goods containing an article not described in the invoice evidence of accident or mistake may be given to rebut the inference of fraudulent intention.—United States v. Package of Wool, Case No. 15,986.

"Market value" is the price at which the manufacturer holds the goods for sale, and which purchasers are willing to pay in the ordinary course of trade, and evidence is not admissible to show that there was not in fact such an actual market value.—United States v. Sixteen Cases of Silk Ribbons, Case No. 16,301.

On a proceeding to forfeit goods as having been invoiced at less than their actual cost at the place of exportation, the market price at that place at the time is admissible as the surest test of the honesty of the transaction.—United States v. Two Cases of Woolens, Case No. 16,576.

In a forfeiture proceeding invoices of shipments in July and August are admissible to show market value of goods shipped in May.—Alfonso v. United States, Case No. 188.

On an information for forfeiture for undervaluation, the importer may show the selling price at the place of importation and the market price at the place of manufacture.—In re One Hundred and Twenty-Three Packages of Glass, Case No. 10,525.

The costs of production, with the addition of a manufacturer's profit, is admissible as tending to show market value, when no evidence of sales can be given.—United States v. Sixteen Cases of Silk Ribbons, Case No. 16,301.

Admissibility and competency of evidence to prove the actual market value of imported wines alleged to have been undervalued.—In re Twelve Hundred and Nine Quarter Casks, etc., of Wine, Case No. 14,279.

The court will be liberal in the admission of evidence bearing upon the point whether goods were fraudulently entered, but evidence clearly irrelevant is not admissible.—United States v. Four Cases Printed Merinoes, Case No. 15,146.

Parol evidence is not admissible to control the intention as expressed on the face of the manifest, showing the vessel and cargo to be consigned to an American port.—The Fame, Case No. 4,633.

Where goods proceeded against on the ground that the packages were made up with intent to evade and defraud the revenue were entered on the oath of a claimant taken as in the case of goods actually purchased, evidence that the real owner was the foreign manufacturer, and the claimant only a consignee, *held* immaterial.—United States v. Four Cases Printed Merinoes, Case No. 15,146.

Statements made by one who for a time had possession of goods claimed as the property of another, in respect to certain alleged violations of the customs laws made after he had parted with the possession thereof, *held* incompetent evidence, as being merely narrative or historical, and in derogation of the title of the alleged owner.—United States v. Lot of Jewelry, Case No. 15,626.

Proof that the fact of an intended illegal importation was previously known to the revenue officers, and that they acted thereon in making the seizure, is admissible.—United States v. Nine Trunks, Case No. 15,886.

On a libel to forfeit goods for false valuation, proof of correct entries made about the same time of the same kind of goods by the claimant is admissible to show that he knew their real value.—United States v. One Hundred and Forty-Six Thousand Six Hundred and Fifty Clapboards, Case No. 15,935.

Books and papers seized on a warrant (Act March 2, 1867, § 2) before institution of an action to recover the value of goods, as forfeited under the customs laws, are admissible against defendant. Case No. 15,419 reversed.—United States v. Hughes, Case No. 15,417.

On an information of forfeiture, the goods themselves are regarded as the defendant, and it is no objection to the admission of proof of communications made to the revenue officer that they were made in the absence of the claimant.—United States v. Nine Trunks, Case No. 15,886.

The question whether the difference between the entry and the invoice arose from accident or mistake is one exclusively for the secretary of the treasury, and cannot be raised at the trial on a seizure as forfeited under Act April 20, 1818.—United States v. One Case of Hair Pencils, Case No. 15,924.

Upon a prosecution for the forfeiture of goods, the law presumes that there was, at the time and place of manufacture of imported goods, an actual market value, and no evidence is admissible to prove the contrary.—In re Six Cases of Silk Ribbons, Case No. 12,914.

§ 104. —— Weight and sufficiency.

The fact that the appraisers have materially raised the invoice value of imported goods is prima facie, but not conclusive, evidence of undervaluation in a subsequent proceeding to for-

feit the goods on the ground of fraudulent invoice.—United States v. Two Hundred Quarter Boxes of Cigars, Case No. 16,587.

In a suit for forfeiture under Act 1799, c. 22, § 68, the government must prove that the goods were "concealed," and the mere fact that they were not entered on the manifest is not sufficient.—United States v. Twenty-Six Diamond Rings, Case No. 16,572.

On an information for forfeiture for undervaluation the United States are not bound by the action of the revenue officers in assenting to the invoice valuation, but they must show undervaluation at the trial.—United States v. Twenty-Five Cases of Cloths, Case No. 16,563.

The government is not bound by the acts of its consul in certifying to the correctness of an invoice, when based upon false and fraudulent statements.—United States v. Sixteen Cases of Silk Ribbons, Case No. 16,301.

Foreign market value of goods may be proven by testimony of domestic merchants.—Alfonso v. United States, Case No. 188.

Where the claimant sets up mistake as an excuse for disagreement with the entries, the fact that probable cause of seizure has been made out does not impose upon him the necessity of making out an unusually clear case of mistake.—United States v. Nine Packages of Linen, Case No. 15,884.

Vessel forfeited for smuggling cigars on the testimony of their owner, who produced an invoice for their shipment to the place from which the vessel sailed, and a letter from the master of the vessel stating that they had been shipped, and that he had paid the master the agreed freight, though the master denied the shipment.—The John Griffin, Case No. 7,348.

On an information for forfeiture of goods subject to ad valorem duty, the appraisement of public appraisers is prima facie evidence.—United States v. Fourteen Packages of Pins, Case No. 15,151; In re One Hundred and Twenty-Three Packages of Glass, Id. 10,525.

Proof of foreign growth or manufacture of alleged unlawfully imported goods is not necessary. Act March 2, 1799, § 50.—The Active, Case No. 33.

Evidence is not sufficient to sustain forfeiture of vessel for smuggling where the only evidence is that of the seamen who were arrested in the act of smuggling, and promised immunity if they would testify against the vessel.—The Cleopatra, Case No. 2,886.

The fact that the consignee, upon entering the goods, added 2 per cent. to the invoiced value thereof merely as a precaution against having the goods subjected to penal duties and forfeited, does not prejudice the question whether the shipper of the goods stated the value thereof correctly in the invoice.—United States v. Three Hundred Bales of Wool, Case No. 16,508.

A mere misdescription of shawls as worsted shawls which are made up of cotton and worsted, is not of itself competent evidence of a fraudulent intent, such as will warrant a forfeiture of the goods under Act July 14, 1832, § 14.—United States v. Ten Cases of Merchandise. Case No. 16,447; Same v. Ten Cases of Shawls, Id. 16,448.

A series of sales or a single sale, or offers to sell in the usual course of trade, are among the best evidences of market value.—In re Six Cases of Silk Ribbons, Case No. 12,914.

The admission of the goods to entry is not evidence either that the proofs were furnished, or of the existence of accident, necessity, or distress.—United States v. Hayward, Case No. 15,336.

§ 105. —— Production of documentary evidence.

On an information under Act May 28, 1830, against articles alleged to be falsely charged in an invoice, the court will not grant an order on the claimant to produce the invoice at the trial.—United States v. Twenty-Eight Packages of Pins, Case No. 16,561.

§ 106. Trial.

The weight of an affidavit of value, annexed to the invoice as required by law, is for the jury.—In re One Hundred and Twenty-Three Packages of Glass, Case No. 10,525.

Form of submission of the question of the intent to defraud, to the jury.—Lewey v. United States, Case No. 8,309.

§ 107. New trial.

Where a systematic arrangement to defraud the revenue is charged, a new trial will not be granted because one of the packages was appraised at less than the invoice value.—United States v. Twenty-Five Cases of Cloth, Case No. 16,563a.

A new trial will not be granted because the jury was sworn to try an issue between the United States and the owner on an information for forfeiture, where the claim and answer were filed by an agent for the owner.—United States v. Fourteen Packages of Pins, Case No. 15,151.

§ 108. Distribution of proceeds.

Act July 18, 1866, is not an act relating to the customs, within the meaning of Act March 2, 1867.—The Monte Christo, Case No. 9,720.

The marshal's commissions for the sale of property, and collecting and paying over the proceeds, form part of the expenses to be deducted before paying the proceeds into court.—United States v. Fifty-One Dozen Pieces of Merchandise, Case No. 15,094.

Under Act March 2, 1867, the amount of forfeitures recovered, less the charges allowed, should be paid to the collector, who should deduct duties and charges, and pay the residue into the treasury, to be distributed, under the direction of the secretary, to the persons and in the proportions prescribed by the decree of the court.—United States v. George, Case No. 15,197.

Though the collector has not proceeded according to law in seizing and selling imported goods as forfeited, he is nevertheless entitled to half of the proceeds, where the same have been credited to him on settlement of his accounts.—United States v. Collier, Case No. 14,833.

The collector of a port who received the proceeds of a forfeiture is not liable for such part as he has paid over to custom-house officers for their shares before notice of plaintiff's claim.—Sawyer v. Steele, Case No. 12,406.

The claimant is entitled to have the penalty illegally exacted returned upon the distribution of the proceeds of the property on condemnation.—United States v. Linens, Case No. 15,604; Same v. Segars, Id. 16,249.

Rights of informers, see "Forfeitures," §§ 15–27.

(C) PENALTIES.

See, also, "Admiralty," § 34.

§ 109. Penalties imposed—Undervaluation.

Act March 3, 1863, imposing a penalty for false and fraudulent entry of goods at less than their true weight or value, was not repealed by Act July 18, 1866, § 4.—United States v. Merriam, Case No. 15,759.

Goods imported by their manufacturer are not subject to a penalty of 20 per cent. ad va-

lorem for undervaluation (Act 1846, § 8), but to a penalty of 50 per cent. of the duty (Act 1842, § 17). — Bischoff v. Maxwell, Case No. 1,438.

Act Aug. 30, 1842, § 17, authorizes penalty of 50 per cent. for undervaluation of any goods other than those purchased.—Bannendahl v. Redfield, Case No. 964.

The penalty for undervaluation attaches whether the importer makes the addition to his invoice or not.—Goddard v. Maxwell, Case No. 5,492; Lehmaier v. Same, Id. 8,214; Morris v. Same, Id. 9,834; Schmaire v. Same, Id. 12,460; Vaccari v. Same, Id. 16,810.

The 20 per cent. penalty for undervaluation (Act July 30, 1846, § 8) is chargeable, whether or not an appraisal is made upon the invoice as originally made up.—Goddard v. Maxwell, Case No. 5,492.

A penalty for undervaluation cannot be imposed on the importation of goods by their producer, where a corrected invoice is handed in before any action is taken to determine the value of the goods.—Howland v. Maxwell, Case No. 6,799.

The penalty of 20 per cent. (Act July 30, 1846, § 8) cannot be exacted for a 10 per cent. undervaluation in coal arising solely from an excess of quantity.—Manhattan Gas-Light Co. v. Maxwell, Case No. 9,023.

The importer is not liable in such case, under section 4, to pay the fee of the weigher and measurer.—Manhattan Gas-Light Co. v. Maxwell, Case No. 9,023.

Freight and commissions, by being added to the value of imports, cannot be made the means of imposing a penalty on the latter. Act July 30, 1846, § 8.—Vaccari v. Maxwell, Case No. 16,810.

Where a valuation of molasses in casks in an invoice is correct, but the quantity stated in the invoice is less than the actual quantity found on gauging, the case is not one for the imposition of a penalty for undervaluation, under Act July 30, 1846, § 8.—Yznaga v. Redfield, Case No. 18,197.

Where an invoice of molasses in casks does not specify the number of gallons, the case is one of undervaluation, and the penalty may properly be imposed.—Yznaga v. Redfield, Case No. 18,197.

Spanish quicksilver, imported from London, *held* subject to penalty for undervaluation, where place of production was not shown.—Belmont v. Lawrence, Case No. 1,280.

The collector cannot impose the penalty prescribed by Act July 30, 1840, § 8, where the invoice valuation of goods imported by the manufacturer is increased on appraisement by more than 10 per cent.—Durand v. Lawrence, Case No. 4,187.

The 20 per cent. additional duty for undervaluation may be imposed after the goods libeled for forfeiture have been discharged on a trial.—Falleck v. Barney, Case No. 4,625.

Where the value in specie and in foreign paper currency are both set out in the invoice, the fact that the importer makes the entry in the specie value alone will not subject the goods to a penalty for undervaluation.—Fiedler v. Maxwell, Case No. 4,760.

A collector having refused to allow the importer to add, on his entry, to the invoice prices, because he was the manufacturer, cannot impose a penal duty on the goods as purchased in the foreign market.—Crowley v. Maxwell, Case No. 3,448.

Where goods are entered and warehoused at one port, intended for reshipment and rewarehousing at another port, the entry is to be completed at the former port, and the collector of the second port has no power to make a reappraisement.—Spring v. Russell, Case No. 13,261.

In such case the collector of the first port cannot make an addition to the invoice value upon mere hearsay information, derived from the collector of the second port.—Spring v. Russell, Case No. 13,261.

After information filed against goods alleged to be forfeited, no penal increase of duties can be exacted by the collector, and such an exaction will not affect the prosecution.—United States v. Segars, Case No. 16,249.

Exaction of the penal duty of 20 per cent., after institution of proceedings for a forfeiture, is illegal.—United States v. Linens, Case No. 15,604.

The additional duty of 20 per cent. (Act July 30, 1846, § 8) is not imposed where the invoice price is raised more than 10 per cent., where the importer is the manufacturer, or procured the goods in the country of their production otherwise than by purchase.—Thomson v. Maxwell, Case No. 13,983.

Where a cargo of goods was shipped from Canton to London, thence to New York, the freight from Canton to London forms no part of the "appraised value," and its addition did not authorize the imposition of the penalty, under Act July 30, 1846, § 8.—Grinnell v. Lawrence, Case No. 5,831.

See, also, ante, §§ 35–47.

§ 110. —— Failure to enter goods in manifest.

Act March 2, 1821, § 1, as re-enacted March 3, 1823, is not repealed by Act Aug. 30, 1842, § 19.—United States v. Smith, Case No. 16,319.

The latter act is aimed at frauds on the revenue in cases where an entry of goods and an invoice are required as prescribed by the act of 1823.—United States v. Smith, Case No. 16,319.

A surplus of cargo, equally, with a deficiency, is a disagreement with the manifest under Act March 2, 1799, § 57.—United States v. Fairclough, Case No. 15,068.

The master is not entitled to the benefit of the proviso in Act 1799, § 24, if the goods are unshipped. Throwing goods into the dock, protected so that they may be reclaimed, is unshipment.—United States v. Hutchinson, Case No. 15,431.

Goods are imported and brought into the United States when brought within the limits of a port of entry with the intention of unlading them there.—The Missouri, Case No. 9,653.

See, also, ante, § 32.

§ 111. —— Receiving and concealing illegally imported goods.

Act March 3, 1823, § 2, forfeiting double the value of goods illegally imported, is not confined to goods imported from territory adjoining the United States.—United States v. Jordan, Case No. 15,498.

Nor is the act confined to cases arising under statutes in operation when that section was enacted.—United States v. Jordan, Case No. 15,498.

Entering goods by a false invoice is an illegal importation under this section.—United States v. Jordan, Case No. 15,498.

This section was repealed by the Revised Statutes (June 22, 1874), but the repeal did not operate upon cases previously commenced.—United States v. Jordan, Case No. 15,498.

A resistance of the seizure of goods, whereby the same are removed from the custody of the officer, is not a concealment.—United States v. Farnsworth, Case No. 15,072.

The fine provided by Act 1866, § 4, which is substantially identical with Rev. St. § 3082, can-

not be recovered in a civil action.—United States v. Claflin, Case No. 14,799.

See, also, post, § 123.

§ 112. —— Unlading without permit.

A vessel engaged in the coasting trade, having goods on board, which have not paid duties, is not within Act 1799, c. 128, § 50, as to landing foreign goods without a permit.—Jackson v. United States, Case No. 7,149.

The carrying out of salt, and its return to the port of departure by a fishing vessel, which touched at a foreign port, is not a bringing of goods from a foreign port, in violation of Act 1799, § 50.—The E. K. Dresser, Case No. 4,324.

See, also, ante, § 33.

§ 113. —— Failure to report arrival.

Where the duty of the master of a vessel arriving from a foreign port to repair to the office of the chief officer of the customs, and there make report (Act 1799, c. 22, § 36), cannot be performed, by reason of the neglect of the officer to do that which is prerequisite, the statute is not violated.—United States v. Randall, Case No. 16,119.

If the master make report of arrival he is not liable to the penalty (Act March 2, 1799, § 30), though he do not repair to the office of the principal officer of customs for that purpose.—United States v. Rendell, Case No. 16,147.

Act March 2, 1799, c. 128, § 30, applies to all vessels arriving at a port, whether the arrival be voluntary or by stress of weather, or the port be the intended port of departure or not.—United States v. Webber, Case No. 16,656.

§ 114. —— Breaking customs locks.

The revenue collection act of 1799 (section 54), respecting the breaking of locks and fastenings put on vessels by inspectors, applies to vessels in the coasting as well as foreign trade.—United States v. Mantor, Case No. 15,719.

§ 115. —— Failure to deface marks on spirit cask.

Act March 2, 1799, making it penal to sell, alienate, or remove an empty cask which has contained foreign distilled spirits before the marks set thereon had been defaced, does not apply to a removal by a person who receives it after a purchase.—United States v. Halberstadt, Cases Nos. 15,277, 15,278.

Act April 20, 1818, requiring the deposit of distilled spirits in public warehouses, does not repeal Act March 2, 1799, requiring certain marks to be set upon casks containing foreign distilled spirits.—United States v. Halberstadt, Case No. 15,276.

§ 116. Knowledge and intent.

Quære, as to how far the court can regard the innocence of a party when the facts subject him to the penalties of a statute, and especially of the collection law.—United States v. Morris, Case No. 15,816.

An intent to evade the payment of duties is essential to the maintenance of a prosecution for the personal penalty for fraudulent entries, and the declaration must aver a scienter. Act March 2, 1799, § 66.—United States v. Platt, Case No. 16,054a.

For importing goods without a manifest, the master is liable to a penalty under Act 1799, § 24, though ignorant that the goods were on board; as where they are brought on board, and concealed by a sailor.—United States v. Hutchinson, Case No. 15,431; Same v. The Missouri, Id. 15,785; Same v. The Queen, Id. 16,108. CONTRA, see United States v. The Stadacona, Case No. 16,371.

Where there was, through mistake, an error in an invoice and entry, and a correct invoice was obtained, a penalty for undervaluation should not be imposed.—Carnes v. Maxwell, Case No. 2,417.

§ 117. Persons liable.

A manufacturer is not subject to penal duties for undervaluation, either under Act Aug. 30, 1842, or Act July 30, 1846.—Crowley v. Maxwell, Case No. 3,448.

Where goods, the property of a foreign manufacturer, are consigned to the party who entered them, the latter is not liable to a penalty for undervaluation, under Act July 30, 1846, § 8.—Christ v. Maxwell, Case No. 2,698.

The duty of delivering a manifest of imported merchandise devolves upon him who has charge of it, whether he be the master or not. Act March 2, 1821.—Steinham v. United States, Case No. 13,355.

It is not essential that such person should be actually on board the vessel when it enters the waters of the United States.—Steinham v. United States, Case No. 13,355.

A person is not liable for the act of his clerk who purchased and removed to his store an empty cask, which had contained foreign distilled spirits, without removal of the marks thereon, where done without his knowledge or acquiescence.—United States v. Halberstadt, Case No. 15,276.

The act of one member of a firm in subscribing an entry in the firm name and taking an oath thereto, is to be deemed the act of the firm.—United States v. Baker, Case No. 14,500.

§ 118. Remedy to recover—Form of.

An information will lie directly against a vessel for the recovery of the penalty for importing goods not included in the manifest without a previous prosecution of the master.—The Missouri, Case No. 9,652; United States v. Platt, Id. 16,054a; Same v. The Queen, Id. 16,107, 16,108.

It is not an essential preliminary that the ship should have been seized.—The Missouri, Case No. 9,652.

Debt is the proper form of action for the recovery of penalties for violations of the law.—Stockwell v. United States, Case No. 13,466.

The remedy for the penalty incurred in keeping or storing goods with knowledge that they were smuggled may be by information or debt.—Walsh v. United States, Case No. 17,116.

§ 119. —— Limitations.

Under Act March 3, 1863, all suits and prosecutions for penalties arising under the customs laws are subject to a five-years limitation.—In re Landsberg, Case No. 8,041.

The limitation of five years for prosecutions for crimes under the revenue laws (Act 1804, § 3) is applicable to an action of debt to recover the value of imported goods for fraudulent entries.—United States v. Platt, Case No. 16,054a.

Act 1839, § 4, is applicable to suits in favor of the United States.—United States v. Maillard, Case No. 15,709.

§ 120. —— Defenses.

A conviction on an indictment for smuggling, where the imprisonment imposed is served out, and the fine paid, and a pardon received as to the costs of prosecution, also imposed, will bar a civil action of debt to recover the penalty of double the value of the goods smuggled.—United States v. Tilton, Case No. 16,525; Same v. Gates, Id. 15,191.

The defense that goods were unladen by unavoidable accident, necessity, or distress is not admissible unless the requisite proofs thereof were made before the collector, or were prevented by inevitable accident, etc. Act March 2, 1799, c. 128, § 27.—United States v. Hayward, Case No. 15,336.

What constitutes a case of unavoidable accident, necessity, and distress.—United States v. Hayward, Case No. 15,336.

§ 120a. —— Pleading, evidence, and decree.

A libel against a vessel for the penalty for smuggling (Act March 2, 1799, § 24) must show ownership of vessel and value of goods.—The Antilles, Case No. 489.

In a libel filed against a vessel to recover the penalty imposed by Act March 2, 1799, for failure to enter goods on the ship's manifest, it is not necessary to aver a prior seizure.—The Missouri, Case No. 9,652.

A count for illegally receiving, concealing, or buying may be joined with one for illegally importing.—Stockwell v. United States, Case No. 13,466.

It is not a sufficient description of the illegality of the original importation to say merely that the goods had been imported and brought into the United States contrary to law.—United States v. Claflin, Case No. 14,798.

Burden of proof *held* not shifted to claimants on production of reports on file in the customhouse showing that a certain lot of goods seized were found on the vessel not entered on the manifest.—The Missouri, Case No. 9,653.

A material undervaluation shown will be presumed to have been made with intent to defraud the revenue, in the absence of clear and credible testimony excusing it.—United States v. Two Hundred Quarter Boxes of Cigars, Case No. 16,587.

The manifest of the cargo filed in the customhouse is competent evidence on the question whether certain goods were imported without being entered on the manifest.—United States v. The Missouri, Case No. 15,785.

A declaration alleging that goods imported without a manifest belonged to the master is not supported by evidence that they belonged to, and were smuggled on board by, one of the crew.—United States v. Hutchinson, Case No. 15,431.

The statement that the "master took all precaution in his power to prevent smuggling" *held* insufficient to prevent enforcement of the penalty against the vessel of the value of goods found concealed in the purser's room and the ship's storeroom.—The Helvetia, Case No. 6,345.

Customhouse documents are prima facie evidence of the facts which called for their issue.—McGlinchy v. United States, Case No. 8,803.

Defendant, to obtain the benefit of the proviso excusing from the penalty, must not only satisfy the court that no part of the cargo had been landed or unladen after it was taken on board as specified in the report, and pursuant to permits duly obtained, but also that the disagreement was by mistake or accident. Act March 2, 1799, § 57.—United States v. Fairclough, Case No. 15,068.

To authorize a recovery against a consignee of the value of goods fraudulently invoiced, where he is not the owner, but merely an agent to sell, knowledge on his part of the fraudulent undervaluation is necessary to establish the "actual intention to defraud." Act June 22, 1874, § 16.—United States v. Newmark, Case No. 15,870.

On an information against a vessel and her master for the penalty for the importation of merchandise not included in the manifest tried as a civil cause of admiralty and maritime jurisdiction, where the answer of the vessel does not except to such joinder but that of the master does, the information will be dismissed as to him and a decree entered against the vessel.—United States v. The Queen, Cases Nos. 16,107, 16,108.

§ 121. Remission of penalties.

The secretary of the treasury may remit the penalty prescribed in Act 1799, § 24.—United States v. Hutchinson, Case No. 15,431.

§ 122. Distribution of penalties.

Penalties imposed for obstructing officers of the customs, under Act March 2, 1799, c. 128, are to be received and distributed by the collector of the customs.—Ex parte Marquand, Case No. 9,100.

Under Act March 2, 1867, the amount of penalties recovered, less the charges allowed, should be paid to the collector, who should deduct duties and charges, and pay the residue into the treasury, to be distributed according to the decree.—United States v. George, Case No. 15,197.

Distribution of the proceeds of penalties incurred under the customs laws.—United States v. George, Cases Nos. 15,197, 15,198.

Customs officers are entitled to share only in penalties which are created by some law of the United States.—United States v. George, Case No. 15,198.

Notwithstanding a compromise of actions for estimated duties and criminal proceedings for frauds upon the revenue is invalid, sums paid into court as duties upon confession of judgment belong to the United States, as against informers claiming to share therein as penalties.—In re Webster, Case No. 17,332.

The additional duties of 20 per cent. ad valorem imposed for undervaluation (Act July 30, 1846, § 8) are not fines and penalties, and the collector is not entitled to a moiety of them.—United States v. Collier, Case No. 14,833.

Rights of informers, see "Penalties," § 4.

(D) OFFENSES.

§ 123. What constitutes an offense.

The acts of August 30, 1842, and March 3, 1823, relating to smuggling and receiving smuggled goods, were repealed by the act of July 18, 1866.—In re Landsberg, Case No. 8,041.

To constitute smuggling, there must be something in the manner of the importation which violates the statute, such as secrecy or concealment, intent to defraud the revenue, or the like.—United States v. Thomas, Case No. 16,473.

Construction of Act March 3, 1863, § 3, in relation to the fraudulent entry of goods.—United States v. Ballard, Case No. 14,506.

A person is not liable for carrying away goods under seizure (Act 1799, c. 22, § 71) unless a seizure has been lawfully made and possession taken and continued by the officer, and the goods are carried away forcibly, knowing them to be under seizure.—United States v. Cook, Case No. 14,852.

An inspector is an officer of the customs, the obstruction of whom is an offense, under Act March 1, 1799, c. 128, § 71.—United States v. Sears, Case No. 16,247.

The office of an inspector ceases with that of the collector who appointed him, and an indictment for resisting such inspector after the resignation of the collector, and before his reappointment to office by the succeeding collector, cannot be sustained.—United States v. Wood, Case No. 16,754.

On an indictment for forcibly obstructing a customs officer in the discharge of his duties, it is no defense that the object was personal chastisement merely, if defendant knew the officer to be so engaged.—United States v. Keen, Case No. 15,511.

If the customs officer acts without probable cause in making a seizure, an indictment will

not lie for resisting him. Act March 2, 1799, c. 128, § 71.—United States v. Gay, Case No. 15,193.

The master is subject to a fine for failure to produce a manifest, as required by Act 1791, § 26.—United States v. Teffry, Case No. 16,443.

Where a person is selling goods in his possession which he concedes to have been smuggled, he is guilty, under Act March 2, 1799, of keeping or storing goods with knowledge that they were landed without license.—Walsh v. United States, Case No. 17,116.

The unlading of rum from a vessel before arrival at her port of discharge is an offense under Act March 2, 1799, § 27, and not under section 50 of such act.—United States v. Brant, Case No. 14,637.

Goods were taken at night in a boat from the vessel, and when partly unloaded on the wharf defendant was discovered, and the goods were all returned to the vessel. *Held* not a landing, within Act March 2, 1799. — United States v. Smith, Case No. 16,343.

The removal of an official seal in ignorance of its character, and in the honest execution of a supposed duty, will not render the person liable under a statute punishing the willful removal of a seal.—United States v. Three Railroad Cars, Case No. 16,513.

Charge to grand jury on the subject of frauds upon the revenue in obtaining payment of money on drawbacks on the exportation of goods which have paid internal revenue taxes.—Charge to Grand Jury, Case No. 18,247.

An indictment for smuggling goods from Canada into the United States without an invoice cannot be maintained under Act Aug. 30, 1842, § 19, as such importations are governed by Act March 2, 1821, which requires only the delivery to the collector of the manifest of the goods imported from adjacent territory.—United States v. Nolton, Case No. 15,897.

§ 124. Persons liable.

One who goes abroad with funds furnished by another, and buys goods to be smuggled home, and causes them to be delivered to the carrier, who actually smuggles them, is guilty, though the service be gratuitous.—United States v. Martin, Case No. 15,729.

Purchasers of goods who were fully informed by the seller of the making and forwarding of false invoices, and who acquiesced therein, and availed themselves thereof, are liable and are estopped to say that they did not themselves perpetrate the unlawful act.—United States v. Merriam, Case No. 15,759.

Where such purchasers knew that the article would be invoiced to them as owners, and so presented for entry, and did not protest or inform the government officers, they are estopped to claim that they were not owners at the time of the entry.—United States v. Merriam, Case No. 15,759.

Act March 2, 1799, § 27, which makes the unlading an offense, applies only to the captain and mate.—United States v. Smith, Case No. 16,343.

§ 125. Limitations.

Under Act March 3, 1863, all crimes arising under the customs laws are subject to a five-years limitation.—In re Landsberg, Case No. 8,041.

An indictment for an offense against Act Aug. 30, 1842, is not barred, if found within five years subsequent to the act charged.—United States v. Shorey, Case No. 16,282.

§ 126. Indictment.

The acts necessary to effect an entry being prescribed by statute, an allegation that an entry was effected is a specific statement of what acts were done without a specific description of those acts.—United States v. Ballard, Case No. 14,506; Same v. Moller, Id. 15,794.

An indictment for smuggling must allege the facts relied upon as rendering the importation alleged an offense, or state the particular illegality intended to be proved, and such allegation must be proved as made.—United States v. Thomas, Case No. 16,473.

An indictment charging defendant with effecting an entry of goods by fraudulent means (Act March 3, 1863, § 3) must specify what fraudulent means were used; otherwise it is bad.—United States v. Bettilini, Case No. 14,587.

The offense of effecting an entry and of aiding in effecting an entry of imported goods at less than their true weight or measure, by means of false samples or representations, may be charged conjunctively in the same count of an indictment.—United States v. Bettilini, Case No. 14,587.

An indictment for smuggling (Rev. St. § 3082), describing the goods as "six cases containing silk goods of the value of $30,000, a more particular description of which is to the jurors unknown," being dutiable goods introduced into the port of New York from France, *held* sufficient.—United States v. Claflin, Case No. 14,798.

Where the certificate which the supervisor of the revenue was authorized to issue (Act March 2, 1799, § 41) was issued by the collector, an indictment under Act March 3, 1825, § 19, for altering it, must allege that the collector was designated by the president to fulfill the duties of the supervisor under Act March 3, 1803, and that the certificate was issued in such capacity.—United States v. Schöyer, Case No. 16,232.

If the information be filed by the district attorney on behalf of the United States, though expressed to be for the benefit of the collector and all concerned, it will be sufficient.—Walsh v. United States, Case No. 17,116.

Sufficiency of allegation of a forcible impeding within Act March 2, 1799, c. 128, § 71.—United States v. Bachelder, Case No. 14,490.

Where an indictment for resisting a customs officer improperly describes the office, the variance is fatal.—United States v. Phelps, Case No. 16,041.

§ 127. Evidence.

On a prosecution for entering goods at a false valuation, evidence that other goods of the same kind were entered about the same time, at a higher valuation, is admissible.—United States v. Merriam, Case No. 15,759.

Under Rev. St. § 3082, possession of goods is not sufficient to authorize conviction until it is otherwise proved that they were imported contrary to law.—United States v. Lot of Jewelry, Case No. 15,626.

An officer of the customs, duly commissioned, and acting in the duties of his office, is presumed to have taken the regular oaths.—United States v. Bachelder, Case No. 14,490.

Proof that an inspector was commissioned and sworn, and in the actual execution of the duties of the office, with the knowledge of the treasury department, is sufficient proof of his appointment to support an indictment for obstructing him in the performance of his duties.—United States v. Sears, Case No. 16,247.

It is not necessary to produce the commission of appointment to prove such appointment.—United States v. Sears, Case No. 16,247.

§ 128. Punishment.

Sentence and fine imposed for smuggling.—United States v. Mills, Case No. 15,777.

D

DAMAGES.

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§ 1. Direct or remote, contingent, or prospective consequences or losses.

The rule which restricts damages to such as may reasonably be supposed to have been contemplated by the parties has no application to cases of tort.—Bowas v. Pioneer Tow Line, Case No. 1,713.

The business occupation of plaintiff is a proper element for consideration in computing the damages sustained from personal injuries.—Lombard v. Chicago, Case No. 8,470; Wightman v. Providence, Id. 17,630.

The nature and extent of the injury and the pecuniary loss sustained by inability to attend to business, whether temporary or permanent, will be considered.—Goble v. Delaware, L. & W. R. Co., Case No. 5,488a; Harkey v. Texas & P. Ry. Co., Id. 6,065; Beardsley v. Swann, Id. 1,187; The D. S. Gregory and The George Washington, Id. 4,100.

The effect on health according to degree and probable duration may be considered.—Goble v. Delaware, L. & W. R. Co., Case No. 5,488a.

In an action for personal injuries, prospective damages may be given when they do not form the basis of a new action.—Fort v. Union Pac. R. Co., Case No. 4,952.

Damages for breach of contract cannot extend to probable profits.—Chapin v. Norton, Case No. 2,599.

Where a contract to cut a channel in a river is partly performed, when a freshet clears out the balance, and the contractor is notified not to complete the contract, he is entitled to recover the fair and reasonable profit which would have been made by him had he been allowed to complete it.—Thompson v. Georgetown, Case No. 13,955.

The value of care and services gratuitously bestowed may be considered.—The D. S. Gregory and The George Washington, Case No. 4,100.

§ 2. Physical and mental suffering.

Damages may be given in the case of an injury to a child from negligence, where there is no other substantial element than physical suffering.—Morgan v. Illinois & St. L. Bridge Co., Case No. 9,802.

In estimating damages for personal injury, pain endured and expenses incurred will be considered.—Beardsley v. Swann, Case No. 1,187; The D. S. Gregory and the George Washington, Id. 4,100; Goble v. Delaware, L. & W. R. Co., Id. 5,488a; Harkey v. Texas & P. Ry. Co., Id. 6,065.

No damages are given for fright or mental suffering resulting from mere risk or peril, where no actual injury has been sustained, nor for the result of mental or nervous disturbance, where no bodily harm is sustained.—Hollyday v. The David Reeves, Case No. 6,625.

§ 3. Disfigurement of person.

Disfigurement of the person caused by an injury is a proper subject of damages, but in estimating them it is proper to consider the condition and circumstances of the party disfigured. —The Oriflamme, Case No. 10,572.

§ 4. Reduction of loss.

As between contending parties, the wrongdoer is not entitled to the benefit of the rule that the condition of one seeking to avoid a loss is viewed with more favor that that of one seeking a gain.—Short v. Skipwith, Case No. 12,809.

A party to a contract who can save himself from loss arising from a breach at a trifling expense, or with reasonable exertions, is in duty bound to do so.—United States v. Burnham, Case No. 14,690.

Damages for failure of a railroad contractor to put on an increased force, as notified by the railroad company, cannot be recovered where the contract provides that the company may in such case put on an increased force at the con-

tractor's expense.—MacDonald v. Saginaw Val. & St. L. R. Co., Case No. 8,766.

§ 5. Aggravation.

In actions of tort the motive of defendant may be inquired into to increase the compensation.—The Yankee v. Gallagher, Case No. 18,124.

§ 6. Interest and expenses of litigation.

Interest on unliquidated damages is not allowed.—Gilpins v. Consequa, Case No. 5,452.

Interest may be given as damages for the nonpayment of money received by the defendant to the plaintiff's use after demand and refusal.—Grammer v. Carroll, Case No. 5,681.

Allowance of interest in cases of tort as damages is matter of discretion.—The Aleppo, Case No. 158.

Expenses and counsel fees are not to be included in the verdict as actual damages.—Simpson v. Leiper, Case No. 12,884.

§ 7. Liquidated damages and penalties.

Where the word "penal" or "penalty" is used in a contract, it must be construed as being so intended by the parties, but, where a sum named is called "liquidated damages," it will be *held* as a penalty if it seems from the contract that it was so intended by the parties, and the justice of the case requires such a construction.—White v. Arleth, Case No. 17,536.

A covenant to pay a certain sum in case of nonperformance of the contract, *held* a penalty, and not liquidated damages.—Goldsborough v. Baker, Case No. 5,516.

Where the actual damages for nonfulfillment of a contract are susceptible of computation in money, a sum named in the contract as a penalty or forfeiture for a violation is to be viewed as a penalty, and not as liquidated damages.—White v. Arleth, Case No. 17,536.

The sum of $10,000 stipulated as liquidated damages for breach of a contract of employment of a person as superintendent of a factory, *held* a penalty.—Ex parte Pollard, Case No. 11,252.

A clause stating that, "in further confirmation of the said agreement, the parties bind themselves, each to the other, in the penal sum of $1,000," *held* a stipulation for a penalty, and not for liquidated damages.—Robinson v. Cathcart, Cases Nos. 11,946, 11,947.

A stipulation "to forfeit $1,000 if we fail to carry out this contract," *held* a provision for a penalty to cover actual damages, and not for liquidated damages.—Taylor v. The Marcella, Case No. 13,797.

When a penalty is inserted in a contract, neither party has a right to avoid the contract by paying the penalty.—Robinson v. Cathcart, Case No. 11,946.

§ 8. Exemplary damages.

Punitive damages are given for a personal injury only where it was the result of willful misconduct, or of that reckless indifference to the rights of the injured person which is equivalent to an intentional violation of them.—Miller v. Baltimore & O. R. Co., Case No. 9,560.

Exemplary damages awarded against railway company for accident happening in consequence of gross negligence or drunkenness of its servants.—Beale v. Railway Co., Case No. 1,159.

§ 9. Measure and amount of damages—Injuries to the person.

Only reasonable actual damages are recoverable for personal injuries caused by the negligence of a carrier.—Harkey v. Texas & P. Ry. Co., Case No. 6,065.

Compensation in damages for a permanent partial disability from personal injuries arrived at by the allowance of a sum equal to the amount of such income as the ordinary labor of the injured person would produce for one-third of his expectancy of life according to the mortality tables.—Miller v. The W. G. Hewes, Case No. 9,594.

$1,750 awarded to a farmer, 35 years old, for injuries resulting in a permanently stiffened knee.—Dunstan v. The R. R. Kirkland, Case No. 4,181.

$10,000 allowed to a domestic servant 40 years old, earning $12 a month, for permanent injuries, where both legs were broken.—The D. S. Gregory and The George Washington, Case No. 4,100.

$2,500 awarded in admiralty for permanent spinal injuries to a pilot, disabling him from following his profession.—McCord v. The Tiber, Case No. 8,715.

§ 10. —— Injuries to property.

Where a sum of money has been lost to plaintiff by the negligence of defendant, the jury can only give as damages the sum which plaintiff has been deprived of.—Walker v. Smith, Case No. 17,086.

Where a wrong is done to a right, and no substantial damages proved, the jury may give as damages counsel fees and necessary expenses fairly incurred beyond the taxed costs.—Whipple v. Cumberland Mfg. Co., Case No. 17,516.

Damages for cargo shipped by canal boat in Canada, where United States gold coin was the currency, and lost on the Hudson river, in New York, must be paid for at its value in such coin.—The Mary J. Vaughan, Case No. 9,217.

In an action against a carrier for the loss of laces, an heirloom, their value must be ascertained by a money standard, based on evidence.—Fraloff v. New York Cent. & H. R. R. Co., Case No. 5,025.

The value of gold coins, shipped by a vessel and lost through the master's negligence, is to be estimated at their worth at Key West, at the time salvage proceedings were there instituted, with interest.—King v. Shepherd, Case No. 7,804.

§ 11. —— Breach of contract.

On breach of a contract to haul all the stone which defendant had contracted to supply for certain work, where plaintiff, after part performance, was not allowed to complete, he is entitled to recover the contract price for the material hauled, together with the profit he would have made had he been allowed to complete the contract.—Gormley v. Smith, Case No. 18,298.

In an action of covenant, plaintiff having been wrongfully prevented by defendants from completing the work, the measure of damages is the difference between the price agreed to be paid for the work and what it would have cost plaintiff to complete it.—Myers v. York & C. R. Co., Case No. 9,997.

On the adjustment of a decree for a balance remaining due on work done under contract, the employer is not entitled to be credited with interest on partial payments made as agreed.—The Isaac Newton, Case No. 7,090.

In a suit for the contract price for work done, the contractor is entitled to interest on the amount due, at least from the commencement of the suit.—The Isaac Newton, Case No. 7,090.

Plaintiff will be entitled to interest from the filing of a report of referees, where the same is confirmed, though both parties prosecuted exceptions thereto.—The Isaac Newton, Case No. 7,090.

But where the right of recovery is doubtful, and the amount is to be adjusted, interest is only recoverable after the amount is determined.—The Isaac Newton, Case No. 7,090.

A recovery for breach of a contract for payment of money in another country will be for a

sum equivalent to that to which plaintiff is entitled there, calculated by the real, and not the nominal, par of exchange.—Hargrave v. Creighton, Case No. 6,064; Reiser v. Parker, Id. 11,685.

The measure of damages for refusal to accept boats built under contract is the difference between the contract price and the amount received on a sale to others.—Ingersoll v. The Carbarga, Case No. 7,038.

§ 12. Pleading and assessment.

Special damages, not specially pleaded, and not necessarily implied, cannot be recovered, although evidence thereof has been given without objection.—Bas v. Steele, Case No. 1,088.

When the sum is certain, or may be reduced to certainty by computation, the intervention of a jury to assess damages is unnecessary.—McLain v. Rutherford, Case No. 8,868a.

DAMS.

See "Navigable Waters."

DAYS OF GRACE.

See "Bills and Notes," § 21.

DEATH.

§ 1, Evidence of death and of survivorship. § 2, Action for causing death—Rights of action and defenses. 3, —— Damages.

Abatement of action, see "Abatement and Revival," §§ 5, 6.
By collision, see "Shipping," § 102.
Cause of death, see "Insurance," §§ 109–115, 176, 183.
Effect of death of party in admiralty, see "Admiralty," § 65.
—— on levy of execution, see "Execution," § 14.
—— on lien, see "Maritime Liens," § 40.
—— on power, see "Powers," § 1.
—— on proceedings in bankruptcy, see "Bankruptcy," §§ 127, 538.
—— on right of seamen to wages, see "Seamen," § 52.
—— on running of statute of limitation, see "Limitation of Actions," § 12.
Ground of continuance, see "Continuance," § 6.
Of partner, see "Partnership," §§ 45–49.
Of person on steamboat, see "Shipping," § 102.
Of settler on public lands, see "Public Lands," § 33.
Proof of death, see "Insurance," §§ 146, 147.

§ 1. Evidence of death and of survivorship.

The grantor of land is presumed to be alive until the contrary appear.—Battin v. Bigelow, Case No. 1,108.

The mere fact of the disappearance of the insured without apparent motive is not a sufficient ground from which his death can be inferred.—Tisdale v. Mutual Ben. Life Ins. Co., Case No. 14,059.

A person absent seven years without being heard from is presumed to be dead.—Montgomery v. Bevans, Case No. 9,735.

In such case death will be presumed to have occurred at the end of the seven years.—Moffit v. Varden, Case No. 9,689.

Where an individual is proved to have been living within seven years, the burden of proving his death lies upon the party who asserts it.—Gilleland v. Martin, Case No. 5,433.

Presumption of death does not arise from the fact that a person who, 22 years ago, was in bad health, would, if now living, be 80 years old.—Hall's Deposition, Case No. 5,924.

The grant of letters of administration on the effects of the insured is prima facie evidence of his death.—Tisdale v. Mutual Ben. Life Ins. Co., Case No. 14,059.

The burden of proof of survivorship, in the case of persons perishing in the same event, is upon him who seeks to disturb the possession of others founded thereon.—Robinson v. Gallier, Case No. 11,951.

Where two persons perish in the same event, there are no presumptions of law as to survivorship, unless prescribed by positive enactment.—Robinson v. Gallier, Case No. 11,951.

In the case of a man of 68 and of a woman of 44, the presumption, under Civ. Code La. art. 939, is that the man perished first.—Robinson v. Gallier, Case No. 11,951.

The presumption of law as to survivorship prescribed by Civ. Code La. arts. 936–939, where two persons perish in the same event, only applies in absence of circumstances of the fact, and where the persons are respectively entitled to inherit from one another.—Robinson v. Gallier, Case No. 11,951.

§ 2. Action for causing death—Rights of action and defenses.

See, also, "Abatement and Revival," § 5; "Admiralty," §§ 33, 39.

It cannot be considered as settled law that no action can be maintained for damages occurring from the death of a human being.—Cutting v. Seabury, Case No. 3,521.

A state statute (California) giving an action for negligence resulting in death cannot apply to negligence on the high seas.—Armstrong v. Beadle, Case No. 541.

An action to recover damages for the death of an infant child by negligence of defendant can be maintained only under the statute, and in the manner there prescribed.—Drew v. Milwaukee, & St. P. R. Co., Case No. 4,079.

A father cannot maintain an action for the death of his minor son while on a whaling voyage, for which he shippped without the father's knowledge or consent, unless the person who shipped him knew that he was a minor.—Cutting v. Seabury, Case No. 3,521.

No recovery can be had under the Maryland statute for the death of a fireman on a railroad train, by collision with another train, unless the company had not used ordinary and reasonable care in selecting the officers of the train in fault.—Maryland v. Baltimore & P. R. Co., Case No. 9,219.

The widow, although the sole beneficiary, cannot maintain an action in her own name, given by the Illinois statute to the "personal representative" of one whose death is caused by the wrongful act of another.—Hagen v. Kean, Case No. 5,899.

Grandchildren living with their grandparent have no right of action for her death, through the wrongful act of defendant, under Wag. St. Mo. c. 43, § 22, giving a right of action to the husband or wife or minor children of deceased.—McCutcheon v. Receivers, Case No. 8,742a.

Under the Maryland statute a mother can recover for the death of her son her actual damages, though he was over 21 years old.—Maryland v. Baltimore & P. R. Co., Case No. 9,219.

Under Act Ill. Feb. 12, 1853, action can be maintained for benefit of next of kin, though they had no legal claim on deceased for support. It is not necessary to allege or prove actual pecuniary loss.—Barron v. Illinois Cent. R. Co., Cases Nos. 1,052, 1,053.

The widow and son of a hand killed on a steamboat by the negligence of the engineer have a remedy against the owners of the vessel, but not in rem against the vessel. Acts

1838, 1852.—The Highland Light, Case No. 6,477.

§ 3. —— Damages.

In such cases there is no fixed measure of damages, but it is a question for the jury.—Barron v. Illinois Cent. R. Co., Case No. 1,052.

The father of a minor child, killed by the wrongful act of defendant, may recover for the loss of his services to the time when he would have become of age, irrespective of the time when death ensued.—Sullivan v. Union Pac. R. Co., Case No. 13,599.

Suffering or wounded feelings of parent not considered in estimating damages for loss of child, but only actual pecuniary loss.—Barley v. Chicago & A. R. Co., Case No. 997; Brady v. Chicago, Id. 1,796.

Only the pecuniary loss is considered, in computing damages. Nothing will be allowed by way of punishment, or for the sufferings of the deceased, or for bereavement of his relatives.—Hollyday v. The David Reeves, Case No. 6,625.

A recovery in a former action for medical attendance, expenses, loss of service and time before the death of a child, does not affect the damages recoverable under the statute.—Barley v. Chicago & A. R. Co., Case No. 997.

Act Tex. Feb. 2, 1860, giving right of action for wrongful death, entitles plaintiff to compensatory damages only.—Gohen v. Texas Pac. Ry. Co., Cases Nos. 5,506, 5,507.

Said act is not abrogated by Const. Tex. 1869, § 30, giving exemplary damages for a homicide committed through willful act or omission.—Gohen v. Texas Pac. Ry. Co., Case No. 5,506.

In the case of a minor son, 18 years old, who earned less than the cost of his support, $700 were allowed his widowed mother.—Hollyday v. The David Reeves, Case No. 6,625.

$5,000 *held* not excessive damages for the death of a person who was a superior woman as wife, mother, and member of society.—Whiton v. Chicago & N. W. R. Co., Case No. 17,597.

DEBT, ACTION OF.

§ 1, Grounds. § 2, Pleading. § 3, Issues and proof. § 4, Evidence. § 5, Damages.

§ 1. Grounds.

Debt will lie on a contract, express or implied, for a sum certain, or capable of being ascertained.—Bullard v. Bell, Case No. 2,121; Dillingham v. Skein, Id. 3,912a; Union Iron Co. v. Pierce, Id. 14,367.

An action of debt lies for breach of a contract to pay a sum certain in an indefinite quantity of cattle and horses.—Randall v. Jaques, Case No. 11,553.

An action of debt will lie on account, as well as assumpsit.—Collins v. Johnson, Case No. 3,015a; Dillingham v. Skein, Id. 3,912a.

Debt will lie for two sums distinctly awarded, one for damages and one for costs.—Matthews v. Matthews, Case No. 9,288.

Debt will lie against the maker of a promissory note.—Gardner v. Lindo, Case No. 5,231.

Debt will lie by an indorsee against the drawer of a bill of exchange, where intermediate indorsements are stricken out.—Home v. Semple, Case No. 6,658.

Debt lies by the indorsee of inland bill against the acceptor.—Vowell v. Alexander, Case No. 17,017.

A party may waive a tort, and sue in debt or assumpsit. When indebitatus assumpsit is maintainable, debt is also.—Collins v. Johnson, Case No. 3,015a.

Debt will not lie on a decree for an unascertained contribution from stockholders to pay the debts of the company.—Bank of Circleville v. Iglehart, Case No. 860. But see Bullard v. Bell, Case No. 2,121.

Debt lies for the recovery of a penalty given by statute where no remedy for its recovery is expressly given.—Jacob v. United States, Case No. 7,157; In re Rosey, Id. 12,066; United States v. Willetts, Id. 16,699.

§ 2. Pleading.

A declaration in debt in an action on a simple contract is bad if it allege that defendant "promised" instead of "agreed" to pay, for the action of debt is founded upon a contract.—Metcalf v. Robinson, Case No. 9,497.

A declaration in debt against a joint obligor, setting forth a joint and several bond, cannot be amended by adding a new count setting forth a joint bond of defendant and another.—Postmaster General v. Ridgway, Case No. 11,313.

A declaration in debt for "$103⅓, or 31 pounds Virginia," is not for a sum certain, and is bad on special demurrer.—Ashton v. Fitzhugh, Case No. 583.

In debt on a bond, where its condition is not parcel of the obligation, as if the latter be a money penalty, and the former be to do some act, as to deliver goods, etc., it is not necessary that defendant plead uncore prist.—Savary v. Goe, Case No. 12,388.

§ 3. Issues and proof.

A former recovery may be given in evidence upon nil debet.—Welsh v. Lindo, Case No. 17,409.

A joint bond of defendant and another is inadmissible under a declaration against one obligor as jointly and severally bound.—Postmaster General v. Ridgway, Case No. 11,313.

§ 4. Evidence.

A former recovery upon a count for goods sold and delivered may be given in evidence in an action of debt upon a promissory note, with evidence that judgment was confessed in the former action upon and for the note now declared upon.—Welsh v. Lindo, Case No. 17,409.

§ 5. Damages.

A demand of one sum in the declaration does not prevent the recovery of a smaller sum, diminished by intrinsic circumstances.—United States v. Colt, Case No. 14,839.

DEBTOR AND CREDITOR.

See "Assignment for Benefit of Creditors"; "Bankruptcy"; "Compositions with Creditors"; "Creditors' Suit"; "Fraudulent Conveyances"; "Insolvency."

DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."

Testimony as to transactions with persons since deceased, see "Witnesses," §§ 51–53.

DECEIT.

See "Fraud."

DECLARATIONS.

As evidence in civil actions, see "Evidence," §§ 18, 39–42.

—— in criminal prosecutions, see "Criminal Law," §§ 60–63.

—— of domicile, see "Domicile," § 5.

Dying declarations, see "Homicide," § 7.

In pleading, see "Pleading," §§ 4–15.

DECREE.

See "Judgment."
Effect of decisions of foreign courts, see "Admiralty," § 1.
In admiralty, see "Admiralty," §§ 106–111.
In equity, see "Equity," §§ 119–126.
On application for injunction, see "Injunction," § 21.

DEDICATION.

§ 1, Nature and requisites—Title or interest of dedicator. § 2, —— What constitutes a dedication in general. § 3, —— Of streets, highways, and public squares. § 4, —— Evidence in general. § 5, —— Presumptions. § 6, Operation and effect.

By municipal corporation, see "Municipal Corporations," § 9.
Of copyright, see "Copyrights," § 19.
Of literary property, see "Literary Property," § 4.

§ 1. Nature and requisites—Title or interest of dedicator.

A dedication by release without covenants, by a mere occupant of public land, does not bind an after-acquired estate therein.—Lownsdale v. Portland, Cases Nos. 8,578, 8,579.

A dedication to public uses by parties in possession prior to the donation act of September 27, 1850, does not affect such land in the hands of persons succeeding in such possession.—Chapman v. School Dist., Case No. 2,608.

§ 2. —— What constitutes a dedication in general.

The intention of the owner at the time of the dedication is to be considered, and not their intention at any subsequent time, in determining whether or not a dedication has been made, as a dedication once made cannot be recalled.—Ruch v. Rock Island, Case No. 12,105.

To constitute a valid dedication of property to public use, there must be not only an intention to dedicate, but an act manifesting such intention.—Robertson v. Wellsville, Case No. 11,930.

Verbal declarations of a surrender of control of property to municipal authorities temporarily do not import a legal dedication.—Robertson v. Wellsville, Case No. 11,930.

Where a dedication to pious uses is too vague to be effectuated in equity, but the property has been long occupied for those uses, with the donor's consent, his heirs will be enjoined from disturbing the possession.—Kurtz v. Beatty, Case No. 7,950.

After the lapse of many years, the title to lots conveyed under a decree on the summary enforcement of a bond to convey the same for public purposes on the establishment of a county seat cannot be impeached by the heirs of the donor.—Sargeant v. State Bank of Indiana, Case No. 12,360.

§ 3. —— Of streets, highways, and public squares.

The consent of the owner of land to the construction of a road upon it for his own and the public use does not make out a valid dedication.—Robertson v. Wellsville, Case No. 11,930.

A statement by the owners, when platting land, that a block without number or mark was to be a public square, is a dedication for that purpose.—Ruch v. Rock Island, Case No. 12,105.

Selling building lots by map defining abutting street, not opened, is a dedication of the street for public use, but the fee does not pass to the city.—Barney v. Baltimore, Case No. 1,029.

The public square in Council Bluffs *held* to be dedicated to the public by the platting and acknowledgment thereof, and acts in pais by the dedicator.—Bayliss v. Pottawattamie County, Case No. 1,142.

The recording by a government agent of a plat designating part of the land as "public ground, forever to remain vacant of buildings," with a memorandum annexed declaring that this portion is not to be occupied by buildings, is a dedication.—United States v. Illinois Cent. R. Co., Case No. 15,437.

A plat of lands, made out, acknowledged, and recorded by the owner in conformity with the statute, operates as a sufficient conveyance of the streets and public grounds to the public use.—Nelson v. Madison, Case No. 10,110.

Deeds referring to a plat, but given before the grantor acquired title, do not bind him, as an act of dedication.—Nelson v. Madison, Case No. 10,110.

But an unequivocal recognition of the map after purchase would operate as an affirmance of the original intention of dedication, and give it full force and effect.—Nelson v. Madison, Case No. 10,110.

A plat made out and recorded in a different county from where the land is situate does not operate as a dedication.—Nelson v. Madison, Case No. 10,110.

Adoption by a town council of a map upon which a street is represented as being bounded by two parallel lines, so as to exclude a strip lying next to a river, is a solemn admission that such strip is not a part of the street.—Lownsdale v. Portland, Case No. 8,579.

Where all the provisions of the state law have not been complied with, it is not a statutory, but a common-law, dedication; and the fee does not vest in the city.—United States v. Illinois Cent. R. Co., Case No. 15,437.

§ 4. —— Evidence in general.

The exhibition or publication, by the proprietor of a town, of a map thereof, having certain spaces marked as streets and squares, is evidence of dedication.—Lownsdale v. Portland, Case No. 8,579.

A dedication is not to be presumed, and if sought to be established by parol acts and declarations these should be of such public and deliberate character as to be generally known and not of doubtful import.—Lownsdale v. Portland, Case No. 8,579.

A dedication alleged to have been made within the memory of living witnesses cannot be proved by reputation.—Chapman v. School Dist., Case No. 2,608.

§ 5. —— Presumptions.

A dedication will not be presumed from a long-continued acquiescence of the owner in the use of the property by the public, where such user is by his license, and not adverse.—Robertson v. Wellsville, Case No. 11,930.

Evidence of continued claim of title and the exercise of acts of ownership may be conclusive to rebut a presumption of dedication.—Robertson v. Wellsville, Case No. 11,930.

§ 6. Operation and effect.

Of street for public uses includes its use as a wharf, if running to or bounded on navigable water.—Barney v. Baltimore, Case No. 1,029.

A dedication by a release, upon condition that a pending suit concerning the premises shall be dismissed, does not take effect if the suit is not dismissed.—Lownsdale v. Portland, Case No. 8,578.

Property specially dedicated to a particular purpose cannot be diverted therefrom by the state or municipality, except under the right of eminent domain.—United States v. Illinois Cent. R. Co., Case No. 15,437.

A street dedicated to a city vests in the public, subject to its regulation and improvement

by the corporation, and cannot be treated or used as private property by that body.—Barclay v Howell, Case No. 975.

By accepting conveyance without objection, and with knowledge that a street through the demised premises had been dedicated, grantee takes subject to the easement thereof.—Barclay v. Howell, Case No. 975.

Where the United States have made a common-law dedication of lands for a particular use they retain, as owners of the fee, an interest enabling them to sue in equity to prevent a diversion to other uses. — United States v. Illinois Cent. R. Co., Case No. 15,437.

A dedication by a proprietary of a plot of ground to general public use will not prevent the building thereon of municipal buildings under legislative permit.—Leger v. Rice, Case No. 8,210.

DEEDS.

I. REQUISITES AND VALIDITY.

§ 1, Form and contents of instrument. § 2, Execution. § 3, Delivery. § 4, Validity.

II. RECORDING AND REGISTRATION.

§ 5, Necessity. § 6, Instruments entitled to record. § 6a, Sufficiency of record. § 7, Place and time of. § 8, Effect.

III. CONSTRUCTION AND OPERATION.

§ 9, General rules of construction. § 10, Property conveyed. § 11, Estates and interests created. § 12, Exceptions. § 13, Conditions and restrictions.

IV. PLEADING AND EVIDENCE.

§ 14, Presumptions and burden of proof. § 15, Admissibility of evidence in general. § 16, Attesting witnesses. § 17, Weight and sufficiency of evidence.

See, also, "Alteration of Instruments"; "Boundaries"; "Cancellation of Instruments"; "Covenants"; "Reformation of Instruments."
Estoppel by deed, see "Estoppel," §§ 2–5.
In fraud of creditors, see "Fraudulent Conveyances."

Deeds by or to particular classes of parties.

See "Corporations," § 40; "Guardian and Ward," §§ 5–7; "Husband and Wife," §§ 3, 8; "Infants," § 1; "Insane Persons," § 4.
By co-tenant, see "Tenancy in Common," § 3.

Deeds of particular species of property.

See "Easements," § 3; "Homestead," § 6; "Mines and Minerals," § 12; "Public Lands," §§ 57, 58; "Waters and Water Courses," § 8.

Particular classes of deeds.

In trust, see "Assignments for Benefit of Creditors," §§ 1, 2; "Trusts," § 1.
Of emancipation, see "Slaves," § 19.
Of trust, see "Chattel Mortgages"; "Mortgages."
Partition deeds, see "Partition."
Sheriff's deed, see "Execution," § 19.
Tax deeds, see "Taxation," § 17.

I. REQUISITES AND VALIDITY.

§ 1. Form and contents of instrument.

The ordinance of 1787, for the government of the Northwest Territory, regulates the form of conveyances of real estate, but does not apply to the transfers of equities, though conveyed under the form of a legal right.—Lewis v. Baird, Case No. 8,316.

The name of a grantee is not essential to the validity of a deed. A grant may be made to classes of persons, if sufficiently designated by descriptio personarum.—Friedman v. Goodwin, Case No. 5,119.

The omission or insertion of the middle name of a person in a conveyance is immaterial.—Dunn v. Games, Case No. 4,176.

A conveyance to "P. H. & Son," a mercantile firm, is a sufficient description of the son to enable him to take under the deed.—Hoffman v. Porter, Case No. 6,577.

Evidence of identity which describes the land so as to distinguish it from other tracts is sufficient for a deed and also in an action of ejectment.—Godfrey v. Beardsley, Case No. 5,497.

In the description of a tract of land, an omission to state the course in one call *held* to be supplied and rendered certain by the remainder of the description.—Morton v. Root, Case No. 9,866.

Where the boundary line can be run so as to comply with the conditions of the description, if it start from any place on a creek several thousand feet in length, the deed is inoperative for incurable uncertainty.—Le Franc v. Richmond, Case No. 8,209.

A plan of a tract of land referred to in a deed for purposes of description is to be treated as if it were annexed to and made part of the deed.—Thomas v. Hatch, Case No. 13,899.

§ 2. Execution.

A deed of land in Michigan, executed in another state, according to the laws of such state, is valid in Michigan.—Farmers' Loan & Trust Co. v. McKinney, Case No. 4,667; Root v. Brotherson, Id. 12,036.

Under Act Ill. Jan. 24, 1831, a deed of land in Illinois is valid if executed according to the law of the state where it is made.—Moore v. Nelson, Case No. 9,771.

A deed executed and acknowledged according to the laws of New York is a good execution under the law of Ohio.—Johnson v. Sukeley, Case No. 7,414.

The existence of a seal presumed from the statement in the concluding clause in the instrument that the grantor affixed thereto his seal, and from the attestation clause stating that the instrument was sealed in the presence of the witnesses, though the record did not show a seal.—Le Franc v. Richmond, Case No. 8,209.

A curative statute, passed in a state in which a deed of land in another state was improperly acknowledged, cannot act extraterritorially and work curatively upon the deed in such other state.—Wright v. Taylor, Case No. 18,096.

The legislature may remedy a mere formal defect of deed previously executed.—Raverty v. Fridge, Case No. 11,586.

See, also, "Acknowledgment"; "Seals."

§ 3. Delivery.

The delivery of a deed is essential to its validity.—Utterbach v. Binns, Case No. 16,809.

The delivery to a third person, in order to keep it secret, of a deed made to the grantor's son for services and affection, a lease for life being taken back from him, *held* good, and not invalidated by the grantor's subsequently taking back the deed for safe-keeping.—Brown v. Brown, Case No. 1,994.

Where an instrument was signed, but left with a third person without any authority to deliver it to the grantee, there is no delivery.—Carr v. Hoxie, Case No. 2,438.

A father procured a deed to be executed to his son, but remained in possession, and 25 years thereafter surrendered the deed and procured a deed to himself. After the father's

death the son recorded the deed to himself. *Held*, that he acquired no title thereunder.—Longworth v. Close, Case No. 8,489.

The delivery of a deed by the grantor to the recorder is not conclusive as a delivery.—Bulkley v. Buffington, Case No. 2,117.

§ 4. Validity.

Act Va. Dec. 6, 1786, against conveying pretended titles, does not vacate the deed, as between the parties.—Miller v. Young, Case No. 9,596.

A deed of lands not in the grantor's possession at the time of its execution does not convey the lands.—Thomas v. Perry, Case No. 13,908; Webster v. Gilman, Id. 17,335; Bank of The United States v. Benning, Id. 908.

A conveyance of lands, of which the grantor is out of possession at the time of the execution of the deed, may be valid in Pennsylvania.—Browne v. Browne, Case No. 2,035.

A quitclaim deed is effectual to pass such title as the grantor has at the time of its execution, although he is not in possession.—Field v. Columbet, Case No. 4,764. CONTRA, see Wakefield v. Ross, Case No. 17,050.

Inadequacy of consideration no ground to infer fraud, unless it is so great as at once to strike every person with its grossness.—Godfrey v. Beardsley, Case No. 5,497.

Where a deed in favor of two persons is obtained by the fraud of one, although without the privity of the other, the deed is void as to both.—Wilson v. Prewett, Case No. 17,828.

A deed of general warranty may be good, although it may not contain, technically, the five covenants which such an instrument usually contains.—Bronson v. Cahill, Case No. 1,926.

II. RECORDING AND REGISTRATION.

§ 5. Necessity.

A deed, although not witnessed, acknowledged, or recorded, is valid at common law between the parties and their privies, and against those taking with notice thereof.—Goodenough v. Warren, Case No. 5,534.

In Tennessee registration of the deed is necessary to pass the legal estate to the grantee.—Patton v. Brown, Case No. 10,832; Same v. Reily, Id. 10,838.

Such registration vests the legal estate in the grantee as of the date of the deed, and relates back to that time.—Patton v. Cooper, Case No. 10,834.

By the registry act of Rhode Island, the recording of the deed is necessary to pass real estate as against third persons, but not as between the original parties or their heirs.—West v. Randall, Case No. 17,424.

The acknowledgment and recording of a conveyance of land in Indiana operates as proof of the instrument and notice. They are not necessary to the validity of the deed.—Godfrey v. Beardsley, Case No. 5,497.

§ 6. Instruments entitled to record.

A deed executed out of Indiana for land within it, acknowledged before a justice of the peace, should bear the county clerk's certificate, and not that of the secretary of state.—Strong v. Smith, Case No. 13,544.

§ 6a. Sufficiency of record.

Under a statutory provision that a conveyance shall be recorded, a mere filing for record is not sufficient.—Scott v. Doe, Case No. 12,528a.

Where the deed is actually left with the recorder for record, the grantee's rights are protected, though the recorder actually records only a portion of it.—Riggs v. Boylan, Case No. 11,822.

The failure of the recording officer to record a deed will not affect the right of the grantee who has properly filed it for record.—Polk v. Cosgrove, Case No. 11,248.

A deed recorded is constructive notice only from the time it is actually recorded by being transcribed into the record book.—Scott v. Doe, Case No. 12,528a.

The recording of a deed in the proper office is only prima facie evidence that it was regularly proved and admitted of record.—Talbot v. Simpson, Case No. 13,730.

§ 7. Place and time of.

Registration of a deed of lands lying in several counties is sufficient if made in either county.—Simms v. Read, Case No. 12,870; Delancey v. McKeen, Id. 3,750.

The land in an unorganized county in Minnesota is regarded for all purposes, including registry, as being within the territorial limits of the county to which it is attached for judicial purposes.—Thayer v. Herrick, Case No. 13,868.

Registration of a deed in the county in which one of several grantees resides is not sufficient, under Act N. C. 1788.—Watson v. Dobbins, Case No. 17,281.

Petition for leave to record deed granted, where the neglect was without any fraudulent design.—Dibble v. Robertson, Case No. 3,882.

A deed executed in Massachusetts by one grantor, and at a later date in the District of Columbia by another grantor, may be properly recorded within six months from the latter date.—Kurtz v. Hollingshead, Case No. 7,953.

A deed in Illinois of a surety on a postmaster's bond, not left for record until after a defalcation of the postmaster occurred, is void, as against the United States.—Ross v. Prentiss, Case No. 12,078.

§ 8. Effect.

As between a deed executed before an attachment and a deed under the attachment, *held* that the former, being first properly acknowledged and recorded, conveyed the paramount title.—Strong v. Smith, Case No. 13,544.

III. CONSTRUCTION AND OPERATION.

§ 9. General rules of construction.

In construing, effect is to be given to every expression, if it can reasonably be done.—Barclay v. Howell, Case No. 975.

In giving an interpretation to a particular clause of a deed, every part of the deed must be looked to.—Goodyear v. Cary, Case No. 5,562; French v. Brewer, Id. 5,096.

In construing a deed involving questions of science, the court may refer to the state of public knowledge and learning, and inquire into the actual knowledge of the parties.—French v. Brewer, Case No. 5,096.

A well-known general meaning of terms used in a grant must be adopted in interpreting the grant, unless it appears that some other or different meaning was intended by them.—Goodyear v. Cary, Case No. 5,562.

Ambiguity requires deed to be construed most strongly against grantor.—Barclay v. Howell, Case No. 975.

The words of the grant are controlled by the habendum.—Mitchell v. Wilson, Case No. 9,672.

Deeds are always construed according to the force of the language used by the grantor, and the apparent intentions of the parties deducible therefrom.—Thomas v. Hatch, Case No. 13,899.

A deed of release, if it cannot take effect as a release, may be construed in furtherance of

the intention of the parties as a bargain and sale.—Baker v. Whiting, Case No. 787.

If a deed be so expressed as that a reasonable construction can be given to it, and, when so given, it does not plainly appear to be at variance with the agreement on which it is founded, the latter is not to be regarded.—Hogan v. Delaware Ins. Co., Case No. 6,582.

Recitals in a deed are binding on the parties to it, and those claiming under them, but not strangers.—West v. Pine, Case No. 17,423.

A deed made in pursuance of a recorded contract does not relate back so as to cut off intervening equities and convey the title as of date of contract.—O'Neil v. Wabash Ave. Baptist Church Soc., Case No. 10,531.

§ 10. Property conveyed.

Law implies a grant of those things without which the principal subject cannot be enjoyed as incident thereto.—Barclay v. Howell, Case No. 975; Pullan v. Cincinnati & C. Air-Line R. Co., Id. 11,461.

The designation of quantity will not control boundaries clearly indicated; but, where the true description is in doubt the designation of quantity may be considered.—Field v. Columbet, Case No. 4,764.

In a case of a doubt as to the extent of a grant, the conclusion should be against the grantor, who is chargeable with obscurity in the language of the contract.—Smith v. Selden, Case No. 13,104.

The description, said to contain "about" so many acres, "more or less," will be considered as a representation of quantity, and in the case of an unreasonable excess or deficit equity will correct the mistake.—Thomas v. Perry, Case No. 13,908.

A quitclaim of all "right, title, or interest, whether in possession or expectancy," passes only what is then vested in the grantor; and "expectancy" does not include an after-acquired title.—Lamb v. Kamm, Case No. 8,017.

The grant to a town of all the proprietor's ways called "highways" conveys only those in existence; not those reserved, but not laid out.—Borden v. Manchester, Case No. 1,656.

Where the owner of a certain lot sells A. 40 acres on the east end, and afterwards sells B. a certain tract "containing 30 acres by measure," being "the west part of" such lot, *held*, that the latter deed would convey all the land in the lot not conveyed to A., and was not limited to 30 acres.—Wakefield v. Ross, Case No. 17,050.

A grant of common in a described lot, confers all rights of common which the land is capable of supporting, including a commonable right to take seaweed from the beach.—Knowles v. Nichols, Case No. 7,897.

The general description, "being the same land," given by the grantor's mother to the grantee by will, will not control specific boundaries in the deed.—Howell v. Saule, Case No. 6,782.

It is not to be presumed that a grantor intends to grant more than he has, a right to grant, or that a grantee intends to receive, by way of grant, that to which he has a full right without a grant.—Goodyear v. Cary, Case No. 5,562.

A deed of land held adversely to the grantor, under color of title, given when he is out of possession, is void, even though the adverse holding be founded on a deed to which such grantor's name was forged.—Bunce v. Gallagher, Case No. 2,133.

Where a house or store is conveyed by the owner thereof, everything passes which belongs to and is in use for the house or store as an incident or appurtenance.—United States v. Appleton, Case No. 14,463.

The use of a side door of a wing, swinging over the piazza of the main building, and a passage over such piazza, will pass under a conveyance of the wing building to the extent that they were used at the time of the conveyance.—United States v. Appleton, Case No. 14,463.

§ 11. Estates and interests created.

There never was any usage in Oregon whereby an occupant who sold town lots within his claim by quitclaim deed was held a trustee to acquire title for his vendee.—Lamb v. Vaughn, Case No. 8,023.

The freehold estate which vests in a relessee under deed of lease and release by enlargement is an estate at common law, which does not require the aid of the statute of uses to execute the possession to the usee.—Hurst v. McNeil, Case No. 6,936.

A deed to A., in consideration of a sum of money paid, or secured to be paid, in the usual form of a deed of bargain and sale, is to be considered as a conveyance executed, notwithstanding a covenant by the grantor "to make a patent," which can only mean to obtain one, and deliver it to the grantee.—Willis v. Bucher, Case No. 17,769.

A deed of bargain and sale only passes such estate as the grantor has, and can rightfully convey.—Minge v. Gilmour, Case No. 9,631.

The surrender and cancellation of a deed does not reinvest the title in the grantor.—Suydam v. Beals, Case No. 13,653.

The covenant in a deed does not affect the grant. The grant passes the title, operating in præsenti, though the covenants have not been performed.—Day v. Stellman, Case No. 3,690.

Deed absolute may be shown to be a mortgage.—Bank of Mount Pleasant v. Sprigg, Case No. 891.

The words "grant, bargain, and sell" import the conveyance of a fee simple, indefeasible with special warranty.—McGill v. Jordan, Case No. 8,795a.

The word "heirs," as used in a granting clause, construed.—Brown v. Schoonmaker, Case No. 2,029.

A conveyance "to J. M. and his generation, to endure as long as the waters of the Delaware should run," passes no more than a life estate.—Foster v. Joice, Case No. 4,974.

The words "rights, liberties, privileges, and appurtenances," are sufficient to create a right of common when the deed refers to a plat and papers which show that a right of common in a described lot is annexed to the land.—Knowles v. Nichols, Case No. 7,897.

A deed of demised premises from a lessee for 99 years, renewable forever, at a certain rent, to the grantee, "his heirs, executors, administrators, or assigns, forever," with general warranty, *held* to convey only the legal estate for the term of years, though the grantor then had an equitable title to the reversion.—Litle v. Ott, Case No. 8,389.

A vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed in future.—Cuyler v. Ferrill, Case No. 3,523.

A conveyance of a remainder in default of issue of a grantee to the surviving sons and daughters of the grantor *held* to mean those surviving at the death of the grantee.—Westbrooke v. Romeyn, Case No. 17,428.

§ 12. Exceptions.

Where a deed excepted from its operation a parcel conveyed by another deed, the exception is not void for uncertainty, if the parcel in the

deed mentioned is described with definite boundaries.—Norton v. Meader, Case No. 10,351.

An exception of that part of the lot granted which the grantor has theretofore sold to a certain person by deed is inoperative where there is no evidence of such prior deed.—Weld v. Madden, Case No. 17,373.

The part excepted in a grant remains in the grantor, and needs no words of perpetuity.—Bowman v. Wathen, Case No. 1,740.

§ 13. Conditions and restrictions.

Under a deed of the land "to erect a pest-house upon" to enjoy "in the manner aforesaid," where the granting clause purported to be an absolute and full conveyance of the land without condition, *held*, that the words quoted were not intended as a condition or a limitation of the estate conveyed.—Ward v. New England Screw Co., Case No. 17,157.

A clause against the use, in payment of a husband's debts, of any part of land deeded to him for the sole and separate use of his wife, with limitation over on her death to him and her children, *held* not to apply after the fee passed to him.—In re Myrick, Case No. 9,999.

Any one may perform a condition who has an interest in it or the land whereto it is annexed.—Vermont v. Society for Propagation of the Gospel, Case No. 16,920.

A grantee or assignee of a reversion cannot take advantage of a re-entry by force of a condition broken.—Vermont v. Society for Propagation of the Gospel, Case No. 16,920.

Where a condition is once performed, the thing to which it was before annexed becomes absolute, and wholly unconditional.—Vermont v. Society for Propagation of the Gospel, Case No. 16,920.

IV. PLEADING AND EVIDENCE.

§ 14. Presumptions and burden of proof.

Under the territorial government, the copy of a deed recorded is prima facie evidence of its execution.—Buckley v. Carlton, Case No. 2,093.

The fact that no possession was had under a deed for half a century, and no claim made or taxes paid, will rebut presumption of delivery, as against bona fide purchaser in possession.—Buckley v. Carlton, Case No. 2,093.

A presumption of due delivery arises from the possession of the deed by the grantee.—Flagg v. Mann, Case No. 4,847; Dunn v. Games, Id. 4,176.

The assent of the grantor to a deed clearly for his benefit may be presumed, unless a consideration is to be paid, when it must be proved.—Hurst v. McNeil, Case No. 6,936.

The presumption is in favor of mental capacity, and, in order to affect the validity of a deed or will, incapacity must be proved.—Hoge v. Fisher, Case No. 6,585; Hall v. Unger, Id. 5,949.

If general derangement of a grantor is proved at any time prior to the execution of the deed, the grantee must prove capacity at the time of the execution.—Hoge v. Fisher, Case No. 6,585; Hall v. Unger, Id. 5,949.

§ 15. Admissibility of evidence in general.

The deed, though acknowledged and recorded, may be shown to have been fraudulently antedated, on the testimony of the grantor.—Holbrook v. Worcester Bank, Case No. 6,597.

If a deed purports to be made "for a valuable consideration," it is competent for a person claiming under it to give evidence of a money consideration.—Munro v. Robertson, Case No. 9,927.

See, also, "Evidence," § 65.

§ 16. Attesting witnesses.

A subscribing witness who was called in to sign the paper as a witness, but did not see the parties execute or acknowledge it, may testify where they both told him that it was their agreement.—Munns v. De Nemours, Case No. 9,926.

A subscribing witness to the execution of a deed may be compelled to attend court to prove it.—Irwin v. Dunlap, Case No. 7,083.

§ 17. Weight and sufficiency of evidence.

The execution of a deed acknowledged and recorded need not be proved by witnesses.—Edmondson v. Lovell, Case No. 4,286.

Delivery may be inferred from circumstances, and need not be proved by positive testimony.—Gardner v. Collins, Case No. 5,223.

DE FACTO OFFICERS.

See "Officers."

DEFAMATION.

See "Libel and Slander."

DEFAULT.

In admiralty, see "Admiralty," §§ 61, 63, 107.
In bankruptcy, see "Bankruptcy," § 124.
Judgment by, see "Judgment," §§ 11–14.

DE HOMINE REPLEGIANDO.

§ 1. When writ will lie.

The writ de homine replegiando, having for its object the discharge of the prisoner on bail, with a view to try the question of the validity of the law under which he is held in confinement, is of common right, and may be issued as of course. It will not, however, lie against a sheriff who has the party in custody under process.—Elkison v. Deliesseline, Case No. 4,366.

DELIVERY.

Evidence of, see "Deeds," § 17; "Evidence," § 12.
Of bill of exchange or promissory note, see "Bills and Notes," § 4.
Of cargo to vessel, see "Shipping," § 135.
Of deeds, see "Deeds," § 3; "Escrow."
Of goods by carrier, see "Carriers," §§ 7–16; "Shipping," §§ 149–159.
—— sold, see "Sales," §§ 22–27, 30, 31, 41.
Of mortgage, see "Chattel Mortgages," § 2.
Of pardon, see "Pardon," § 4.
Of patent, see "Public Lands," § 51.
Of pledge, see "Pledges."
Of policy, see "Insurance," § 15.
Presumption of, see "Deeds," § 14; "Evidence," § 12.
To pass title, see "Sales," §§ 30, 31.

DEMAND.

As affecting right to costs, see "Admiralty," § 131.
Before action, see "Limitation of Actions," § 10.
For payment of bill or note, see "Bills and Notes," §§ 59–80.
For surrender of fugitive from justice, see "Extradition," § 5.
Of performance of contract, see "Contracts," § 31.

DEMURRAGE.

See "Shipping," §§ 208–222.
As damages in collision cases, see "Collision," § 141.

DEMURRER.

In pleadings, see "Admiralty," § 84; "Bankruptcy," § 113; "Equity," §§ 65–77; "Pleading," §§ 39–44.
To evidence, see "Trial," § 13.
To indictment, see "Indictment and Information," § 23.

DEPOSITARIES.

See "Deposits in Court."
Of deeds delivered in escrow, see "Escrow."

DEPOSITIONS.

§ 1, When authorized. § 2, Application and affidavits and notice. § 3, Commission and issuance thereof. § 4, Letters rogatory. § 5, Interrogatories. § 6, Cross interrogatories. § 7, Time of taking deposition. § 8, Place of taking. § 9, Who may take depositions and appointment of commissioners. § 10, Acts of commissioners as binding on parties. § 11, Notice of taking—Necessity. § 12, —— Time of giving notice. § 13, —— To whom notice may be given. § 14, —— By whom notice must be given. § 15, —— Form and contents. § 16, —— Service. § 17, Compelling witnesses to attend and testify. § 18, Manner of taking in general. § 19, What law governs. § 20, Statutory provisions. § 21, Presence of parties. § 22, Swearing witnesses. § 23, Re-examination of witness. § 24, Punishment of witnesses for contempt. § 25, Reducing to writing. § 26, Entitling and caption of deposition. § 27, Designation of parties in deposition. § 28, Certificate of taking—Form. § 29, —— Facts necessary to be certified. § 30, —— False certificate. § 31, —— Conclusiveness of certificate and effect as evidence of facts certified. § 32, Amendment and correction. § 33, Suppression and retaking. § 34, Transmission and opening. § 35, Recording and filing depositions. § 36, Withdrawing from file. § 37, Objections and waiver thereof. § 38, Use of depositions in evidence—Inability of witness to attend. § 39, —— Diligence to procure attendance. § 40, —— Effect of failure to produce. § 41, —— Use by adverse party. § 42, —— Use in another action. § 43, —— Withdrawing from evidence.

See, also, "Affidavits"; "Witnesses."
Continuance to procure, see "Criminal Law," § 82.
In admiralty, see "Admiralty," §§ 93–96.
In bankruptcy, see "Bankruptcy," §§ 29, 112, 413–427.
In equity, see "Equity," §§ 94–96.
Irregularities in as ground of continuance, see "Continuance," § 4.
Taxation of fees for, see "Costs," § 18.

§ 1. When authorized.

Depositions should not be taken merely de bene esse in case of old age, sickness, or going abroad.—Allen v. Blunt, Case No. 217.

In a case falling within Act March 3, 1865, the evidence of the party cannot be taken and admitted under Equity Rule 70, on the ground that the witnesses are old and infirm.—Eslava v. Mazange's Adm'r, Case No. 4,527.

A witness casually absent from home, although found at a place more than 100 miles from the place of trial, unless he is aged and infirm, etc., cannot be subjected to an examination de bene esse.—Ex parte Humphrey, Case No. 6,867.

The law in relation to the taking of depositions of witnesses residing over 100 miles from the place of holding the court, fully examined.—Evans v. Hettick, Case No. 4,562.

A commission cannot be issued by the circuit court of the District of Columbia where the witness is within the jurisdiction of the court.—United States v. Thomas, Case No. 16,476.

The person whose deposition is taken, under the act of congress, must reside more than a hundred miles from the place of holding the court.—Curtis v. Central Ry., Case No. 3,501; Wellford v. Miller, Id. 17,380; Russell v. Ashley, Id. 12,150.

§ 2. Application and affidavits and notice.

On an application for a dedimus potestatem, the court will consider the materiality of the testimony, and the purposes for which it is invoked.—United States v. Parrott, Case No. 15,999.

A commission to take depositions in another state will not be granted without an affidavit showing it to be necessary for the purposes of justice.—Sutton v. Mandeville, Case No. 13,650.

Defendant is not guilty of laches in not procuring commission until 10 months after plea, where it was procured immediately after replication filed.—Buchanan v. Trotter, Case No. 2,075.

Practice as to granting commissions to take evidence in foreign countries.—Cunningham v. Otis, Case No. 3,485.

A party taking out a commission to take evidence in relation to pedigree is not bound to name the witnesses he intends to examine.—Parker v. Nixon, Case No. 10,744.

A motion for the appointment of commissioners to take testimony abroad is not grantable of course, and previous notice to the adverse party is necessary.—United States v. Parrott, Case No. 15,999.

Notice of a motion for a commission to take testimony may be given to the attorney at law.—Irving v. Sutton, Case No. 7,078; Potts v. Skinner, Id. 11,348.

§ 3. Commission and issuance thereof.

The deposition of a witness, living out of the state, and more than 100 miles from court, cannot be read unless taken under a commission.—Bleecker v. Bond, Case No. 1,534.

A clerical error in the dedimus, whereby an initial of a party's name is changed, will not prevent the admission of the depositions.—Meade v. Keane, Case No. 9,373.

A commission is not defective because the commissioners and their clerk were not sworn.—Gilpins v. Consequa, Case No. 5,452.

The mistake of the clerk in misnaming one of the parties in a commission may be amended after the death of the witness.—Boone v. Janney, Case No. 1,642.

Time of issue of commmission to take deposition in a foreign country, and the filing of interrogatories and cross-interrogatories, and notice.—Frevall v. Bache, Case No. 5,113.

The court will not inquire into the regularity of the issuance of a commission by a court of another circuit when its aid is sought to enforce it.—In re Cole, Case No. 2,975.

Testimony taken on a commission in blank sent abroad is admissible on proof that the names and materiality of the witnesses were unknown when the commission was sued out.—The Infanta, Case No. 7,030.

A complainant in equity who takes the deposition of the adverse party without a previous order of court, specially reserving his rights, is not thereby estopped to deny the truth of his evidence.—Rison v. Cribbs, Case No. 11,860.

Testimony taken under a commission not issued under any practice or rule of the court

or of any other court, or in accordance with a statute, is not admissible in the orphans' court.—Walsh v. Walsh, Case No. 17,117.

The circuit court, having full power when sitting as a court of law to issue commissions to take testimony abroad, will not entertain any proceedings for such a purpose on its equity side.—Peters v. Prevost, Case No. 11,032.

See, also, post, § 9.

§ 4. Letters rogatory.

The circuit court will issue letters rogatory, for the purpose of obtaining testimony, when the government of the place where the evidence is to be obtained will not permit a commission to be executed.—Nelson v. United States, Case No. 10,116.

§ 5. Interrogatories.

The filing of interrogatories in an equity case is not necessary where the evidence is to be derived chiefly from books not yet examined.—Russell v. McLellan, Case No. 12,158.

Depositions cannot be read where proper interrogatories are not answered.—Bell v. Davidson, Case No. 1,248; Dodge v. Israel, Id. 3,952; Richardson v. Golden, Id. 11,782.

Interrogatories in a commission should be answered separately, and failure therein is fatal to the whole commission, although the witness, in answering the general interrogatory, says that he knows nothing further material to either party.—Ketland v. Bissett, Case No. 7,742.

It is sufficient if all the interrogatories which accompany a commission are substantially, although not formally, answered.—Nelson v. United States, Case No. 10,116.

If all the interrogatories, either in form or substance, are not put to the witnesses, the depositions cannot be read.—Winthrop v. Union Ins. Co., Case No. 17,901.

Under an ex parte commission, any of the interrogatories, except the last general one, may be omitted.—Merrill v. Dawson, Case No. 9,469.

A witness cannot be asked if the facts stated in an ex parte certificate are true. He should be interrogated as to those facts particularly.—Richardson v. Golden, Case No. 11,782.

Exceptions to interrogatories are waived unless they are propounded as objections before the commission issues.—Cocker v. Franklin Hemp & Bagging Co., Case No. 2,930.

A disagreement between parties as to interrogatories should be referred to a master in chancery to be settled by him subject to the review of the court on appeal from the report.—Cocker v. Franklin Hemp & Bagging Co., Case No. 2,930.

§ 6. Cross interrogatories.

If the cross interrogatories are not put to a witness examined under a commission, his deposition cannot be read.—Gilpins v. Consequa, Case No. 5,452.

A deposition *held* admissible in equity, where the direct interrogatories were fully answered, notwithstanding the witness died before cross-examination.—Gass v. Stinson, Case No. 5,262.

Answers to cross interrogatories not dependent upon a direct interrogatory, answer to which was ruled out, are admissible.—Alsop v. Commercial Ins. Co., Case No. 262.

It is no objection that the cross interrogatories were not put to each witness until all the direct interrogatories were answered by all the witnesses.—Gilpins v. Consequa, Case No. 5,452.

§ 7. Time of taking deposition.

Depositions may be taken under the act of congress after the expiration of a rule to take them.—Buckingham v. Burgess, Case No. 2,088.

The time for taking testimony under a commission will be enlarged to let in newly-discovered evidence, where the party has not been guilty of any laches.—The Ruby, Case No. 12,103.

A deposition, taken more than six months after replication, in a chancery suit, cannot be read at the hearing unless taken by consent or by order of the court, or out of the district.—Wiggins v. Wiggins, Case No. 17,627.

§ 8. Place of taking.

Depositions must be taken at the place indicated in the commission.—Boudereau v. Montgomery, Case No. 1,694; Rhoades v. Selin, Id. 11,740.

Place of taking testimony, under special circumstances, where witness resides in a different place from the examiner.—Prevost v. Gorrell, Case No. 11,405a.

§ 9. Who may take depositions, and appointment of commissioners.

A "justice" of a county court is, within Act Sept. 24, 1789, a "judge" of such court, and competent to take testimony.—Smith v. Williams, Case No. 13,127.

The probate court of Mississippi being a court of record, and possessing a seal, the judge thereof is authorized to take depositions, under the statute.—Merrill v. Dawson, Case No. 9,469.

Admissibility of deposition taken in another state before the superintendent of a city.—Lindsay v. Riggs, Case No. 8,366.

Depositions sworn to before justice of peace, if taken under rule of court, may be read.—Banert v. Day, Case No. 836.

A deposition under section 30, Act 1789, may be taken before a notary public. Act July 29, 1854.—Dinsmore v. Maroney, Case No. 3,920.

The verification of a deposition may be taken before a notary.—Blake Crusher Co. v. Ward, Case No. 1,505.

A deposition cannot be taken under the act of congress before a judge of a municipal court.—Foreman v. Holmead, Case No. 4,935.

A "county commissioner," in Illinois, is not authorized to take depositions under Act Sept. 24, 1789, § 30.—Garey v. Union Bank, Case No. 5,241.

Where an application was made for a commission to examine a witness in the East Indies, it appearing that no one was known who could be named as commissioner except the wife of the witness, she was named as commissioner.—The Norway, Case No. 10,358.

Depositions under a commission issued to a place where the commissioners are prohibited executing the commission, taken according to the law of the place, in the presence of the commissioners by the judge, are admissible.—Winthrop v. Union Ins. Co., Case No. 17,901.

A magistrate who is a partner of the active counsel of a party to a patent-interference proceeding is incompetent to take depositions therein.—Nichols v. Harris, Case No. 10,243.

A deposition, though merely to prove a pedigree, if taken by others than those named in the commission, cannot be read.—Banert v. Day, Case No. 836.

A commission directed to a number of commissioners must be executed by all of them.—Armstrong v. Brown, Case No. 542; Guppe v. Same, Id. 5,871; Munns v. De Nemours, Id. 9,926.

And this is the rule, though the commissioner named by the adverse party, after proceeding some length in the examination, withdraws and refuses to complete it.—Munns v. De Nemours, Case No. 9,926.

Where a commission for the examination of witnesses confers the power to execute it upon any one of several commissioners, it may be executed by one of them.—The Griffin, Case No. 5,814; Lonsdale v. Brown, Id. 8,492.

The testimony of a witness, taken under a commission directed to five persons, or any one of them, cannot be read in evidence if another person than the commissioner, and who was not named in the commission, assisted in taking the examination of the witness.—Willings v. Consequa, Case No. 17,767; Consequa v. Willings, Id.

Equity rule 67 authorizes the court to appoint examiners for the taking of depositions orally, outside as well as inside its territorial jurisdiction.—Western Division of Western N. C. R. Co. v. Drew, Case No. 17,434; Schutte v. Florida Cent. R. Co., Id.

The federal circuit courts have power to appoint examiners, and it is within their discretion to appoint the standing examiners, or designate others.—Van Hook v. Pendleton, Case No. 16,852.

§ 10. Acts of commissioners as binding on parties.

Those who execute a commission are appointed by the court, and, although they may be nominated by the parties, they are not their agents, and their mistakes are not binding on them.—Gilpins v. Consequa, Case No. 5,452.

§ 11. Notice of taking—Necessity.

Defendants who were not served with process should be notified of the taking of depositions, if they lived within 100 miles of the place of caption.—Brown v. Piatt, Case No. 2,026.

Notice to counsel of taking is necessary when witness lives within 100 miles.—Allen v. Blunt, Case No. 217.

No notice is required where the witness resides over 100 miles from the place of trial.—Merrill v. Dawson, Case No. 9,469.

Notice need not be given where neither the party nor his counsel is within 100 miles of the place of caption.—Miller v. Young, Case No. 9,596.

Notice of time and place of taking is necessary under a joint commission, but if the opposite party fails to join, and the commission issues ex parte, notice is not necessary.—Merrill v. Dawson, Case No. 9,469.

Depositions taken de bene esse, and without notice to the opposite party, in suits at common law, are not admissible in the trial of feigned issues out of equity.—Cahoon v. Ring, Case No. 2,292.

§ 12. —— Time of giving notice.

Where all parties reside in the place, a notice to take depositions on following day is not too short.—Atkinson v. Glenn, Case No. 610.

One hour's notice of the taking of a deposition, where the adverse party lived in the same village or town, *held* reasonable.—Leiper v. Bickley, Case No. 8,222.

Notice at Washington on December 31, of taking of deposition in Baltimore on January 2, is not reasonable.—Barrell v. Simonton, Case No. 1,042.

The deposition of a seafaring man may be taken on one day's notice to the adversary's attorney. Act Md. 1721, c. 14, § 14.—Bowie v. Talbot, Case No. 1,732.

Notice given at 8 o'clock of the taking of depositions between 9 and 2 of the same day *held* unreasonable.—Jamieson v. Willis, Case No. 7,204.

Notice given at noon to take a deposition between 4 and 6 o'clock of the same day is not reasonable.—Renner v. Howland, Case No. 11,700.

When notice is given that a deposition will be taken between certain hours, it is not necessary to wait until the last hour.—House v. Cash, Case No. 6,736.

Notice served on counsel during court, or which would deprive him of attendance at the commencement of court, is not good.—Bell v. Nimmon, Case No. 1,259.

§ 13. —— To whom notice may be given.

When taken to be used against United States its attorney must be notified.—The Argo, Case No. 517.

Notice of taking, directed to the party, may be served on his attorney.—Barrell v. Limington, Case No. 1,040.

Notice of taking must be given to attorney of record.—The Argo, Case No. 517.

Under the law of Virginia respecting the taking of depositions, notice to the attorney at law of the opposite party is not sufficient.—Wheaton v. Love, Case No. 17,484.

§ 14. —— By whom notice must be given.

The notice of taking the deposition under Act 1789, § 30, must be given by the magistrate before whom the deposition is to be taken. A notice given by the party is not sufficient.—Young v. Davidson, Case No. 18,157.

§ 15. —— Form and contents.

Form of notice of taking deposition.—Bussard v. Catalino, Case No. 2,228.

It is not necessary that the notice of taking under Act Sept. 24, 1789, should state the reason for taking it.—De Butts v. McCulloch, Case No. 3,718.

Depositions taken under a commission to another state cannot be read where the other party was not served with a copy of the interrogatories, and notice of the rule and of the names of the commissioners.—Rhoades v. Selin, Case No. 11,740.

§ 16. —— Service.

Service of notice of taking the deposition by leaving a copy at the place of abode of the adverse party is insufficient.—Carrington v. Stimson, Case No. 2,450; Merrill v. Dawson, Id. 9,469.

Affidavit of service of notice of taking of deposition by leaving it at defendant's lodging *held* insufficient, where the place of lodging was not specified.—Hill v. Norvell, Case No. 6,497.

An affidavit of service of notice to take depositions, by leaving it with defendant's wife, need not state that she was informed of its purport.—McCall v. Towers, Case No. 8,674.

§ 17. Compelling witnesses to attend and testify.

The federal district court has no power to issue a summons to compel a witness to appear and testify on a commission from a court of a foreign country to its resident consul to take testimony to be used in a criminal prosecution.—Spanish Consul's Petition, Case No. 13,202.

Before a subpœna can issue evidence must be given before the commissioner showing the case to be one in which a de bene esse examination can be had.—Ex parte Peck, Case No. 10,885.

A witness examined under Rev. St. § 863, may be compelled to produce books and papers which would be competent for the party calling him upon the trial, but cannot be compelled to produce them to refresh his memory.—United States v. Tilden, Case No. 16,522.

The same rules apply, in determining the propriety of compelling a witness to answer a question on an examination de bene esse be-

fore a commissioner, that govern in trials before the court.—In re Judson, Case No. 7,563.

See, also. post, § 24.

§ 18. Manner of taking in general.

See, also, post, §§ 25, 26.

In taking ex parte depositions under the act of congress, the requirements of the act must be strictly complied with.—Thorpe v. Simmons, Case No. 14,007.

Mode of taking depositions, under Act 1789, § 3, explained in note.—Russell v. Ashley, Case No. 12,150.

§ 19. What law governs.

In common-law actions in the federal courts, depositions may be taken pursuant to the state law or the act of congress, as parties may elect.—Flint v. Crawford County, Case No. 4,871.

The mode of issuing and executing a dedimus granted in pursuance of Rev. St. § 866, is regulated by common usage or practice.—Jones v. Oregon Cent. Ry. Co., Case No. 7,486.

A witness examined under a dedimus should be sworn according to the law of the forum whence it issued.—Jones v. Oregon Cent. Ry. Co., Case No. 7,486.

As to the mode of administering the oath, it is sufficient in that respect to follow the directions of the statute law of the state of the United States where the depositions were taken.—Wilson Sewing Mach. Co. v. Jackson, Case No. 17,853.

§ 20. Statutory provisions.

Rev. St. §§ 863–865, in relation to the taking of depositions to be used in the federal courts, are not repealed by section 914, requiring the federal practice to conform to that of the state courts.—Sage v. Tauszky, Case No. 12,214.

§ 21. Presence of parties.

If a deposition be taken under the act of congress, in the absence of the party, he should take the deposition again, if not satisfied with the examination.—Goodhue v. Bartlett, Case No. 5,538.

§ 22. Swearing witnesses.

A witness must be sworn to testify the whole truth.—Rainer v. Haynes, Case No. 11,536.

Rev. St. § 864, must be strictly complied with in taking depositions de bene esse; and the witness must be sworn to testify the "whole truth" on the entire subject of the depositions, and not as to each interrogatory.—Wilson Sewing Mach. Co. v. Jackson, Case No. 17,853.

A witness may be sworn either before or after the deposition is reduced to writing.—Tooker v. Thompson, Case No. 14,097.

§ 23. Re-examination of witness.

Where the deposition of a witness has been once taken and closed, he cannot be re-examined except by an order of court which can be made only upon good cause shown.—Phettiplace v. Sayles, Case No. 11,083.

§ 24. Punishment of witnesses for contempt.

Practice on motion for attachment for refusal to obey a subpœna for examination before a commissioner de bene esse, as a witness in a suit pending in another district.—Ex parte Judson, Case No. 7,561.

Where the nature of the inquiry does not appear from the commission, witnesses will not be *held* in contempt for refusal to make answers on examination.—In re Glaser, Case No. 5,476.

Before a witness can be punished for contempt in refusing to answer a question put to him, on examination de bene esse, before a commissioner, or a subpœna duces tecum, as a witness in a suit pending in another district, it must be shown that the commissioner has jurisdiction.—Ex parte Peck, Case No. 10,885.

An attachment, for refusal of a witness to answer a question on an examination de bene esse before a commissioner, will not be granted, where the materiality of the evidence sought is not shown.—In re Judson, Case No. 7,563; Ex parte Peck, Id. 10,885.

§ 25. Reducing to writing.

A deposition taken under the act of congress must be reduced to writing by the magistrate or by the deponent.—Edmondson v. Barrell, Case No. 4,284; Marstin v. McRea, Id. 9,141; Rainer v. Haynes, Id. 11,536. CONTRA, see Meade v. Keane, Case No. 9,373; Nicholls v. White, Id. 10,235.

Where the deposition is reduced to writing by deponent, it must be in the presence of the magistrate.—Edmondson v. Barrell, Case No. 4,284; Rainer v. Haynes, Id. 11,536; Vasse v. Smith, Id. 16,896. CONTRA, see Bussard v. Catalino, Case No. 2,228.

§ 26. Entitling and caption of deposition.

Where an issue is joined between plaintiff and garnishee, depositions must be entitled in the garnishee's name.—Baker v. Mix, Case No. 774.

The caption of the deposition must name all parties in the suit.—Peyton v. Veitch, Case No. 11,057; Smith v. Coleman, Id. 13,029.

A deposition will not be excluded because defendant's name is omitted from the caption, where it appears in the commission and proceedings.—Merrill v. Dawson, Case No. 9,469; Waskern v. Diamond, Id. 17,248.

In a joint action against two, the defendant served was the only one named in the caption of a deposition. *Held*, that it was admissible against the other, who was subsequently served.—Pannill v. Eliason, Case No. 10,707.

Title of cause in which deposition is taken under act of congress (1 Stat. 73) must be truly stated in the caption.—Centre v. Keene, Case No. 2,553.

A deposition is not defective which does not state in the caption in what county the cause is pending or that the name of one of the parties is misspelled.—Van Ness v. Heineke, Case No. 16,866.

Accidental omission of word from caption, or incorrect caption, is not necessarily fatal.—Buckingham v. Burgess, Case No. 2,088; Bussard v. Catalino, Id. 2,228.

§ 27. Designation of parties in deposition.

Depositions which do not show, either in the caption or body of them, between what parties they were taken, cannot be received.—Murray v. Marsh, Case No. 9,965.

A mistake in the name of a party, where he is designated as plaintiff or defendant, and the name is correctly stated in the title, is no ground for rejecting the deposition.—Voce v. Lawrence, Case No. 16,979.

§ 28. Certificate of taking—Form.

Form of certificate of magistrate taking deposition under Act 1789, § 30.—Garrett v. Woodward, Case No. 5,253; Rainer v. Haynes, Id. 11,536.

§ 29. —— Facts necessary to be certified.

All the facts necessary to make the deposition evidence under the statute must be certified by the magistrate.—Jones v. Knowles, Case No. 7,474.

The magistrate who takes a deposition under the act of congress must certify the reasons

of its being taken.—Woodward v. Hall, Case No. 18,005.

A deposition taken before the mayor of a city who usually certifies his acts under his official seal must be so certified, or his authority otherwise proved.—Paul v. Lowry, Case No. 10,844.

Sufficiency of certificate of magistrate taking deposition of a witness, upon his affirmation. —Elliot v. Hayman, Case No. 4,388.

A deposition taken under Act 1789, § 30, must be certified by the judge that it was reduced to writing by himself or by the witness in his presence.—Blake v. Smith, Case No. 1,502; Pettibone v. Derringer, Id. 11,043. But, see Van Ness v. Heineke, Case No. 16,866; Jones v. Oregon Cent. Ry. Co., Id. 7,486.

A magistrate who takes a deposition under an act of congress (1 Stat. 73) need not certify that deponents subscribed it in his presence.—Centre v. Keene, Case No. 2,553.

The officer need not certify that the deponent signed a deposition, where he certifies that the deposition was reduced to writing by him.—Voce v. Lawrence, Case No. 16,979.

A judge who takes a deposition under the act of congress must certify that the witness was cautioned and sworn to testify the whole truth. —Pentleton v. Forbes, Case No. 10,966. CONTRA, see Brown v. Piatt, Case No. 2,026; Jones v. Oregon Cent. Ry. Co., Id. 7,486.

A certificate that deponent was "carefully examined, and cautioned and sworn to speak the whole truth," *held* sufficient.—Edmondson v. Barrell, Case No. 4,284.

A deposition before the mayor of a city, under the act of congress, is sufficiently certified "as taken in pursuance of the act," though it be not stated that the witness was cautioned.—Moore v. Nelson, Case No. 9,771.

An ex parte deposition de bene esse is not admissible where the officer does not certify that the witness was "cautioned" as well as "carefully examined and sworn," as required by the statute. 1 Stat. 73.—Luther v. The Merritt Hunt, Case No. 8,610.

A commissioner need not certify as to the form of the oath administered to the witness.—Jones v. Oregon Cent. Ry. Co., Case No. 7,486.

The commissioner should state where the depositions were taken.—Boudereau v. Montgomery, Case No. 1,694; Rhoades v. Selin, Id. 11,740. CONTRA, see Jones v. Oregon Cent. Ry. Co., Case No. 7,486.

Where the place where the deposition is taken is stated in the caption, it is sufficient—Tooker v. Thompson, Case No. 14,097.

The commissioner should state when the depositions were taken.—Boudereau v. Montgomery, Case No, 1,694. CONTRA, see Jones v. Oregon Cent. Ry. Co., Case No. 7,486.

The magistrate need not certify that he was not of counsel for either of the parties.—Miller v. Young, Case No. 9,596; Peyton v. Veitch, Id. 11,057.

Nor interested in the suit.—Miller v. Young, Case No. 9,596.

The judge who takes the deposition must certify that notice was given to the adverse party. —Pentleton v. Forbes, Case No. 10,966.

Residence of adverse party sufficiently averred by certificate of magistrate that it appears to him that he resides more than 100 miles from place of caption.—Banks v. Miller, Case No. 963.

A magistrate acting under 3 Stat. 350, need not certify that the opposite party had no attorney within 100 miles of the place of caption, in order to excuse a want of notice.—Smith v. Coleman, Case No. 13,029.

Where the certificate states facts showing the notice to be unnecessary, it need not state the reason why no notice was given.—Dinsmore v. Maroney, Case No. 3,920.

§ 30. —— False certificate.

A false certificate of magistrate as to the time and place when and the person by whom the deposition was reduced to writing will render it inadmissible.—United States v. Smith, Case No. 16,332.

§ 31. —— Conclusiveness of certificate and effect as evidence of facts certified.

Where the magistrate omits to state whether notice was given defendant, plaintiff may show that defendant lived more than 100 miles from the place of hearing, and had no agent or attorney within that distance.—Travers v. Bell, Case No. 14,149.

The certificate of a magistrate to a deposition cannot be impeached by the testimony of experts in handwriting.—Elliot v. Hayman, Case No. 4,388.

Parol evidence is not admissible of a different cause of caption than that certified.—Wheaton v. Love, Case No. 17,485.

The certificate of the magistrate to the deposition (Act Sept. 24, 1789) is competent evidence to prove compliance with the statute in taking and certifying it.—Smith v. Williams, Case No. 13,127; Winter v. Simonton, Id. 17,894.

The authority of the magistrate need not be proved otherwise than by his own certificate.—Dinsmore v. Maroney, Case No. 3,920; Jasper v. Porter, Id. 7,229; Price v. Morris, Id. 11,414; Ruggles v. Bucknor, Id. 12,115; Vasse v. Smith, Id. 16,896.

§ 32. Amendment and correction.

The court cannot supply a jurisdictional word, though the omission may appear to be merely clerical.—Dunkle v. Worcester, Case No. 4,162.

A deposition which has been altered to correct an error must be resworn to before it can be filed. A deponent cannot confer upon another the power to alter a sworn paper.—In re Walther, Case No. 17,126.

§ 33. Suppression and retaking.

Motion to suppress depositions for irregularities is too late where not made until lapse of three years after filing.—Bank of Danville v. Travers, Case No. 886.

Where a motion to suppress a deposition as taken after publication had passed was not pressed on counsel's consenting to strike out certain interrogatories, *held*, that such a motion would not prevail at final hearing.—Patten v. Darling, Case No. 10,812.

A motion to suppress depositions brings up the regularity of an order directing them to be taken, as well as the competency of the witnesses examined, where the objection has not been waived.—Eslava v. Mazange's Adm'r, Case No. 4,527.

Deposition must be suppressed when it does not affirmatively appear that the witness resided more than 100 miles from the place where the cause was to be tried.—Dunkle v. Worcester, Case No. 4,162.

The fact that witness heard the interrogatories in advance *held* not a ground for suppressing the depositions.—Western Division of Western N. C. R. Co. v. Drew, Case No. 17,434; Schutte v. Florida Cent. R. Co., Id.

Where the examination of witnesses is made by counsel, and not by the examiner, the depositions will be suppressed.—Western Division of Western N. C. R. Co. v. Drew, Case No. 17,434; Schutte v. Florida Cent. R. Co., Id.

Where depositions or affidavits are taken with notice in conformity to a special order, but when the opposite side was not able to confer with counsel and attend, they will be admitted, with the condition that the opposite party have time to take them over again and cross-examine the witnesses.—Aiken v. Bemis, Case No. 109.

§ 34. Transmission and opening.

A deposition taken under the act of congress which is written out by the party, and forwarded by him to the court, will be rejected.—Shankwiker v. Reading, Case No. 12,704.

A deposition taken de bene esse under the judiciary act cannot be read in evidence where it is neither delivered to the court personally by the magistrate or by him sealed up and directed to the court.—Jones v. Neale, Case No. 7,483.

Where the name of the magistrate is written across the place where the envelope is sealed, it is sufficient evidence that the deposition was sealed up by him.—Thorp v. Orr, Case No. 14,006.

Directing the sealed deposition to "the judges" of the court is sufficient.—Thorp v. Orr, Case No. 14,006.

Act Sept. 24, 1789, § 30, is not changed by Rev. St. § 865, in respect to the time when depositions de bene esse may be opened.—United States v. Tilden, Case No. 16,520.

Depositions de bene esse, taken under Rev. St. § 863, may be opened before trial by order of the court on motion against the objection of the other party.—United States v. Tilden, Case No. 16,520.

Depositions opened out of court, and without the consent in writing of the opposite party, cannot be read in evidence.—The Roscius, Case No. 12,042.

A commission opened before it came into the hands of the clerk will be set aside.—United States v. Price, Case No. 16,089.

§ 35. Recording and filing depositions.

A deposition in perpetuam, which has not been recorded according to the law of the state where it is taken, is not competent evidence in the courts of the United States.—Gould v. Gould, Case No. 5,637.

A deposition left for several months in the hands of defendant's attorney, and not placed on file until the morning of the trial, cannot be read.—Livingston v. Pratt, Case No. 8,417.

§ 36. Withdrawing from file.

In the absence of objection, and by leave of court, a deposition may be withdrawn from the files to procure an amendment of the magistrate's certificate.—Leatherberry v. Radcliffe, Case No. 8,163.

§ 37. Objections and waiver thereof.

Objections cannot be made to a deposition on a new trial where all objections were waived on the first trial.—Edmondson v. Barrell, Case No. 4,284.

Objection to parts of depositions should be made before the final hearing, by motion to strike out.—Hitchcock v. Shoninger Melodeon Co., Case No. 6,537.

If, upon the return of depositions, the opposite party except "to the caption as well as to the substance of them," he may specify his objections at the hearing.—Walker v. Parker, Case No. 17,082.

All formal objections to taking depositions must be indorsed on them before the trial.—Brooks v. Jenkins, Case No. 1,953.

An objection to a deposition taken de bene esse, that it was not taken and returned according to law, *held* to apply to it as a deposition in chief.—The Thomas and Henry v. United States, Case No. 13,919.

A party attending on the taking of depositions will be presumed to have waived objections to the competency of witnesses not raised at the time. But objections not known at the time may be raised on the reading of the deposition.—United States v. One Case of Hair Pencils, Case No. 15,924.

The deposition is admissible where the adverse party appears, and cross-examines the witness, although notice of the taking was not given as required by Act Sept. 24, 1789, § 30.—Dinsmore v. Maroney, Case No. 3,920.

Though a deposition be taken under a stipulation waiving "all objections as to the form and manner of taking," it must still be returned to court in all respects as provided by law.—Livingston v. Pratt, Case No. 8,417.

A waiver of all objection to a deposition taken de bene esse does not impart any new character to it, and does not make it a deposition in chief.—The Thomas and Henry v. United States, Case No. 13,919.

Depositions sworn to, but not signed, by the witness may be read where the objection has been waived.—Ketland v. Bissett, Case No. 7,742.

A deposition read without objection will not afterwards be rejected because other depositions, duly excepted to, were disallowed.—Evans v. Hettick, Case No. 4,562.

An agreement to admit certain depositions *held* to extend to the final determination of the cause.—Hinde v. Vattier, Case No. 6,512.

§ 38. Use of depositions in evidence—Inability of witness to attend.

It must be shown that witness whose deposition was taken de bene esse was served with subpœna, and is unable to attend.—Banert v. Day, Case No. 836; Penns v. Ingraham, Id. 10,944; Read v. Bertrand, Id. 11,603; The Thomas and Henry v. United States, Id. 13,919.

But if the deposition of a witness who is attending in court is read without objection, he may be examined in chief by the party who read his deposition.—Whitney v. Emmett, Case No. 17,585.

What is a sufficient return to a subpœna to enable a party to read the deposition of the witness taken de bene esse.—Jones v. Greenolds, Case No. 7,464.

A certificate by the officer taking the deposition, of the residence of the witness, and that it is over 100 miles from the place of trial, is sufficient to authorize the reading of the deposition.—Merrill v. Dawson, Case No. 9,469; Leatherberry v. Radcliffe, Id. 8,163.

A deposition taken in chief under a commission may be read, unless the other party can prove that the witness is within reach of the process of the court.—Ridgeway v. Ghequier, Case No. 11,813.

It is no objection to reading a deposition taken abroad that the witnesses had previously been examined and cross-examined under a commission in the United States.—Winthrop v. Union Ins. Co., Case No. 17,901.

The deposition of a witness who is at the place where the court is held, if objected to, cannot be read if the witness be able to attend the court.—Weed v. Kellogg, Case No. 17,345.

The deposition may still be read after the witness has moved within 100 miles, unless the objecting party shall show that such fact was known to the opposite party in time to have had the witness subpœnaed.—Russell v. Ashley, Case No. 12,150.

Deposition excluded in a trial at Philadelphia; it appearing that the witness generally lived in

his boat, but, when on land, stayed in Jersey City,—less than 100 miles from the place of trial.—Hope v. Eastern Transp. Line, Case No. 6,680.

The deposition of a witness, who resides 300 miles away, taken de bene esse, cannot be read, unless the witness was served with a subpœna, and it appears that, from some sufficient reason, he cannot attend.—Brown v. Galloway, Case No. 2,006.

That a witness who lives in another state, more than 100 miles from the place of trial, has been in the city during the sessions of the court, is no objection to reading his deposition, where his presence was not known to the party.—Pettibone v. Derringer, Case No. 11,043.

The circuit court of the District of Columbia will not permit a deposition taken de bene esse to be read, if the witness resides within 100 miles, although out of the District.—Park v. Willis, Case No. 10,716.

The deposition of a seafaring man cannot be read at the trial unless it appear that the witness has departed from the district.—Bowie v. Talbot, Case No. 1,732.

§ 39. —— Diligence to procure attendance.

A deposition cannot be read unless due diligence be first used to obtain the attendance of the witness at the trial or his evidence under commission.—Bleecker v. Bond, Case No. 1,534; Pettibone v. Derringer, Id. 11,043.

§ 40. —— Effect of failure to produce.

A suppression of answers to questions in a deposition warrants finding that they were prejudicial.—Beardsley v. Tappan, Case No. 1,188a.

§ 41. —— Use by adverse party.

Taken and filed by one party may be read in evidence by the other.—Andrews v. Graves, Case No. 376; Park v. Willis, Id. 10,716.

A deposition taken by plaintiff cannot be read in evidence by defendant, where the testimony would not have been competent for defendant if the deposition had been taken on his part.—Reid v. Hodgson, Case No. 11,667.

§ 42. —— Use in another action.

The deposition of a deceased person taken in another cause may be read as hearsay.—Banert v. Day, Case No. 836; Boudereau v. Montgomery, Id. 1,694; Joice v. Alexander, Id. 7,435.

Depositions taken in another case will not be excluded where the objecting party was the real party in interest in that case, the subject-matter was the same, and he then had opportunity to cross-examine.—McCormick v. Howard, Case No. 8,719.

In a suit by 100 plaintiffs, depositions taken in a suit by 5 of them are not admissible.—Boudereau v. Montgomery, Case No. 1,694.

The court may, upon application before trial, allow depositions taken in a suit between the same parties, for the same cause of action, in another court, to be filed as evidence.—Grunninger v. Philpot, Case No. 5,853.

The objecting party should show affirmatively that there was mistake, misapprehension, or other good cause why they should not be received.—Grunninger v. Philpot, Case No. 5,853.

§ 43. —— Withdrawing from evidence.

A deposition, after having been read, may be waived and withdrawn by party offering it.—Bank of Washington v. Walker, Case No. 956.

DEPOSITS.

As payment, see "Payment," § 1.
In bank, see "Bankruptcy," § 190; "Banks and Banking," §§ 8, 9.
Interpleader for money deposited, see "Interpleader."
Right of bank to set-off, in bankruptcy, see "Bankruptcy," § 410.

DEPOSITS IN COURT.

§ 1, When deposit may be made. § 2, Care and custody.

In admiralty, see "Admiralty," § 66.

§ 1. When deposit may be made.

Money in controversy, held by a nominal party solely as trustee for another person not a party to the record, may be ordered to be paid into court at the instance of the party in interest.—Nusbaum v. Emery, Case No. 10,381.

Where the holder of money, being an officer of the government, had ceased to be such during the pendency of the suit, the court should order the money to be paid into court.—Nusbaum v. Emery, Case No. 10,381.

Subcharterer will be allowed to pay freight moneys into court to abide decision of contest between owner and charterer as to claim for demurrage in which he is not interested.—Copp v. De Castro & Donner Sugar-Refining Co., Case No. 3,215.

§ 2. Care and custody.

Under the act of April 18, 1814, requiring moneys received by court officers to be deposited in bank, the court may require officers to pay moneys received by them into court, to be deposited in bank by the clerk.—The Laurens, Case No. 8,122.

DEPUTIES.

See "District and Prosecuting Attorneys," § 4; "Officers," § 3; "Sheriffs and Constables," § 9; "United States Marshals," §§ 3–7.
Postmasters, see "Post Office," § 3.

DESCENT AND DISTRIBUTION.

§ 1, Property subject to inheritance. § 2, Persons entitled and their respective shares. § 3, Rights and liabilities of heirs and distributees—Nature and establishment of rights in general. § 4, Debts of intestate and incumbrances on property.

See, also, "Curtesy"; "Dower"; "Executors and Administrators"; "Husband and Wife."
Competency of legatees and distributees as witnesses, see "Witnesses," § 40.
Inheritance and transfer taxes, see "Taxation," § 19.
Legacy and succession taxes, see "Internal Revenue," § 21.
Removal of proceedings to federal court, see "Removal of Causes," § 2.
Right of aliens, see "Aliens," § 3.
—— of adopted child, see "Adoption."

§ 1. Property subject to inheritance.

In Massachusetts, reversions and remainders after life estates vested by descent in the intestate pass to his heirs, without any regard to the ancestor from whom inherited, in the same manner as estates in possession.—Cook v. Hammond, Case No. 3,159.

The common law in such case is different, and gives the estate in reversion to the heir of the first purchaser or reversioner, who is heir at the time when the life estate expires.—Cook v. Hammond, Case No. 3,159.

Where a contract for the sale of land is void, or cannot be enforced by reason of laches on the part of the vendee, the land will descend to the heirs of the vendor.—McKay v. Carrington, Case No. 8,841.

§ 2. Persons entitled and their respective shares.

A father is of the blood of his daughter, within the meaning of the Rhode Island statute of descents limiting the descent of ancestral estates to those of the blood of the person from whom the estate came to the intestate, if any such there be.—Cole v. Batley, Case No. 2,977.

Under Act Mass. 1783, c. 36, the eldest son took a double portion in remainders and reversions as well as in estates in possession.—Cook v. Hammond, Case No. 3,159.

In Rhode Island, the maternal grandfather of the intestate takes an estate which descended to the intestate from her mother, to the exclusion of uncles and aunts of the intestate who were brothers and sisters of her mother.—Cole v. Batley, Case No. 2,977.

Second cousins *held* entitled to share with first cousins in the ancestral property of an intestate. Laws R. I. 1882, p. 222.—Dexter v. Dexter, Case No. 3,860.

Under the statute of descents of Rhode Island of 1822, brothers and sisters of the half blood inherit equally with those of the whole blood.—Gardner v. Collins, Case No. 5,223.

In the case of the death of one of two illegitimate children, unmarried and without issue, the mother being also dead, his property descends to the brother, under the Illinois statute of wills.—Rogers v. Weller, Case No. 12,022.

"Next of kin to the mother," in such statute, includes illegitimate as well as legitimate children.—Rogers v. Weller, Case No. 12,022.

"Children," as used in such statute, is not confined to children born in lawful wedlock.—Rogers v. Weller, Case No. 12,022.

The right of the wife to a distributive share of her husband's personal estate is absolute, and she does not forfeit it by her conduct, however unworthy. 1 Rev. Code Va. c. 104, § 29.—Stegall v. Stegall, Case No. 13,351.

Where a sale of land is set aside, and the money directed to be paid to the administrator or the purchaser, to be distributed as assets, the second husband of the widow of the purchaser is entitled as distributee to his deceased wife's third.—United States v. Baker, Case No. 14,503.

§ 3. Rights and liabilities of heirs and distributees—Nature and establishment of rights in general.

A woman claiming an estate as widow and heir at law, must give other proof than her mere statement where her right is contested.—Amory v. Amory, Case No. 335.

The Rhode Island statutes of 1768 and 1822 respecting estates of persons dying without known heirs or representatives in the United States, apply to undivided interests in an estate.—Stevens v. Ruggles, Case No. 13,403.

Where an intestate is much indebted at the time or his decease, an agreement among distributees that no administration shall be taken, and that one of them, who was the apparent owner of the property at the death of the intestate, shall continue to hold and manage the estate for the benefit of all, will not be enforced in equity, as such agreement tends to defraud creditors and is against public policy, and is inconsistent with the statute of Rhode Island (Pub. Laws, p. 239, § 2), which provides for the just and orderly settlement of intestate estate.—Allen v. Simons, Case No. 237.

As to sales of real estate of an intestate for the purpose of distribution in the District of Columbia, and the powers of the circuit court and commissioners, see Shaw v. Shaw, Case No. 12,724; Hastings v. Granberry, Id. 6,200.

The share of a distributee who purchases at a sale of the intestate's realty may be applied to make good a loss on the sale caused by his delinquency.—Shaw v. Shaw, Case No. 12,724.

One heir or next of kin suing for a distributive share of an estate must make the other heirs or next of kin parties, or show that they are within some exception to the rule requiring all persons materially interested to be made parties.—West v. Randall, Case No. 17,424.

In a suit by one or more heirs to recover assets, another heir and distributee is a proper party, but is not indispensable whenever the court can proceed and do justice to the parties before it without injury to the absent person.—Van Bokkelen v. Cook, Case No. 16,831.

In a suit by one of the next of kin to obtain a distribution of property, the executor or administrator of a deceased next of kin, and not his devisee or heirs, must be made a party.—Wisner v. Odgen, Case No. 17,914; Alston v. Cohen, Id. 265. See, also, West v. Randall, Case No. 17,424.

In a suit to obtain the distribution of property which came into the hands of the administrator of an executor, where plaintiffs claimed as heirs at law and next of kin of testator, the legal representative of the testator is not a necessary party.—Wisner v. Odgen, Case No. 17,914.

Heirs must bring their action under the limitation act of Kentucky of 1809 within 10 years after the decease of their ancestor, if at the time of the decease there be adverse possession.—Lewis v. Marshall, Case No. 8,327.

On a decree of distribution, complainants, residing in France, required to give refunding bonds with security, pursuant to Act Pa. 1794, concerning intestate estates.—Harman v. Harman, Case No. 6,071.

§ 4. Debts of intestate and incumbrances on property.

One-half of the real estate of testator, in Virginia, *held* liable for his debts, though not charged by the will.—Prime v. McRea, Cases Nos. 11,422, 11,423.

A foreign bill of exchange protested does not bind the heir of the drawer.—Alston v. Munford, Case No. 267.

Heir is not liable to judgment creditor of his ancestor for profits received before filing bill.—Alston v. Munford, Case No. 267.

As against creditors of the ancestor, land sold by the heir is to be charged to him at its value at the time he sold it.—Gibson v. Williams, Case No. 5,403.

Land which descended to the heir is deemed to have been purchased by him to the extent of debts of the ancestor paid by him.—Gibson v. Williams, Case No. 5,403.

A Connecticut court cannot enforce payment of a debt from personal estate previously distributed.—Davis v. Van Sands, Case No. 3,655.

The heir is liable, to the extent of assets received from his ancestor, for the contracts or liabilities of the ancestor, and suit may be maintained against him after the administration of the estate is closed, where the claims subsequently accrued.—Payson v. Hadduck, Case No. 10,862.

An administrator who has distributed personalty by order of the probate court may bring a bill in equity to compel the distributees to contribute to payment of a newly-accrued debt; or the creditor who has obtained judgment for such debt may himself bring such bill.—Davis v. Van Sands, Case No. 3,655.

If the heir, in an action against him on the bond of his ancestor, plead nothing by descent or devise, and it be found against him, judg-

ment shall be de bonis propriis.—Hamilton v. Simms, Case No. 5,990.

The purchaser from the heir may plead, in the name of the heir, to a sci. fa. for execution against the lands of the deceased, that the executor had assets.—Hamilton v. Jones, Case No. 5,983.

Where the personal funds of a decedent's estate have passed into other hands than those of his legal personal representative, a bond creditor may proceed to subject the realty to payment.—Corbet v. Johnson, Case No. 3,218.

Creditors must exhaust the personal estate before they can resort to the lands, in equity, whether they were charged by will or by bond.—Garnett v. Macon, Case No. 5,245.

And, in such case, a decree against the executor is not conclusive, but prima facie evidence only against the heir or devisee.—Garnett v. Macon, Case No. 5,245.

In a suit to charge real estate of an intestate for deficiency of personal assets, the answer of the administrator, and his accounts settled, are prima facie evidence against the other defendants, who are without personal knowledge.—Hayman v. Keally, Case No. 6,265.

Where a sale of decedent's lands to pay debts is set aside upon a bill of review, and a decree of restitution obtained, the heirs are entitled to an account, and a discovery of profits.—Ritchie v. Bank of United States, Case No. 11,863.

Heirs of deceased debtor not permitted to have rents and profits of realty until the sale to pay debts.—Bank of United States v. Peter, Case No. 933.

Proceedings to sell real estate to pay intestate's debts, presumed authorized after 48 years.—Allen v. Lyons, Case No. 227.

See, also, "Covenants," § 3.

DESCRIPTION.

Names of individuals, see "Names."
Of devisees or legatees in will, see "Wills," §§ 8, 28.
Of parties, see "Parties," § 3.
Of property conveyed, see "Boundaries," §§ 1–4; "Deeds," § 10.
—— devised or bequeathed, see "Wills," § 30.
—— mortgaged, see "Chattel Mortgages," § 13; "Mortgages," § 10; "Railroads," § 36.

DESERTION.

Of vessel by seamen, see "Seamen," §§ 64–69.

DESIGNS.

Copyright, see "Copyrights," § 11.
Patents for, see "Patents."

DETECTIVES.

§ 1. Compensation.

A detective employed by a town to ascertain what individuals composed a mob that destroyed property for which the town was liable may recover compensation, with interest from the time of his demand.—Sargent v. Inhabitants of Bristol, Case No. 12,363.

DETINUE.

§ 1, Nature of remedy. § 2, Grounds of action and defenses. § 3, Pleading. § 4, New trial.

See, also, "Replevin."
Survival of action, see "Abatement and Revival," § 5.

§ 1. Nature of remedy.

Detinue is an action in form ex contractu, and not ex delicto.—Maynadier v. Duff, Case No. 9,349.

§ 2. Grounds of action and defenses.

Detinue will lie for a slave, although defendant obtained possession tortiously.—Bernard v. Herbert, Case No. 1,347.

Detinue lies against a person who has quitted the possession of property prior to the institution of suit.—Woodruff v. Bentley, Case No. 17,986a.

A legal eviction or return of the property before suit will bar the action.—Woodruff v. Bentley, Case No. 17,986a.

§ 3. Pleading.

Notwithstanding the artificial words of a declaration in detinue, if the action be grounded on a tortious seizure by the defendant of the property mentioned, it will not be held, contrary to the fact, an action on contract.—Elgee's Adm'r v. Lovell, Case No. 4,344.

§ 4. New trial.

In detinue, a new trial will not be granted because the damages are excessive, as defendant may discharge the judgment by restoring the property.—Mirick v. Hemphill, Case No. 9,647a.

DEVIATION.

Of vessel, see "Insurance," §§ 71, 72; "Shipping," § 166.

DEVISES.

See "Charities"; "Wills."

DILATORY PLEAS.

See "Pleading," §§ 22, 30, 31.

DIRECTING VERDICT.

In civil actions, see "Trial," § 15.

DISABILITIES.

Effect on limitation, see "Limitation of Actions," § 11.

Particular classes of persons.

See "Aliens," §§ 1–4; "Infants"; "Insane Persons"; "Slaves."
Married women, see "Husband and Wife," § 4.

DISBARMENT.

Of attorney, see "Attorney and Client," § 1.

DISCHARGE.

From employment, see "Seamen," §§ 42–48, 88, 93.
—— imprisonment, see "Arrest," §§ 10, 11; "Criminal Law," § 81; "Execution," § 25; "Habeas Corpus," § 12.
—— indebtedness, see "Accord and Satisfaction"; "Bankruptcy," §§ 537–639; "Compositions with Creditors"; "Compromise and Settlement"; "Insolvency," §§ 2–4, 13–16; "Payment," §§ 15, 16; "Release."
—— service as juror, see "Jury," § 12.
In bankruptcy, see "Bankruptcy," §§ 537–639.
In insolvency, see "Insolvency," §§ 2–4, 13–16.
Of assignee in bankruptcy, see "Bankruptcy," § 465.

Of executor or administrator, see "Executors and Administrators," §§ 7, 77.
Of guarantor, see "Guaranty," §§ 7–9.
Of indorser of commercial paper, see "Bills and Notes," §§ 42, 43, 80.
Of judgment, see "Judgment," §§ 75–78.
Of lien, see "Maritime Liens," §§ 34–48.
—— for freight, see "Shipping," § 189.
—— of judgment, see "Judgment," § 61.
Of prisoner, see "Arrest," §§ 10, 11; "Criminal Law," § 81; "Habeas Corpus," § 12.
Of sureties, see "Bail," § 10; "Post Office," § 7; "Principal and Surety," §§ 4–10.
On habeas corpus, see "Habeas Corpus," § 12.

DISCLAIMER.

Affecting claim to patent, see "Patents," §§ 115–120.
Of estate, see "Remainders."

DISCONTINUANCE.

See "Dismissal and Nonsuit."
Of proceedings in admiralty, see "Admiralty," § 49.

DISCOUNT.

By bank, see "Banks and Banking," § 11.
Exchange, see "Banks and Banking," § 12; "Bills and Notes," §§ 16, 105.

DISCOVERY.

§ 1, Nature and remedy in equity in general. § 2, Right to maintain bill. § 3, Against whom bill will lie. § 4, Pleading. 5, Incidental relief. § 6, Decree. § 7, Costs. § 8, Production and inspection of writings. § 9, Discovery under statutory provisions.

See, also, "Creditors' Suit."
In suits for infringement of copyright, see "Copyrights," § 45.
—— of patents, see "Patents," § 212.

§ 1. Nature of remedy in equity in general.

There cannot be concurrent jurisdiction at law and in equity where the right and remedy are the same, but equity may proceed in aid of the remedy at law by a bill of discovery.—Baker v. Biddle, Case No. 764.

Where the aid of a court of chancery is indispensable to obtain discovery of the important facts in the case, an application for relief can be sustained in connection with such discovery in the federal circuit court, notwithstanding section 16 of the judiciary act.—Warner v. Daniels, Case No. 17,181.

The theory and basis of a bill of discovery in equity, in aid of a defense in another suit, is that the court in which such other suit is pending has no means of compelling a discovery from the plaintiff therein of facts material to the defense.—Heath v. Erie Ry. Co., Case No. 6,307.

A bill for the discovery of assets lies in equity, notwithstanding the remedy at law.—Pratt v. Northam, Case No. 11,376.

There is a distinction between a bill for discovery merely and one for discovery and relief.—Bell v. Pomeroy, Case No. 1,263.

§ 2. Right to maintain bill.

Bill does not lie if plaintiff has knowledge or means of proof, or the same means as defendant.—Baker v. Biddle, Case No. 764.

It is no sufficient answer to a bill of discovery that the facts can be proved by another, who is interested.—Bell v. Pomeroy, Case No. 1,263.

A plea to a bill of discovery presenting the issue as to who is best acquainted with the facts of the case is not good.—Bell v. Pomeroy, Case No. 1,263.

Discovery will not be granted in aid of a suit at law not in the proper form of remedy.—Atwill v. Ferrett, Case No. 640.

Defendant cannot be compelled to make a discovery to a bill seeking to enforce a penalty.—Atwill v. Ferrett, Case No. 640.

But this is not the rule where the bill relinquishes all claim to the penalty.—Finch v. Rikeman, Case No. 4,788.

Defendant cannot be compelled to make discovery to a bill seeking to enforce forfeitures.—Atwill v. Ferrett, Case No. 640; United States v. Twenty-Eight Packages of Pins, Id. 16,561.

A bill in equity, although it charge a felony, may be sustained by proof; but the defendant is not bound to make a discovery thereof.—Ocean Ins. Co. v. Fields, Case No. 10,406.

Defendants cannot be compelled to answer whether, upon a note being sent to them to be signed, they did not substitute a note for the same amount, dated on Sunday, as this would subject them to a penalty for violating the Sabbath.—Stewart v. Drasha, Case No. 13,424.

If evidence of defendant's title furnishes evidence of the complainant's, the latter may compel a discovery of it.—Gaines v. Mausseaux, Case No. 5,176.

The fact that in Louisiana titles are registered in a public office does not affect complainant's right to call for such discovery.—Gaines v. Mausseaux, Case No. 5,176.

A plaintiff who, on a rule to show his cause of action, files a positive affidavit, will not be required to submit to examination under oath at court, where there is no ground for suspicion that the debt was not due.—Champion v. Ross, Case No. 2,585.

Where, after goods are selected, inventoried, and set apart under an agreement in payment of a creditor's claim, other creditors come in with the consent of the debtor, and take the whole stock, the former creditors may maintain a bill for discovery for the inventory to enable them to support their action at law for the goods.—Walker v. Wanton, Case No. 17,090.

When an execution has been issued, and no property found on which to levy, the judgment creditor is entitled to the aid of a court of equity to discover and apply the debtor's property to the payment of the judgment.—Ward v. Chamberlain, Case No. 17,152.

Where several persons are liable for the same debt, each one is entitled to know the amount which the creditor has received, and for such purpose the creditor may be cited to a discovery.—Molyneaux v. Marsh, Case No. 9,703.

Defendant, after judgment in ejectment and new trial allowed, cannot file a bill for discovery whether the conveyance to plaintiff was not merely colorable, and made in order to give the court jurisdiction.—Richardson v. Mattison, Case No. 11,790.

§ 3. Against whom bill will lie.

A bill of discovery will lie against a corporation.—Vaughan v. East Tennessee V. & G. R. Co., Case No. 16,898.

§ 4. Pleading.

A bill of discovery in aid of an action at law should aver the materiality of the facts.—Bell v. Pomeroy, Case No. 1,263; Markey v. Mutual Ben. Life Ins. Co., Id. 9,091; Vaughan v. Central Pac. R. Co., Id. 16,897.

Such bill should also aver that the discovery of the facts by defendant is indispensable as proof.—Bell v. Pomeroy, Case No. 1,263; Vaughan v. Central Pac. R. Co., Id. 16,897.

A bill for a discovery in aid of a suit at law should allege that the court of law in which

the case is pending cannot compel the discovery.—Markey v. Mutual Ben. Life Ins. Co., Case No. 9,091.

A bill of discovery must set forth a title sufficient to support or defend a suit, and pray a discovery pertinent thereto; and, where it cannot be sustained as a bill of discovery, it cannot be retained for the purpose of relief, unless it makes an independent case.—Young v. Colt, Case No. 18,155.

A cross bill for discovery charging that plaintiff was a nominal one, and that the real plaintiff was a citizen of the same state with defendant, filed after the original bill was set for hearing, on information subsequently obtained, must be answered before the original suit is heard.—Young v. Pott, Case No. 18,172.

§ 5. Incidental relief.

On a bill for discovery and other equitable relief, where plaintiff's ultimate object is to obtain damages, proper relief in damages will be given after discovery is granted.—Magic Ruffle Co. v. Elm City Co., Case No. 8,950.

The fact that plaintiff is entitled to the discovery prayed does not necessarily entitle him also to an account.—Magic Ruffle Co. v. Elm City Co., Case No. 8,950.

§ 6. Decree.

If relief not incidental to discovery, bill does not give power to make final decree where answer discloses nothing, or denies all equity.—Baker v. Biddle, Case No. 764.

§ 7. Costs.

Where several persons are liable for the same debt, and the creditor is cited to a discovery to ascertain the amount which he has received, and he refuses to make the disclosure, he will be liable to the costs of the bill of discovery.—Molyneaux v. Marsh, Case No. 9,703.

§ 8. Production and inspection of writings.

Plaintiff is not entitled to the production of a book which his bill does not in any way call for or show to be material.—Robbins v. Davis, Case No. 11,880.

Plaintiff may require the production, for his inspection and use in the suit, of documents in defendant's possession referred to in the answer, without being set forth in full, and material to his case.—Robbins v. Davis, Case No. 11,880.

Plaintiff is not entitled to the production of papers to which no allusion is made in the answer, though referred to in the bill. Plaintiff's remedy is to except to the answer.—Robbins v. Davis, Case No. 11,880.

Where the answer sets forth extracts from defendant's books, with the averment that they embrace everything in the books that relates to the subject-matter of the suit, plaintiff cannot, on a suggestion that such extracts are garbled or liable to suspicion, entitle himself to a general inspection of the books of defendant relating to other matters.—Robbins v. Davis, Case No. 11,880.

Plaintiff is entitled to the production for inspection of the books referred to, but defendant may seal up the parts not relating to the subject-matter of the suit, and the inspection must take place under the supervision of an officer of the court.—Robbins v. Davis, Case No. 11,880.

§ 9. Discovery under statutory provisions.

To obtain a discovery under Act Sept. 24, 1789, § 15, it is only requisite that the cause should be at issue, and that the court should be satisfied that the evidence will be pertinent to such issue, and that the discovery would be decreed in equity.—Jacques v. Collins, Case No. 7,167.

A notice of the time and place of making the application and a plain designation of the documents sought for are sufficient.—Jacques v. Collins, Case No. 7,167.

Defendant may be required to produce books and papers before trial for plaintiff's inspection.—Central Bank v. Tayloe, Case No. 2,548.

Plaintiff's attorney will not be compelled to furnish a sworn statement of the residence, occupation, and present address of plaintiff, after the cause has been set down for trial.—Corbett v. Gibson, Case No. 3,222.

After a verdict at law, plaintiff may maintain a bill in equity for a discovery as to usury in the contract on which the verdict was founded. Act Va. Nov. 23, 1796.—Swann v. Brown, Case No. 13,673.

DISCRETION OF COURT.

Review in civil actions, see "Appeal and Error," § 33.

DISMISSAL AND NONSUIT.

§ 1, Voluntary—Time of taking nonsuit. § 2, —— Effect. § 3, Involuntary—Grounds. § 4, —— Leave of court. § 5, —— Effect. § 6, —— Reinstatement.

At trial, see "Trial," § 14.
Costs on, see "Costs," § 4.

Dismissal of particular actions or proceedings.
Cause removed from state court, see "Removal of Causes," §§ 51–54.
In admiralty, see "Admiralty," §§ 49, 97, 99.
In bankruptcy, see "Bankruptcy," § 129.
In equity, see "Equity," §§ 97, 98, 101.
Of appeal, see "Appeal and Error," § 25; "Admiralty," § 125; "Bankruptcy," § 692.

§ 1. Voluntary—Time of taking nonsuit.

A court of the United States is not empowered to grant a nonsuit in a case where evidence has been taken.—Boucicault v. Fox, Case No. 1,691; Folger v. The Robert G. Shaw, Id. 4,899.

In replevin, the court will not order a non pros. on defendant's motion after the jury is sworn.—Walker v. Hunter, Case No. 17,072.

After the court has given its decision on a plea of nul tiel record, it is too late to take a nonsuit.—Stewart v. Gray, Case No. 13,428a.

§ 2. —— Effect.

A voluntary discontinuance by plaintiff will not prevent another suit.—Bingham v. Wilkins, Case No. 1,416; Hoffman v. Porter, Id. 6,577; Holmes v. The Lodemia, Id. 6,642; Jay v. Almy, Id. 7,236.

§ 3. Involuntary—Grounds.

Want of proper averments in declaration cannot be made ground of nonsuit.—Bas v. Steel, Case No. 1,087.

Defendant is not entitled to nonsuit the plaintiff for not producing papers as noticed without first obtaining an order.—Dunham v. Riley, Case No. 4,155.

Where no declaration or plea has been filed, a rule to try or non pros. cannot be enforced.—Sulivan v. Browne, Case No. 13,593.

If the bill be found to be erroneous, after the jury to try the case are impaneled, the plaintiff will have to suffer a nonsuit.—Williams v. Sinclair, Case No. 17,737.

Where the case is submitted upon the bill and answer, the answer must be taken as true, and where it denies the case made by the bill the bill must be dismissed.—United States v. Scott, Case No. 16,242.

Where, in Virginia, defendant pleads the general issue, and demurs, and plaintiff joins issue only on the plea, he will be nonsuited.—Furniss v. Ellis, Case No. 5,162.

An error in the original capias is no ground of dismissal where a correct alias capias has been served.—Scull v. Kuykendall, Case No. 12,570b.

To entitle plaintiff to file a common appearance for defendant under Act Pa. March 20, 1724, the summons must have been served 10 days before the return day. But, if not so served the writ is not to be dismissed, but plaintiff must proceed regularly to enforce an appearance.—Smith v. Bohn, Case No. 13,015.

After defendant in ejectment has appeared and entered into the common rule, he may rule plaintiff to proceed to trial or be non pros'd, although the declaration has not been changed so as to bring in the real defendant.—Hurst v. Ker, Case No. 6,935.

§ 4. —— Leave of court.

A discontinuance will be entered without leave of court unless defendant interfere on the ground that the discontinuance is oppressive.—Yeatman v. Henderson, Case No. 18,132.

§ 5. —— Effect.

Suit dismissed for want of prosecution is no bar.—American Diamond Rock Boring Co. v. Sheldon, Case No. 296.

§ 6. —— Reinstatement.

A nonsuit will be set aside, in the discretion of the court, where justice requires it; and if there has been surprise, or the plaintiff has equity, the nonsuit will be set aside.—Williams v. Sinclair, Case No. 17,737.

If a cause be non pros'd and not reinstated at the same term, it cannot be reinstated at a subsequent term, but is discontinued.—Riggs v. Chester, Case No. 11,823.

Causes which were non pros'd at the preceding term were reinstated upon the attorney stating that he was confined to bed by sickness in the country, and was unable to attend or to write.—Memorandum, Case No. 9,410.

The court will not, at a subsequent term, reinstate a cause which has been non pros'd for want of security for costs.—Lindsay v. Twining, Case No. 8,367.

The court will, on affidavit, reinstate a cause non pros'd on a rule for security for costs where plaintiff's attorney died in the meantime, and no rule was served on him to employ new counsel.—Cook v. Beall, Case No. 3,153.

The court will not, at a subsequent term, reinstate an action of replevin which has been non pros'd at a preceding term upon a rule to declare.—McDaniel v. Fish, Case No. 8,744.

An action of replevin discontinued at a previous term will not be reinstated.—Nicholls v. Hazel, Case No. 10,230.

Suit *held* discontinued by nonappearance of defendant at the return of the writ, through neglect of his attorney, and reinstatement not allowed.—Mitchell v. Wilson, Case No. 9,671; Thompson v. Wells, Id. 13,980.

An action, discontinued at a preceding term for want of appearance of defendant, will not be reinstated unless the omission was by neglect of the clerk.—French v. Venable, Case No. 5,105; McCleod v. Gloyd, Id. 8,697; McDermott v. Naylor, Id. 8,747; Sherburne v. King, Id. 12,759; Williamson v. Bryan, Id. 17,751.

DISORDERLY CONDUCT.

See "Breach of the Peace"; "Disturbance of Public Assemblage."

DISORDERLY HOUSE.

§ 1, What constitutes an offense. § 2, Indictment. § 3, Evidence.

§ 1. What constitutes an offense.

A house kept for the meeting of men and women for illegal and obscene purposes, or for the purpose of enticing young girls there for debauchery, is a disorderly house.—United States v. Gray, Case No. 15,251.

The practice of selling spirituous liquors publicly to negroes assembled in considerable numbers, to be drunk in or about the house, on Sunday, is keeping a disorderly house.—United States v. Lindsay, Case No. 15,602; Same v. Coulter, Id. 14,875; Same v. Prout, Id. 16,093.

A person who keeps a barroom open on all days and at all hours for the promiscuous sale of liquors is guilty of keeping a disorderly house.—United States v. Bede, Case No. 14,558; Same v. Benner, Id. 14,569; Same v. Columbus, Id. 14,841.

§ 2. Indictment.

Sufficiency of indictment for keeping disorderly house.—United States v. Columbus, Case No. 14,841.

The name of a prosecutor must be indorsed on an indictment for keeping a bawdyhouse.—United States v. Rawlinson, Case No. 16,123.

The time laid in the indictment is not material if before the indictment is found.—United States v. Burch, Case No. 14,683.

§ 3. Evidence.

Upon an indictment for keeping a disorderly house and a bawdyhouse the United States cannot give evidence of the general character of defendant.—United States v. Warner, Case No. 16,642; Same v. Nailor, Id. 15,853; Same v. Jourdine, Id. 15,499.

Nor of the general reputation of the house.—United States v. Rollinson, Case No. 16,191; Same v. Jourdine, Id. 15,499, overruling United States v. Gray, Case No. 15,251.

Under an indictment for keeping a disorderly house, charging that defendant suffered persons of ill fame to come together, evidence of the general reputation of such persons is admissible.—United States v. Stevens, Case No. 16,391; Same v. McDowell, Id. 15,671.

Facts from which the jury may find defendant guilty of keeping a disorderly house.—United States v. Elder, Case No. 15,039.

DISSOLUTION.

Of attachment, see "Attachments," § 14.
Of corporation, see "Banks and Banking," §§ 7, 23; "Corporations," §§ 69–75; "Municipal Corporations," § 4.
Of injunction, see "Bankruptcy," §§ 153, 512; "Injunction," §§ 25–34; "Patents," § 249.
Of partnership, see "Partnership," §§ 50–53, 59.

DISTRESS.

For rent, see "Landlord and Tenant," § 11.
To collect taxes, see "Internal Revenue," § 18.

DISTRIBUTION.

Assets of partnership on dissolution, see "Partnership," § 52.
Estate of decedent, see "Descent and Distribution"; "Executors and Administrators," §§ 32–36, 40.
—— of insolvent, see "Executors and Administrators," § 40; "Insolvency," § 11.
Penalties, see "Customs Duties," § 122.

Proceeds in admiralty, see "Admiralty," § 111; "Maritime Liens," §§ 62–64; "Salvage," §§ 72, 74; "Shipping," § 255.
—— in bankruptcy, see "Bankruptcy," §§ 309, 368–456, 499, 504.
—— of foreclosure sale, see "Mortgages," §§ 27, 41; "Railroads," § 52.
—— of forfeitures, see "Customs Duties," § 108; "Forfeitures," § 14; "Internal Revenue," § 88; "War," § 23.
—— of prize property, see "War," §§ 72–78.
—— of property fraudulently conveyed, see "Fraudulent Conveyances," § 35.
Proceeds of sale of goods seized, see "Customs Duties," § 108.
—— on execution, see "Execution," § 20.

DISTRICT AND PROSECUTING ATTORNEYS.

§ 1, Powers and duties. § 2, Rights and liabilities. § 3, Compensation. § 4, Deputies and assistants.

Powers and duties as to grand jury, see "Grand Jury," § 5.

§ 1. Powers and duties.

After indictment found, and before trial commenced, the district attorney has absolute power to enter a nolle prosequi.—United States v. Schumann, Case No. 16,235; Same v. Stowell, Id. 16,409.

He has the same power any time before verdict.—United States v. Watson, Case No. 16,652.

When a statute makes an offense punishable by fine or imprisonment, or both, the district attorney cannot waive the imprisonment, and sue in debt for the fine.—United States v. Morin, Case No. 15,810.

The United States district attorney has no absolute power to dismiss a criminal charge while an examination of the accused is proceeding before a commissioner, or the grand jury.—United States v. Schumann, Case No. 16,235.

A United States attorney has no authority to take from the hands of the marshal warrants regularly issued to him by a circuit court commissioner, for the purpose of deciding whether or not such warrants shall be executed.—United States v. Scroggins, Case No. 16,244.

The United States attorney has discretionary power as to the presentation to or withholding from the consideration of the court any particular testimony in the cause.—The Peterhoff, Case No. 11,024.

A United States district attorney may, upon the authorization of the government, appear in behalf of a person seeking the remission of a forfeiture.—In re Princess of Orange, Case No. 11,431.

Whenever the vindication of the authority of the government requires it, the district attorney should appear for the United States in contempt proceedings.—Durant v. Washington County, Case No. 4,191.

A district attorney in Oregon, by virtue of his office, is the attorney for the several counties in his district; and he must prosecute or defend all actions to which such counties may be a party, without reference to the locality of the court.—Moreland v. Marion County, Case No. 9,794.

The district attorney is not so far an officer of the court that the court can compel him to enter the appearance of the United States.—Fifth Nat. Bank v. Long, Case No. 4,780.

The federal district attorneys have exclusive direction and authority over the prosecutions committed by law to their charge until the cases come under control of the court.—United States v. Corrie, Case No. 14,869.

§ 2. Rights and liabilities.

A district attorney is liable for money actually received, or money lost by his unwarrantable neglect; but he is not answerable for the default, inattention, or frauds of the marshal.—United States v. Ingersoll, Case No. 15,440.

The discharge of public debtors by a district attorney before or after judgment is not of itself a ground of liability on his part to the government.—United States v. Ingersoll, Case No. 15,440.

Claim by a district attorney, for a credit for costs not taxed, but taxable, is not admissible in an action against him, unless it has been disallowed by the accounting officers.—United States v. Ingersoll, Case No. 15,440.

§ 3. Compensation.

The attorney is not entitled to fees for extra official services rendered to other subordinate governmental officers at their request, without requisition of an executive department, and not provided for by law or sustained by uniform usage.—United States v. Ingersoll, Case No. 15,440.

Allowance of costs to the district attorney is altogether in the jurisdiction of the judge, and not of the officers of the treasury.—United States v. Ingersoll, Case No. 15,440.

The district attorney is entitled to but one fee for all cases arising out of one writ of mandamus. If they are separately brought, he should move for their consolidation.—Durant v. Washington County, Case No. 4,191.

A district attorney is not entitled to fees in prize cases as for extra services. Such fees belong to the government.—The Anna, Case No. 402.

District attorneys are not entitled to commissions upon the amount of recovery obtained by them in favor of the United States, but only upon the amount collected or realized. Act March 3, 1863, § 11.—The Pacific, Case No. 10,645.

Amount allowed district attorney for attending an examination to procure remission of a forfeiture under Act March 2, 1799, § 50.—The Pacific, Case No. 10,645.

Where a proceeding in rem to forfeit property is compromised by the payment of a sum of money by the claimants, the district attorney is entitled to commissions upon such sum. Act March 3, 1863, § 11.—United States v. Five Hundred Barrels of Whisky, Case No. 15,115.

A district attorney *held* entitled to fees for prosecuting a suit in the name of a debtor of the United States, and to whose rights the United States had succeeded.—United States v. Ingersoll, Case No. 15,440.

The district attorney is entitled to 2 per cent. on all moneys collected or realized in any proceeding under the revenue laws conducted by him.—United States v. Five Hundred Barrels of Whisky, Case No. 15,115.

Under the provisions of Act May 18, 1842, which are made permanent by Act March 3, 1845, the district attorneys for the Northern and Southern districts of New York are entitled to the same fees that are allowed to attorneys, solicitors, and counsel in the supreme court and court of chancery of New York, according to the nature of the proceedings, for like services rendered therein.—In re District Attorneys' Fees, Case No. 18,290.

For services rendered to the United States by those officers in civil and criminal cases, their fees must be taxed according to the latest fee bill in the supreme court of New York, in which the rate of fees is prescribed for at-

torneys and counsel in that court.—In re District Attorneys' Fees, Case No. 18,290.

The act of the legislature of New York abolishing all attorney and counsel fees (Laws N. Y. 1849, c. 438, § 303) does not affect the right of those district attorneys to the rate of compensation allowed to attorneys and counsel in the supreme court of New York, as it stood at the time of the passage of that act.—In re District Attorneys' Fees, Case No. 18,290.

Where there is an allowance in the supreme court or court of chancery of New York, according to the nature of the proceedings, for a corresponding service, the district attorney can have no other or greater fee.—In re District Attorneys' Fees, Case No. 18,290.

But it is not necessary, in order to entitle the district attorney to fees for a given service, that a corresponding fee for a like service should be given to attorneys, solicitors, and counsel by an existing law of the state.—In re District Attorneys' Fees, Case No. 18,290.

Where no such corresponding fee is given by any existing law of the state, the usage and practice is to refer back to some previous law of the state regulating the fees of attorneys and counsel, wherein may be found an allowance for a corresponding service.—In re District Attorneys' Fees, Case No. 18,290.

Distribution of fees, where part of the services were performed during the term of a predecessor.—Ex parte Robbins, Case No. 11,879.

Under Act Feb. 26, 1853, separate indictments against different persons cannot be consolidated, although the offense was joint, and they might have been jointly indicted.—United States v. Durkee, Case No. 15,008.

§ 4. Deputies and assistants.

The county court may employ counsel to assist, but the district attorney is entitled to control the proceedings.—Moreland v. Marion County, Case No. 9,794.

Counsel employed in legal proceedings within any district are presumed to act under the management of the district attorney, and have no right to assume control of the proceedings.—San Francisco v. United States, Case No. 12,316.

DISTRICT COURTS.

See "Courts," §§ 93–103.
Jurisdiction in admiralty, see "Admiralty," §§ 1–36.

DISTRICT OF COLUMBIA.

§ 1, Cession to United States. § 2, Commissioners. § 3, Marshal.

Courts, see "Courts," §§ 105–108; "Criminal Law," § 14.

§ 1. Cession to United States.

All the state prerogative which Maryland enjoyed under the common law which she had adopted passed to the United States.—United States v. Watkins, Case No. 16,649.

The jurisdiction of the United States over the District of Columbia vested on the first Monday of December, 1800.—United States v. Hammond, Case No. 15,293.

§ 2. Commissioners.

The commissioners were authorized to sell the public lots in Washington, D. C., in April, 1797.—O'Neal v. Brown, Case No. 10,511.

A certificate in fee from the commissioners of Washington is not evidence of possession.—O'Neale v. Brown, Case No. 10,514.

§ 3. Marshal.

The marshal of the District of Columbia is not a county or corporation officer, and he cannot be required by the orphans' court of the county of Alexandria to administer the estate of a deceased person.—Ex parte Ringgold, Case No. 11,841.

Fees for summoning and impaneling coroner's inquest in Alexandria county.—Brent v. Justices of the Peace, Case No. 1,840.

The marshal of the District of Columbia is entitled to a fee of 90 pounds of tobacco for impaneling a jury in a criminal case.—United States v. McDonald, Case No. 15,669.

The marshal of the District of Columbia is not entitled to poundage upon the arrest of a debtor on a ca. sa. in Alexandria county, who has been discharged from such arrest by order of the plaintiff without payment.—Swann v. Ringgold, Case No. 13,674.

The marshal of the District of Columbia and his sureties are liable to account for all common-law fines and forfeitures received, whether on execution or otherwise.—United States v. Williams, Case No. 16,715.

Such marshal is not liable upon his bond for executions not returned, or for the escape of persons taken and in his custody on ca. sa. for fines, etc., whether prayed in commitment in execution or not.—United States v. Williams, Case No. 16,715.

The sureties of the marshal of the District of Columbia are liable for advances made by the secretary of the treasury to him.—United States v. Williams, Case No. 16,715.

An action will not lie upon the official bond of the marshal of the District of Columbia for not returning an execution, unless he has been required by a rule of court to return it, and has failed to do so.—United States v. Williams, Case No. 16,714.

DISTURBANCE OF PUBLIC ASSEMBLAGE.

§ 1, Nature and elements of the offense. § 2, Punishment.

§ 1. Nature and elements of the offense.

The disturbance of public worship is an act tending to destroy the public morals and is indictable at common law.—United States v. Brooks, Case No. 14,655.

§ 2. Punishment.

The offense of disturbing a religious congregation *held* punishable by fine and imprisonment, to be assessed by the jury.—United States v. Aubrey, Case No. 14,476.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts," §§ 41–63; "Removal of Causes," §§ 12–22.

DIVERSION.

Of water course, see "Waters and Water Courses," § 4.

DIVIDENDS.

In bankruptcy, see "Bankruptcy," §§ 441–445, 491.
On corporate stock, see "Banks and Banking," § 4; "Corporations," § 25.

DIVORCE.

§ 1, Decree. § 2, Alimony and disposition of property. § 3, Custody and support of children. § 4, Operation and effect of divorce and rights of divorced persons.

Effect on homestead rights, see "Homestead," § 7.

§ 1. Decree.

A decree of divorce providing that it may be modified upon application of either party, on sufficient cause shown, is not a temporary decree, and the presumption that it remains unchanged can only be overcome by record evidence.—Bennett v. Bennett, Case No. 1,318.

§ 2. Alimony and disposition of property.

Alimony will not be granted to a wife before she answers.—Allen v. Allen, Case No. 18,223.

A deed of manumission by a resident to his slaves pending a suit by his wife for alimony is fraudulent and void, if made to prevent her from recovering her claim.—Clagett v. Gibson, Case No. 2,778.

During the pendency of a bill for divorce, the parties have no power to make an arrangement about the property which shall be binding, unless embodied in the decree.—Sellon v. Reed, Case No. 12,646.

See, also, "Bankruptcy," §§ 386, 630.

§ 3. Custody and support of children.

Custody of children may be awarded to either parent. Hitt. Laws Cal. § 2419.—Bennett v. Bennett, Case No. 1,318.

The court has no authority under Act Or. Jan. 17, 1854, to give the property of either parent to the children, except during their minority, and as a means of providing for their nurture and education during such minority.—Fitch v. Cornell, Case No. 4,834.

§ 4. Operation and effect of divorce and rights of divorced persons.

A divorce leaves the wife competent to choose her own domicile.—Bennett v. Bennett, Case No. 1,318.

The disability to marry imposed upon the guilty party by the law of a state in which a divorce is granted, only attaches by way of penalty within the state, and a valid marriage may be contracted in another state, which will be recognized in the former state.—Ponsford v. Johnson, Case No. 11,266.

DOCKETS.

Docket fees, see "Costs," § 17.
Docket of judgments, see "Judgment," §§ 18–24.

DOCKS.

See "Wharves."

DOCUMENTS.

As evidence, see "Criminal Law," § 64; "Customs Duties," § 105; "Ejectment," §§ 13, 14; "Evidence," §§ 43–62, 86.
Introduction at trial, see "Trial," § 6.
Production and inspection, see "Bankruptcy," § 132; "Discovery," § 8; "Witnesses," § 9.

DOMICILE.

§ 1, Nature. § 2, By acquisition—Removal of residence. § 3, —— Intent. § 4, By operation of law. § 5, Evidence.

Residence as ground of jurisdiction, see "Courts," §§ 41–63; "Removal of Causes," §§ 12–22.

§ 1. Nature.

A person cannot be a resident of two states at the same time.—Brent v. Armfield, Case No. 1,833.

What will constitute residence, in contradistinction to temporary domicile.—Hylton v. Brown, Case No. 6,981.

§ 2. By acquisition—Removal of residence.

A man is not prevented from acquiring citizenship in a place to which he goes with the purpose of permanently residing there, and in which he votes, by the fact that his wife and children remained at his old home.—Blair v. Western Female Seminary, Case No. 1,486.

A person may be regarded as having his domicile in a state in which he owns and cultivates land on which he resides with part of his family, with the intention of moving the rest of his family, though he has not acquired the right to vote there.—Burnham v. Rangeley, Case No. 2,176.

Removal into another state, with intention of making it a place of permanent residence, will effect a change of domicile, notwithstanding the person continues his estates in the state from which he removed, and is elected a member of the legislature thereof.—Butler v. Hopper, Case No. 2,241.

The domicile of a person is not affected by removal to another state, where he intended to return, and ultimately did return, and never voted in the latter place.—United States v. Thorpe, Case No. 16,494.

Domicile of origin is not lost, for purposes of succession, by very long residence abroad, and mere doubt—even very strong doubt—of a real intention to return.—White v. Brown, Case No. 17,538.

§ 3. —— Intent.

Mere residence is evidence of domicile, but may be shown to be for temporary purposes. The intention is to be collected from the acts, and not the declarations, of the person.—Butler v. Farnsworth, Case No. 2,240.

Actual residence in a place, with intent that it shall be the permanent residence, makes domicile, and temporary absences do not change it.—Ex parte Kenyon, Case No. 7,720.

A person having two places of residence may elect which shall be his domicile.—Burnham v. Rangeley, Case No. 2,176.

§ 4. By operation of law.

The residence of the wife is in subordination to that of the husband.—Burnham v. Rangeley, Case No. 2,176.

The domicile of the child follows the domicile of the father.—Powers v. Mortee, Case No. 11,362.

§ 5. Evidence.

The presumption arising from actual residence in any place is that the party is there animo manendi, and the burden is upon him to show the contrary.—Rogers v. The Amado, Case No. 12,005.

A former domicile is presumed to continue until a new one is clearly shown.—Burnham v. Rangeley, Case No. 2,176.

The presumption that a domicile once acquired continues does not prevail when its effect would be to impose upon the party the character of an enemy to his government.—Stoughton v. Hill, Case No. 13,501.

The declarations of a party as to his intentions in changing his residence are competent

evidence for him in connection with his acts.—Burnham v. Rangeley, Case No. 2,176.

DONATIONS.

See "Gifts."

Of public lands, see "Public Lands," §§ 28–34.

DORMANT PARTNERS.

See "Partnership," § 4.

DOWER.

§ 1, Property subject to dower. § 2, Inchoate interest—Right vested during life of husband. § 3, —— Bar, release, or forfeiture. § 4, Rights and remedies of widow.

See, also, "Curtesy."

Devises in lieu of dower, see "Wills," §§ 38, 53, 54.

Rights of assignee in bankruptcy, see "Bankruptcy," § 191.

§ 1. Property subject to dower.

At common law the widow was entitled to dower in all lands of which her husband was seised at any time during coverture.—Johnston v. Vandyke, Case No. 7,426.

The widow is not entitled to dower in lands of which her husband died possessed, but to which he had no legal title, although he had paid the whole purchase money.—Williams v. Barrett, Case No. 17,714.

Dower is not allowable of an estate of which the husband is trustee only.—Powell v. Monson & Brimfield Mfg. Co., Case No. 11,356; Robinson v. Codman, Id. 11,970; Warford v. Noble, Id. 17,175; Lenox v. Notrebe, Id. 8,246c.

A feme covert is not entitled to dower in real estate which was held as partnership assets.—Hiscock v. Jaycox, Case No. 6,531.

The right to dower in land sold during coverture *held* within the saving clause of a statute restricting dower to lands of which the husband died seised, providing that no right which had already attached or vested should be affected thereby.—Johnston v. Vandyke, Case No. 7,426.

Where property is covered by a mortgage, inchoate dower attaches only to the equity of redemption.—Hiscock v. Jaycox, Case No. 6,531.

The interest of a married woman in the property of her husband is paramount to the right of the state, under Act Pa. March 29, 1779.—Delancey v. McKeen, Case No. 3,749.

§ 2. Inchoate interest—Right vesting during life of husband.

A wife's inchoate right of dower in Indiana becomes absolute upon the judicial sale of her husband's real estate, and she is entitled to immediate possession.—Warford v. Noble, Case No. 17,175.

§ 3. —— Bar, release, or forfeiture.

The right of dower, before the same becomes vested on the death of the husband, is under the absolute control of the legislature, and it may enact that deeds theretofore executed under a joint power of attorney from husband and wife shall bind the wife.—Randall v. Kreiger, Case No. 11,554.

Dower, unassigned, cannot be barred by a tax sale.—Blodget v. Brent, Case No. 1,553.

A deed of land executed by husband and wife, but containing no words of grant by the wife, does not convey her estate in the land nor her dower.—Powell v. Monson & Brimfield Mfg. Co., Case No. 11,356.

All the substantial requisites of the statute must be complied with, in taking a relinquishment of dower.—Raverty v. Fridge, Case No. 11,586.

The subsequent assent by the wife to a conveyance by her husband, indorsed thereon under seal, *held* not a release of dower.—Hall v. Savage, Case No. 5,944.

A widow's dower is not barred by her acknowledgment of a deed not recorded.—Kurtz v. Hollingshead, Case No. 7,953.

A release of dower, executed by the wife alone, long after the conveyance of land by her husband, and for a new consideration, is not, in Massachusetts, an extinguishment of the dower.—Powell v. Monson & Brimfield Mfg. Co., Case No. 11,356.

The English statute making adulterous elopement of the wife a bar to dower (13 Edw. I. c. 34) is not in force in Iowa, being inconsistent with the state legislation.—Smith v. Woodworth, Case No. 13,130.

Construction of 1 Rev. Code Va. c. 107, § 10, declaring that if a wife willingly leave her husband, and go away and continue with the adulterer, she shall forfeit dower, etc.—Stegall v. Stegall, Case No. 13,351.

It will be considered a voluntary separation within 1 Rev. Code Va. c. 107, § 10, where the wife refuses to accompany her husband at his request, on the grounds of her parents' objection, and because of reports that he was married to another.—Stegall v. Stegall, Case No. 13,351.

§ 4. Rights and remedies of widow.

The dower to be set off must include all casual and natural enhancement from circumstances, excluding all improvements actually made by the tenant.—Johnston v. Vandyke, Case No. 7,426; Powell v. Monson & Brimfield Mfg. Co., Id. 11,356.

In the case of improvements by the purchaser, dower will be assigned according to the value of the estate at the time of the assignment, if no improvements had been made.—Powell v. Monson & Brimfield Mfg. Co., Case No. 11,356.

The tenant, until assignment of dower, is bound to pay the taxes.—Blodget v. Brent, Case No. 1,553.

As against a purchaser from the husband, dower will be set off out of that portion which has not been improved by the purchaser, or, if that is not possible, out of the whole tract according to its value at the time it was sold by the husband.—Leggett v. Steele, Case No. 8,211.

A mortgage is not an alienation, so as to preclude dower from attaching to improvements thereafter made.—Powell v. Monson & Brimfield Mfg. Co., Case No. 11,357.

A bill in equity lies for dower.—Powell v. Monson & Brimfield Mfg. Co., Case No. 11,356.

A person claiming as wife of another must allege the marriage, with circumstance of time and place.—Holmes v. Holmes, Case No. 6,638.

Upon a writ of dower, the marriage may be proved by parol evidence of cohabitation as man and wife.—Blodget v. Thornton, Case No. 1,554.

Dower will be assigned in equity, where there has been a parol partition by tenants in common, and damages will be awarded from the time of the demand, if the husband died seised.—Nutt v. Mechanics' Bank, Case No. 10,382.

Widow not entitled to damages in equity for non-assignment of dower where husband did

not die seised.—Alexander's Adm'r v. Selden, Case No. 173.

DRAWBACK.

On re-exportation of goods after payment of duties, see "Customs Duties," § 76.

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Intoxication as an excuse for crime, see "Criminal Law," § 5.

DUELING.

§ 1. Nature and elements of offense.
Upon an indictment for unlawfully carrying a challenge to fight a duel, a scienter must be proved.—United States v. Shackelford, Case No. 16,260.

DUE PROCESS OF LAW.

See "Constitutional Law," § 13.

DUPLICITY.

In indictment, see "Indictment and Information," § 17.
In pleading, see "Criminal Law," § 50; "Pleading," §§ 11, 27.

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Confessions under, see "Criminal Law," § 70.
In making contract, see "Bills and Notes," § 11; "Bonds," § 6; "Contracts," § 6; "Principal and Surety," § 1; "Seamen," § 24.
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Customs duties, see "Customs Duties."
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EASEMENTS.

§ 1, Creation. § 2, Extent and right. § 3, Abandonment or nonuser.

See, also, "Dedication"; "Highways."

§ 1. Creation.
In determining the right to an easement of way acquired by user, the fact of user and susceptibility to such use must appear.—Barclay v. Howell, Case No. 975.

Presumption of grant to public by uninterrupted use of way for convenience requires much shorter time than in case of use by individual.—Barclay v. Howell, Case No. 975.

Such presumption may be repelled by showing owner's assertion of right, and denial of use assumed by public.—Barclay v. Howell, Case No. 975.

No prescription runs against a public right, nor is possession and use for 20 years evidence of a grant from the United States.—Pierson v. Elgar, Case No. 11,157.

§ 2. Extent of right.
The right of city inhabitants to access to a river over town proprietors' lands is a mere right of way.—Barclay v. Howell, Case No. 975.

A grant of liberty "to dig a canal through the grantor's land" does not carry the ownership of the soil which is dug up and removed.—Lyman v. Arnold, Case No. 8,626.

A covenant to keep open and free of incumbrances a right of way limited to particular purposes will prevent any kind of obstruction.—Brownell v. Dyer, Case No. 2,038.

§ 3. Abandonment or nonuser.
A mill privilege in a city *held* to have been lost by the change of site and cutting a new race, where the right of the public to the streets intervened.—Pierson v. Elgar, Case No. 11,157.

EJECTMENT.

§ 1, Nature and right of action in general. § 2, Notice to quit. § 3, Title to support action. § 4, Possession of plaintiff. § 5, Possession of defendant. § 6, Defenses. § 7, Limitations. § 8, Parties. § 9, Application to be admitted as defendant. § 10, Pleading. § 11, Issues and proof. § 12, Evidence—Presumptions and burden of proof. § 13, —— Admissibility. § 14, —— Weight and sufficiency. § 15, Trial. § 16, Costs. § 17, Judgment. § 18, Arrest of judgment and staying execution. § 19, New trial. § 20, Enforcement of judgment. § 21, Damages and mesne profits. § 22, Improvements—In general. § 23, —— Construction and effect of statutory provision. § 24, —— Persons entitled, good faith, and color of title. § 25, —— Pleading. § 26, —— Nature of improvement. § 27, Taxes.

See, also, "Adverse Possession"; "Entry, Writ of"; "Real Actions"; "Trespass to Try Title."
Survival of action, see "Abatement and Revival," § 5.

§ 1. Nature and right of action in general.
An action of disseisin is authorized and regulated by the statute of Indiana.—Follett v. Rose, Case No. 4,900.

The action of ejectment existed in the territory of Arkansas from 1807.—Grande v. Foy, Case No. 5,682a.

§ 2. Notice to quit.
A notice to quit is necessary only where the relation of landlord and tenant subsists.—Doe v. Johnston, Case No. 3,958; Waters v. Butler, Id. 17,263; Worthington v. Etcheson, Id. 18,053.

A purchaser under a deed of trust need not give notice to quit before bringing ejectment against the grantor of the trust deed.—Waters v. Butler, Case No. 17,263.

§ 3. Title to support action.
Title acquired after date of demise cannot sustain the action.—Baylor v. Neff, Case No. 1,143.

The lessor of the plaintiff, who has a regular paper title, cannot be displaced, unless defendant has a better title, either legal, or such an

equitable one as a court of equity would sustain.—Gordon v. Kerr, Case No. 5,611.

A purchaser at a sheriff's sale of an equitable estate has no title on which to maintain ejectment.—Carson v. Boudinot, Case No. 2,462.

A lease for the sole purpose of mining vests a corporeal interest sufficient to sustain ejectment.—Barker v. Dale, Case No. 988.

The conveyance of a homestead by a bankrupt and his wife set aside at the suit of an assignee in bankruptcy works no estoppel in favor of the purchaser from the assignee, and he has no title to support ejectment.—McFarland v. Goodman, Case No. 8,789.

A recovery may be had by one tenant in common against adverse claimants in possession, if he represent the better title.—Le Franc v. Richmond, Case No. 8,209.

Where a deed was delivered on condition of a lease for like back to the grantor, the grantee cannot recover in ejectment against the grantor, where such condition has not been fulfilled. —Henry v. Henry, Case No. 6,383.

A substituted grantee, having knowledge of the condition, stands in no better position than the original party.—Henry v. Henry, Case No. 6,383.

A title under Connecticut cannot avail the defendant in ejectment for any purpose in Pennsylvania.—Fellows v. Pedrick, Case No. 4,724.

An owner of the reversion to real estate cannot recover in ejectment upon the ground that the owner of the life estate has forfeited his estate by the commission of waste.—Patrick v. Sherwood, Case No. 10,804.

§ 4. Possession of plaintiff.

Act Cong. July 1, 1862, granting a right of way to the Central Pacific Railroad Company 200 feet wide on each side of the track, gives an exclusive right of possession, for which the company may maintain ejectment. — Central Pac. R. Co. v. Benity, Case No. 2,551.

The construction and maintenance of a bridge over a creek abutting on premises claimed *held* sufficient evidence of possession to maintain ejectment.—Quicksilver Min. Co. v. Hicks, Case No. 11,508.

§ 5. Possession of defendant.

Any subjection of land to the dominion of a party, such as cultivation or other subsequent use, is sufficient evidence of possession to enable an adverse claimant to maintain ejectment against him. Actual occupation in person, or by an agent or servant, is not essential.—Quicksilver Min. Co. v. Hicks, Case No. 11,508.

Possession held to pass under conveyance in like manner as if grantee had actually entered. —Bayard v. Colefax, Case No. 1,130.

§ 6. Defenses.

The defendant in defense must rely upon a defense other than the weakness of the plaintiff's title.—Boyreau v. Campbell, Case No. 1,760; Fellows v. Pedrick, Id. 4,724.

But this is not the rule under Civ. Code Or. § 316.—Moreland v. Marion County, Case No. 9,794.

The rule that plaintiff must recover upon the strength of his title, and not upon the weakness of defendant's title, is not applied where plaintiff has documentary title, accompanied by possession, and defendant is a mere trespasser. —Turner v. Aldridge, Case No. 14,249.

Defendant may show fraud in the plaintiff, or one under whom he claimed, in obtaining the title derived from defendant.—Torrey v. Beardsly, Case No. 14,104.

The purchase of a disputed title to real estate (in Maine) affords no defense to the tenant in an action to eject him because of maintenance or champerty.—Burnham v. Hewey, Case No. 2,175.

A conveyance by plaintiff pendente lite cannot be set up to defeat the recovery. The suit proceeds in the name of the original party.— French v. Edwards, Case No. 5,097.

Defendant cannot avail himself of an outstanding title in a third person, under whom he does not claim, where such title is barred by the statute of limitations, or by a descent cast. —Foster v. Joice, Case No. 4,974.

Defendant, who sets up an outstanding title in a third person, must show it to be a legal, subsisting title, and better than the plaintiff's. —Griffith v. Bradshaw, Case No. 5,821.

An equitable claim cannot be set up to defeat the legal title.—Baird v. Wolfe, Case No. 760; Butler v. Young, Id. 2,245; Hall v. Austin, Id. 5,925; Larriviere v. Madegan, Id. 8,096.

Equitable estoppels in pais cannot be set up as a defense to an action at law to recover the possession of real property. — Wythe v. Smith, Case No. 18,122.

See, also, "Adverse Possession."

§ 7. Limitations.

Ejectment by one claiming title under a Mexican grant will lie at any time within five years after its final confirmation. Act Cal. 1855, § 6; Act 1863, § 6.—Bissell v. Henshaw, Case No. 1,447.

The issuing of the patent is the final confirmation, except where the survey is confirmed by the district court, when final confirmation dates from the decree.—Bissell v. Henshaw, Case No. 1,447.

§ 8. Parties.

Plaintiff cannot join as defendants persons who hold by several and distinct titles.—Ex parte Girard, Case No. 5,457.

One claiming as mortgagee is a proper defendant to an action of ejectment in Vermont, though it does not appear that he is in possession.—Marvin v. Dennison, Case No. 9,180.

An interest or subsisting title in the premises need not be shown in order to make persons lessors in the action. It is sufficient that the circumstances of plaintiff's case require that they should be made lessors.—Kelley v. Jackson, Case No. 7,659.

In Michigan the action must be brought against the tenant in possession. If no one be in possession, it must be brought against any one exercising acts of ownership over, or claiming title to, the premises.—Hyde v. Folger, Case No. 6,971.

Landlord not permitted to defend alone in ejectment without consent of plaintiff in Pennsylvania.—Beardsley v. Torrey, Case No. 1,190.

The death of the lessor at the time of the demise laid in the declaration will defeat the action.—Gilleland v. Martin, Case No. 5,433.

Insanity of lessor of plaintiff is no ground of dismissal.—Gilleland v. Martin, Case No. 5,433.

§ 9. Application to be admitted as defendant.

A landlord has no right to apply to be made defendant in place of the tenant until the latter files his answer admitting his tenancy. Code Or. § 226.—Fitch v. Cornell, Case No. 4,834.

§ 10. Pleading.

It is sufficient to describe the locus in quo sufficiently to acquaint defendant with knowledge of what is claimed, and to enable him to prepare his defense.—Barclay v. Howell, Case No. 975.

An averment of seisin is essential, and it must be alleged to have been within the time

limited for bringing the action.—Bockee v. Crosby, Case No. 1,593.

In Oregon the defendant must set up in his answer the title relied upon to defeat the action.—Stark v. Starr, Case No. 13,307.

Defendant should state in his answer the nature and duration of the estate he claims in the premises, if any, but not the evidence of it. Code Or. §§ 226, 227.—Fitch v. Cornell, Case No. 4,834.

And a detailed statement of matters which might be evidence in support of a plea of title in defendant is not a sufficient plea of such title, and will be stricken out, on motion, as redundant.—Hall v. Austin, Case No. 5,925.

To set forth the nature and duration of an estate, license, or right to the possession, under Civ. Code, Or. § 316, it is sufficient to allege that the party is the sole or part owner in fee simple or upon condition or for life or years of the premises, as the case may be; or, in case of some special license or right to the possession for a limited time or special use, to state succinctly the license or right to the possession as claimed, with the necessary facts constituting it.—Witherell v. Wiberg, Case No. 17,917.

A plea that defendant is the owner of a perpetual right of way over the premises in controversy, under grant from the owners, is a sufficient statement of the nature and duration of such estate or interest in the premises.—Lewis v. Oregon Cent. R. Co., Case No. 8,329.

Defendants, if not mere trespassers without color of right, may plead in abatement that they occupy in severalty distinct parcels of the land, where such fact does not appear upon the face of the complaint. Civ. Code Or. § 91.—Gibbons v. Martin, Case No. 5,381.

The title of a person under whom both parties claim can be denied by neither.—Mickey v. Stratton, Case No. 9,530.

The defendant may allege in his answer that he is the owner of the premises in controversy, but if he couples such allegation with a statement of the grounds of his title, from which it does not appear that he is such owner, the matter may be stricken out as sham.—Wythe v. Myers, Case No. 18,119.

With the leave of the court, the plaintiff in ejectment may amend his declaration by a count upon a new demise, which count will be considered as the commencement of the suit as to the title claimed under that new demise.—Wilkes v. Elliot, Case No. 17,660.

In ejectment, the fictitious lease may be amended, after the jury is sworn, upon payment of term costs.—McDaniel v. Wailes, Case No. 8,746.

The declaration cannot be amended by stating a demise under a new title.—Gale v. Babcock, Case No. 5,188.

A demise in the name of one deceased will be stricken out on motion.—Baylor v. Neff, Case No. 1,143.

See, also, post, § 25.

§ 11. Issues and proof.

Under the Oregon Code, defendant cannot avail himself of an estate in the premises, in himself or another, as a defense, unless the fact is pleaded.—Hall v. Austin, Case No. 5,925.

Where plaintiff claims under an adverse possession, but does not set out the statute or the nature of his title, defendant may show that he is within an exception of the statute without pleading it.—Palmer v. Low, Case No. 10,693.

An objection to jurisdiction on the ground that plaintiff's title is merely colorable is not available under a general answer.—Boyreau v. Campbell, Case No. 1,760.

The death of the lessor of the plaintiff cannot be taken advantage of upon the general issue.—Worthington v. Etcheson, Case No. 18,053.

§ 12. Evidence—Presumptions and burden of proof.

A presumption of title may arise from long possession under circumstances favorable to such presumption, but may be rebutted by positive proof.—Baird v. Wolfe, Case No. 760.

One seeking to invalidate or avoid a deed for adverse possession must impeach it.—Barr v. Galloway, Case No. 1,037.

Mere possession of land, or offering to sell it, or even partial sales actually made, are not, alone, sufficient to authorize a presumption of ownership.—Delancey v. McKeen, Case No. 3,749.

Defendant in ejectment need not show title to the land before he can call upon plaintiff to produce title papers to defeat his title. Case No. 6,981 reversed.—Hylton v. Brown, Case No. 6,982.

§ 13. —— Admissibility.

In ejectment, explanatory notes of a surveyor, appointed by the court to retrace lines, are admissible to far as they relate to the marks on the ground, and explain his own work, but not as to matters of possession.—Lanning v. Case, Case No. 8,072.

The proceedings of the board of property of Pennsylvania, directing a survey of certain districts, and the survey and plot returned thereon, are not evidence.—Griffith v. Evans, Case No. 5,822.

An extract from the books of the surveyor general of the land office, in Pennsylvania, is not evidence.—Griffith v. Evans, Case No. 5,822.

A connected plot or sundry tracts, made and put together by an officer in the land office, is not evidence.—Griffith v. Tunckhouser, Case No. 5,823.

No evidence other than of an entry can be received to impeach the validity of a state grant.—Polk v. Hill, Case No. 11,249.

It may be shown, to defeat a title under a patent from the government, that the government did not possess the title at the time of the grant.—Patterson v. Tatum, Case No. 10,830.

Deeds conveying pre-emption rights, though invalid, may be received in evidence to prove outstanding title, where the patent has since actually issued.—Morgan v. Curtenius, Case No. 9,799.

The recitals in a warrant to a third person *held* admissible as evidence when corroborated by circumstances, where the papers of the surveyor general have been destroyed by fire.—James v. Stookey, Case No. 7,185.

Evidence after verdict, by witnesses, on affidavits as to the value of the land in dispute, is admissible to fix the jurisdiction of the court.—Hartshorn v. Wright, Case No. 6,169.

§ 14. —— Weight and sufficiency.

In ejectment the plaintiff must show a right of entry.—Hylton v. Brown, Case No. 6,980. But see Wilkes v. Elliot, Case No. 17,660.

The assignee of a mortgage cannot recover in ejectment unless he show a conveyance to himself. A mere assignment with authority to foreclose is not sufficient.—Cottrell v. Adams, Case No. 3,272.

The proof of boundaries, where the consent rule has been entered into, by a special rule of court, is dispensed with.—Dunn v. Games, Case No. 4,176.

A warrant and survey of Pennsylvania lands, and payment of the purchase money, are sufficient to give a legal right of entry in ejectment.—Willink v. Miles, Case No. 17,768.

A Pennsylvania warrant holder, to maintain ejectment, must produce a survey regularly made, or show, by parol or otherwise, that a survey was actually made.—Dubois v. Newman, Case No. 4,108; Vanhorn v. Chesnut, Id. 16,856.

What will be *held* a sufficient survey in such case.—Dubois v. Newman, Case No. 4,108.

A warrant and survey without proof of payment of the consideration is not sufficient to sustain ejectment.—Copley v. Riddle, Case No. 3,214; Vanhorn v. Chesnut, Id. 16,856.

There is a prima facie presumption of a fee-simple estate in the devisor of land, and the devisee in ejectment need not go beyond such person in deducing title.—West v. Pine, Case No. 17,423.

It is not necessary to produce the deed poll, from the person in whose name the application was made for a tract of land, in order to support the title of the plaintiff in an ejectment for the land, the plaintiff having obtained the warrant and paid the purchase money. —Willink v. Miles, Case No. 17,768.

A person setting up a settlement right must prove the same to be prior to an opposing right, and continuing. — Griffith v. Bradshaw, Case No. 5,821.

As to the validity and effect in evidence of a document purporting to be an appointment of a certain person as commissioner for the distribution of land in Texas. — Viesca v. Wyche, Case No. 16,940.

The oldest grant is conclusive evidence of title at law, except in the single case of an elder legal entry.—Bass v. Dinwiddie, Case No. 1,092.

Plaintiff must prove the length of defendant's enjoyment of the premises, and their value.—Barclay v. Howell, Case No. 975.

The truth of recitals in deeds, offered only to show the transmission of the legal title, need not be proved aliunde.—Bank of United States v. Benning, Case No. 908.

In ejectment against any other person than the proprietary or one claiming under him, it is not necessary to prove the title out of the proprietaries of Pennsylvania if a right of entry is proved.—Allen v. Lyons, Case No. 227.

The owner of the fee in ejectment against a squatter, who has neither claim nor color of title, and has admitted title in plaintiff's grantor, need not produce other evidence of title than the conveyance from his grantor.—Sykes v. Hayes, Case No. 13,709.

In ejectment for a lot in Washington, D. C., it is not necessary to show a grant from the state of Maryland.—O'Neal v. Brown, Case No. 10,511.

Proof of prior possession is sufficient to maintain ejectment against a mere trespasser.—Mickey v. Stratton, Case No. 9,530.

Sufficiency of proof in ejectment upon reentry for nonpayment of rent by a tenant in fee.—Cooke v. Voss, Case No. 3,179.

§ 15. Trial.

Where defendant derives title under a foreclosure decree which does not describe the land, but simply refers to it, the question whether the land in controversy was covered by the decree is for the jury.—Kibbe v. Thompson, Case No. 7,754.

Whether a deed is to be presumed from long possession is a mixed question of law and fact, to be submitted to the jury under the advice of the court.—Jackson v. Porter, Case No. 7,143.

§ 16. Costs.

The payment of costs on an ejectment decided in the state court is not a condition to a trial of an ejectment in the federal court.—Den v. Bacon, Case No. 3,783.

§ 17. Judgment.

Plaintiff may recover less but not more than he declares for.—Patton v. Cooper, Case No. 10,834.

Tenants who enter under other tenants, on whom notice has been served, will be subject to the judgment.—Smith v. Trabue, Case No. 13,116.

Where a defendant in ejectment, in fraud of his agreement with a purchaser on a mortgage foreclosure pending the ejectment suit, confessed a judgment to the latter, *held*, that the judgment would be set aside, and defendant continued as a nominal party to preserve the jurisdiction of the court.—Thomas v. Newton, Case No. 13,905.

In ejectment by A. against B., a judgment against A. determines nothing as to the validity of B.'s title; and, in a subsequent ejectment by B. against A., B. must show a good title.—Merriman v. Bourne, Case No. 9,480.

In such case, A. may set up a subsequently acquired title.—Merriman v. Bourne, Case No. 9,480.

The object of ejectment as used in Vermont is to settle title, as well as to obtain possession, and the judgment is conclusive on all parties.—Marvin v. Dennison, Case No. 9,180.

Where a rule on the tenant in possession can be taken, and the effect of a judgment under such a rule.—Campbell v. Harper, Case No. 2,360.

Proceedings against nonresidents in relation to land within the state given by special statute (Ohio) can only affect the land specifically named in the bill, and the decree cannot affect the property of defendants generally.—Boswell v. Dickerson, Case No. 1,683.

The judgment in ejectment does not suspend the operation of the statute of limitations.—Smith v. Trabue, Case No. 13,116.

The judgment in ejectment is not a bar to another action where the verdict for defendant only states that he is entitled to the possession. Code Or. § 227.—Fitch v. Cornell, Case No. 4,834.

Judgment by default and habere facias possessionem executed set aside; the service not being made on the tenant in possession, but on the landlord.—West v. Talman, Case No. 17,426.

Plaintiff need not commence suit within the year, after judgment against him, where defendant commences a suit for the same property within the year against plaintiff's grantees. —Brownsville v. Cavazos, Case No. 2,043.

A plea in such action in the nature of a reconvention, claiming title to the property in dispute, and demanding damages for trespass is equivalent to a new action.—Brownsville v. Cavazos, Case No. 2,043.

§ 18. Arrest of judgment and staying execution.

A motion in arrest of judgment because the ejectment against the casual ejector was wrongly entitled, and for other defendants, will be overruled where the declaration to which the real defendant pleaded was right.—Huidekoper v. Burrus, Case No. 6,849.

A person in possession, asserting an anterior title, must apply to the court, if he would stay the enforcement of the writ.—Hall v. Dexter, Case No. 5,929.

The federal court will stay execution in ejectment until the equity between the parties shall

be investigated in a state court, only when the federal court has not jurisdiction of the equity.—Doe v. Johnston, Case No. 3,958.

§ 19. New trial.

Plaintiff cannot proceed with a second trial in ejectment where the costs of the former ejectment, which had been non pros'd, were not paid.—Hurst v. Jones, Case No. 6,933.

See, also, "New Trial," § 28.

§ 20. Enforcement of judgment.

A demise may be extended after judgment in ejectment on notice to the persons in possession, so as to enable plaintiff to realize the benefit of his judgment.—Ledgerwood v. Pickett's Heirs, Case No. 8,175.

The marshal must execute the writ issued upon a judgment in ejectment even as against third persons in possession having a superior title, but he may require an indemnity bond.—Hall v. Dexter, Case No. 5,929.

If adverse possession be held, the officer is first to turn out the occupant, and take possession in the name of the law, and afterwards deliver it to the plaintiff. It is not necessary that the vacant possession be immediately delivered.—United States v. Lowry, Case No. 15,636.

Where a demise has been extended after judgment without notice to the persons in possession, they are entitled to be heard on a writ of error coram nobis, or by motion.—Ledgerwood v. Pickett's Heirs, Case No. 8,175.

Where a tenant has been improperly turned out of possession on a judgment in ejectment, a writ of restitution is the proper mode of redress.—Smith v. Trabue, Case No. 13,116.

If, after plaintiff is put into possession under a hab. fac. poss., he is turned out by the defendant, he may, upon suggesting vice comitatus non misit breve, obtain an attachment or an alias hab. fac. Aliter, if he is turned out by a stranger.—United States v. Slaymaker, Case No. 16,313.

Defendant cannot rule the marshal to return a hab. fac. poss., although plaintiff may do so.—United States v. Slaymaker, Case No. 16,313.

§ 21. Damages and mesne profits.

Plaintiff may recover mesne profits, on giving notice that he means to proceed for them.—Battin v. Bigelow, Case No. 1,108.

When plaintiff's term expires before the trial, he may proceed for damages, for the trespass, and for mesne profits.—Brown v. Galloway, Case No. 2,006.

Distinct actions may be brought in California to recover possession of land, and for damages for withholding its possession.—Field v. Columbet, Case No. 4,764.

In actions for mesne profits, the measure of damages is the fair rental value of the property; if that cannot be ascertained, then the fair actual value while in defendant's possession will govern.—Campbell v. Brown, Case No. 2,355.

The right to damages given by Code Or. §§ 313, 318, includes all damages to which the owner is entitled because of the wrongful occupation, as well for waste committed or suffered as the value of the use and occupation. Such right is a distinct cause of action, and, if joined with a claim for possession, should be separately stated.—Wythe v. Myers, Case No. 18,119.

Plaintiff in ejectment can recover mesne profits only from the time of the ouster laid in the declaration, where he proves no title prior thereto.—Hylton v. Brown, Case No. 6,983.

Manner of estimating rents and profits on lands, buildings, and draining machine in possession and use by the city of New Orleans.—Gaines v. City of New Orleans, Case No. 5,177.

No recovery can be had for profits accruing after the commencement of the action for mesne profits.—Campbell v. Brown, Case No. 2,355; Mora v. Foster, Id. 9,784.

Procedure on an assessment under the Ohio occupying claimant's law of 1831.—Dunn v. Games, Case No. 4,177.

In an action for mesne profits, the confession of entry by defendant in ejectment is sufficient to enable plaintiff to recover; aliter, when the judgment was by default.—Brown v. Galloway, Case No. 2,006.

Possessors in bad faith in Louisiana will not only be charged with what they have received, but with what they might have received, and cannot claim the benefit of the prescription with regard to the rents and profits.—Gaines v. City of New Orleans, Case No. 5,177.

The period prescribed within which actions for mesne profits must be brought in California is three years; but if the statute be not pleaded, mesne profits for a longer period may be recovered.—Field v. Columbet, Case No. 4,764.

§ 22. Improvements—In general.

The court will allow a recoupment of the value of permanent improvements.—Bright v. Boyd, Cases Nos. 1,875, 1,876; Gill v. Patten, Id. 5,428; Semple v. Bank of British Columbia, Id. 12,660; Wells v. Riley, Id. 17,404.

The value of defendant's improvements will be first set off against mesne profits received prior to the actual ouster.—Hylton v. Brown, Case No. 6,983.

§ 23. —— Construction and effect of statutory provision.

A statute allowing the value of improvements, etc. (Act N. H. June 19, 1805), is unconstitutional so far as it applies to past improvements.—Society for Propagation of the Gospel v. Wheeler, Case No. 13,156.

Act Me. June 27, 1820, relating to compensation for improvements, construed.—Bright v. Boyd, Case No. 1,875.

Construction of "occupying claimants" law of Iowa, as to "color of title" and "good faith."—Litchfield v. Johnson, Case No. 8,387.

Construction of Rev. St. Ill. 1845, p. 104, § 8, in relation to the protection of a person in possession of lands under color of title.—Russell v. Barney, Case No. 12,152.

§ 24. —— Persons entitled, good faith, and color of title.

Bona fide holder under invalid title, but with belief of good title, is entitled to be paid for permanent and valuable improvements.—Campbell v. Brown, Case No. 2,355; Kanawha Coal Co. v. Kanawha & O. Coal Co., Id. 7,606.

But one acquiring title pending suit to recover the property cannot recover for improvements made after the commencement of the suit.—Campbell v. Brown, Case No. 2,355.

A tenant in possession under a defective title from the commonwealth is entitled to the full value of his improvements.—Borland v. Dean, Case No. 1,660.

Possessors in bad faith are entitled to compensation for improvements accepted by the owner.—Gaines v. New Orleans, Case No. 5,177; Jackson v. Ludeling, Id. 7,139.

Settlers on Des Moines river lands in Iowa *held* entitled to be allowed for improvements as occupying claimants under the Iowa statutes, where they were afterwards adjudged not to be the rightful owners.—Litchfield v. Johnson, Case No. 8,387.

One who purchased from a person acting under an informal power, who sold the lands in his own name, having no claim to them, cannot claim compensation for his improvements under

the occupying claimant law.—Reynolds v. Cordery, Case No. 11,729.

A person making a void entry on the Virginia military district of Ohio, having a patent, is entitled to improvements under the occupying claimant law.—Chinn v. Darnell, Case No. 2,684.

The value of permanent improvements cannot be set off against damages for withholding possession, unless defendant held the land not only in good faith, but under color of title.—Field v. Columbet, Case No. 4,764; Stark v. Starr, Id. 13,307.

Any instrument gives "color of title" which, by apt words of conveyance from grantor to grantee, in form passes what purports to be a good title.—Field v. Columbet, Case No. 4,764.

A deed of the land will give color of title, whether the grantor had title or not.—Stark v. Starr, Case No. 13,307.

§ 25. —— Pleading.

Sufficiency of a counterclaim for the value of improvements made by defendant, in a suit for wrongfully withholding possession. Civ. Code Or. § 318.—Neff v. Pennoyer, Case No. 10,085.

A plea of set-off for permanent improvements in an action for mesne profits must allege that the same were made while holding under color of title adversely to the claim of plaintiff, and in good faith. Code Or. § 227.—Fitch v. Cornell, Case No. 4,834.

A counterclaim for permanent improvements should not be pleaded to the whole complaint, but only to so much thereof as to which it is an answer or defense; and it should allege the present value of said improvements, and that they better the condition of the property for the ordinary purposes for which it is used.—Wythe v. Myers, Case No. 18,119.

§ 26. —— Nature of improvement.

The amount of an assessment for a street improvement cannot be set off as an improvement made on the property, but may be deducted from the gross value of the rents in estimating the actual damage from withholding the possession.—Stark v. Starr, Case No. 13,307.

The value of improvements cannot be set off against mesne profits unless they are not only permanent, but also add to the future value of the property for the ordinary purposes for which it is or may be used.—Stark v. Starr, Case No. 13,307.

A permanent improvement is something done or put upon the land which cannot be removed either physically or in contemplation of the law.—Stark v. Starr, Case No. 13,307.

§ 27. Taxes.

Taxes on land, paid by defendant while holding under color of title, in good faith, adversely to plaintiff, in an action for damages for withholding possession, are a proper subject of counterclaim.—Neff v. Pennoyer, Case No. 10,085; Semple v. Bank of British Columbia, Id. 12,660.

ELECTION.

Between counts in indictment, see "Indictment and Information," § 18.
—— testamentary provisions and other rights, see "Wills," § 53.
To treat property as converted, see "Conversion," § 3.

ELECTION OF REMEDIES.

§ 1, Necessity for election. § 2, Right to election.

§ 1. Necessity for election.

Plaintiff proceeding both at law and in equity must elect.—Allison v. Alexander, Case No. 251.

Plaintiff will not be put to his election on motion of a defendant who is not a party to both suits.—Graham v. Meyer, Case No. 5,673.

The federal circuit court cannot, at the suit of obligors in a redelivery bond, compel an election between two suits pending in the district court,—one on such bond, and the other to condemn the goods as forfeited for fraud or undervaluation in their invoice.—Powell v. Redfield, Case No. 11,359.

§ 2. Right to election.

Any one of various remedies may be employed where either will enforce the right, or obtain the satisfaction to which the party is entitled.—Smith v. United States, Case No. 13,122.

On an agreement containing a penalty, plaintiff may bring debt for the penalty only, or covenant and recover more or less damages than the penalty.—Martin v. Taylor, Case No. 9,166.

Where timber cut upon public lands willfully, fraudulently, or negligently is made into saw logs, the government may elect to replevy such logs, or sue in trover for their value as such.—Bly v. United States, Case No. 1,581.

Where one gets possession of chattels tortiously, the owner may waive the tort, and sue in assumpsit for the value or the proceeds.—Janes v. Buzzard, Case No. 7,206a.

Or, where they have been returned by the trespasser, the owner may waive the trespass, and recover in assumpsit for the time of their detention.—Janes v. Buzzard, Case No. 7,206a.

The fact that plaintiff has a remedy ex contractu against others is no bar to a suit ex delicto against a wrongdoer.—Strause v. Western Union Tel. Co., Case No. 13,531.

ELECTIONS.

§ 1, Right of suffrage and regulation thereof in general. § 2, Officers. § 3, Qualification of voters. § 4, Registration of voters. § 5, Conduct of elections. § 6, Returns. § 7, Contests and actions to enforce right to vote. § 8, Violation of the election laws—Offenses. § 9, —— Preliminary proceedings. § 10, —— Evidence. § 11, —— Indictment. § 12, Actions to enforce penalties or forfeitures.

Of assignee in bankruptcy, see "Bankruptcy," §§ 160–176.
Of corporate officers, see "Corporations," § 34.

§ 1. Right of suffrage and regulation thereof in general.

Act May 31, 1870, to enforce the rights of citizens of the United States to vote in the several states of the Union, is not unconstitutional, on the ground of discriminating between different classes of citizens. The words "without distinction of race, color, or previous condition of servitude" are general terms, descriptive in character, and are not restricted and cannot limit the preceding words, which apply to all citizens otherwise qualified to vote.—Charge to Grand Jury, Case No. 18,252. See, also, United States v. Hall, Case No. 15,282.

Congress has power to interfere for the protection of voters at federal elections irrespective of the fourteenth and fifteenth amendments to the federal constitution.—United States v. Crosby, Case No. 14,893.

A state may deny the right of suffrage to any citizens of the United States for other causes than those specified in Const. U. S. Amend. art. 15.—McKay v. Campbell, Case No. 8,839; United States v. Crosby, Id. 14,893.

Under the fifteenth amendment, congress cannot legislate in reference to any interference with the right of a colored person to vote which does not proceed from his race, color, or previ-

ous condition of servitude.—United States v. Cruikshank, Case No. 14,897.

The power to regulate the time, place, and manner of holding elections for representatives in congress (Const. art. 1, § 4) includes the power to protect the electors in a free interchange of views, in making a free choice, and in expressing that choice freely at the ballot box.—United States v. Goldman, Case No. 15,225.

Electors in a state, who have the qualifications requisite for electors of the most numerous branch of the state legislature, have the right, under Const. art. 1, § 2, to vote for representatives in congress, and congress has the constitutional power to protect that right.—United States v. Goldman, Case No. 15,225.

See, also, "Constitutional Law," § 4.

§ 2. Officers.

Method adopted for the appointment of supervisors of election under the federal election laws of 1870, 1871, and 1872.—Harrison v. McLaren, Case No. 6,139.

The circuit court will not remove a chief supervisor of elections for issuing instructions which are the same as those previously issued and shown to have been approved by the district attorney and circuit judge.—In re Walsh, Case No. 17,112a.

Members of election returning board of state are state and not federal officers, even when canvassing votes for presidential electors.—Ex parte Anderson, Case No. 349.

A suit will not lie in the federal court to enjoin state election officers from registering voters or holding an election in pursuance of a state law on the ground that the same is unconstitutional.—Holmes v. Oldham, Case No. 6,643.

§ 3. Qualification of voters.

Act May 31, 1870, is inapplicable to the qualifications of voters, except as founded upon the distinction of race, color, or previous condition of servitude.—Ex parte McIllwee, Case No. 8,820.

The charter of the city of Washington of 1848 (section 5) does not require, as a qualification for voting, citizenship of the United States one year prior to the election.—United States v. McCormick, Case No. 15,663a.

The act of 1848 added, to the qualifications of voters in the District of Columbia, the payment of a school tax.—United States v. McCormich, Case No. 15,660a.

The evidence of qualification afforded by the registry is not exclusive; other testimony may be admitted, and, if all qualifications are proved, the person is entitled to vote.—United States v. McCormich, Case No. 15,660a.

The laws of New York do not deprive of the right of suffrage a person who has been convicted in the federal courts of a mere statutory offense against the United States, such as uttering a counterfeited security of the United States. Rev. St. § 5431.—United States v. Barnabo, Case No. 14,522.

§ 4. Registration of voters.

The assessors must register all white male residents of Washington City subject to a school tax, whether foreigners or not.—United States v. McCormick, Case No. 15,663a.

Instructions to the supervisors to take from a person who asks to be registered as a voter his certificate of naturalization are unauthorized by the statute.—In re Walsh, Case No. 17,112a.

§ 5. Conduct of elections.

Act La. April 11, 1877, does not authorize the use of separate ballot boxes for state and federal offices.—United States v. Nicholson, Case No. 15,877.

The mayor of Washington, D. C., has no power to enforce a demand that the polls should be kept open as required by law.—United States v. Stewart, Case No. 16,401a.

All persons must take the oath of qualification required by the state law, when challenged.—McKay v. Campbell, Case No. 8,839.

Rights of deputy marshals at elections of members of the house of representatives.—United States v. Gitma, Case No. 15,209.

The federal election law (Rev. St. tit. 26) is constitutional, and special deputy marshals of the United States will be protected by the federal courts in discharging their duty thereunder.—In re Engle, Case No. 4,488.

Such deputy marshals are clothed with discretion in the exercise of their duties, under Rev. St. §§ 2021, 2022.—In re Engle, Case No. 4,488.

§ 6. Returns.

The proper composition of a returning board of Louisiana determined.—Kellogg v. Warmouth, Case No. 7,667.

All the judges of an election in Georgetown, D. C., *held* not necessary to be present to constitute a legal session.—Fearson v. United States, Case No. 4,712.

As to the manner of electing a mayor of the city of Washington, D. C., and the returns of such election.—United States v. Carbery, Case No. 14,720.

§ 7. Contests and actions to enforce right to vote.

The federal courts have jurisdiction in contested elections of state officers only where the title to office arises out of the denial of the right to vote to citizens on account of race, color, or previous condition of servitude.—Harrison v. Hadley, Case No. 6,137.

Rev. St. § 2010, gives no jurisdiction to the United States circuit court of an action to recover possession of an office from which plaintiff has been ejected after his title had been established by an election.—Johnson v. Jumel, Case No. 7,392.

The acts to enforce the rights of citizens to vote (16 Stat. 140) *held* constitutional under the fifteenth amendment and applicable to the election of a state governor.—Kellogg v. Warmouth, Case No. 7,667.

Sufficiency of petition to give federal court jurisdiction under such statutes.—Kellogg v. Warmouth, Case No. 7,667.

The question of the eligibility of complainant to the office of governor cannot arise under a bill for the preservation of evidence to enable complainant to prosecute a suit at law, alleging that voters have been deprived of registration and their votes suppressed on account of race, color, etc.—Kellogg v. Warmouth, Case No. 7,667.

§ 8. Violation of the election laws—Offenses.

Act May 31, 1870, § 20, providing for the punishment of persons illegally registering under the state law at an election for a representative in congress, is not unconstitutional.—United States v. Quinn, Case No. 16,110.

Rev. St. § 5515, in relation to offenses by election officers, is constitutional.—United States v. Clarke, Case No. 14,809.

Rev. St. §.5515, does not apply to a violation of the state laws regulating elections, when such violation does not affect the election, or the result of the election, of a delegate or representative in congress.—United States v. Nicholson, Case No. 15,877.

The governor of a state is not an election officer within Act May 31, 1870, § 22, punishing the fraudulent making of a false certificate of the result of a congressional election.—United States v. Clayton, Case No. 14,814.

Judges of election are not liable to criminal prosecution unless they have acted from corrupt motives.—United States v. Gillis, Case No. 15,207.

The refusal to allow a person, when challenged, to take the oath of qualification, if made on account of his race, color, or previous condition of servitude, but not otherwise, is a violation of Act May 31, 1870, § 2.—McKay v. Campbell, Cases Nos. 8,839, 8,840.

Intrusting the keys of ballot boxes to a police patrolman, and opening the boxes in a different order than that prescribed by the state statute, *held* insufficient to authorize a conviction, under Rev. St. § 55, though there was a fraudulent substitution of ballots, where the inspectors were not shown to have been connected therewith.—United States v. Hayden, Case No. 15,333.

A registration officer who refuses or knowingly omits to give full effect to the law, by placing the name of any citizen on the list of voters who applies for registration, and who is entitled under the state constitution and laws to be registered as a voter, is guilty of a misdemeanor, and is liable to a criminal prosecution, as well as to a civil action, by the party aggrieved.—Charge to Grand Jury, Case No. 18,252.

A certificate reciting that the statutory requisites have been complied with, issued to one who has fully complied with all the conditions precedent to admission to citizenship, is not within Rev. St. § 5426, though all the proceedings were not recorded.—In re Coleman, Case No. 2,980.

Under Act May 30, 1870, it is a crime to counsel or advise another to vote illegally or in any way to procure or aid such vote.—Charge to Grand Jury, Case No. 18,254.

The offense of preventing the free exercise of the right of suffrage (Act May 31, 1870, § 19) is complete by the forcible expulsion from the polls of voters waiting in line to cast their ballots, though they afterwards returned and voted.—United States v. Souders, Case No. 16,358.

An indictment for a conspiracy to prevent the giving of support and advocacy to an election (Rev. St. § 5520) need not set out the acts of advocacy and support which the conspiracy was formed to prevent.—United States v. Goldman, Case No. 15,225.

It is no defense to an indictment of a woman for knowingly voting at an election without a lawful right to vote, that she believed that she had a right to vote, and voted in reliance on such belief.—United States v. Anthony, Case No. 14,459.

§ 9. —— Preliminary proceedings.

Sufficiency of affidavit of violation of Rev. St. § 5426, relating to unlawful registration.—In re Coleman, Case No. 2,980.

§ 10. —— Evidence.

Evidence that defendant stated, as certain colored men approached the polls, that no colored men should vote, and that he would die first, which caused them to leave, *held* sufficient to sustain a conviction under Act May 31, 1870, § 4.—United States v. Canter, Case No. 14,719.

A copy of a township election return filed with the county clerk, accompanied by his certificate that it is a full and correct return of such election as filed, sent to the office of the secretary of state, is not an official paper under the election law of New Jersey.—United States v. Souders, Case No. 16,358.

A conviction on an indictment for using, for the purpose of registering as a voter, a naturalization certificate, knowing the same to have been unlawfully issued (Rev. St. § 5426), is not sustained by proof that defendant knew that the certificate had been issued without his presence in court, and without any oath being taken by him.—United States v. Burley, Case No. 14,686.

To convict for conspiracy under Rev. St. §§ 5508, 5520, it is not necessary to find that the conspiracy charged was formed against the voter named in the indictment alone.—United States v. Butler, Case No. 14,700.

§ 11. —— Indictment.

In an indictment for offenses against the elective franchise, it is sufficient to charge the offense in the language of the statute.—United States v. White, Case No. 16,674; Same v. Quinn, Id. 16,110.

An allegation that defendant offered a person a certain sum to vote is equivalent to an allegation that he counseled and advised him to vote.—United States v. Hendric, Case No. 15,346.

An allegation that a person claimed a right to vote at an election is not equivalent to an allegation that he was a qualified voter.—United States v. Hendric, Case No. 15,347.

An indictment under Rev. St. § 5512, for fraudulent registration, charging that defendant, "having no lawful right to register, fraudulently and willfully did register," *held* bad in not pointing out the fraud, and stating facts showing that defendant was not entitled to register.—United States v. Hirschfield, Case No. 15,372.

An averment that the accused was an alien, and had not been admitted to become a citizen of the United States, does not show that he had no right to register, or that he was not a citizen of the United States, or that he had no right to vote.—United States v. Hirschfield, Case No. 15,372.

An averment, in an indictment for bribing voters, that an election was held in a certain precinct on the day prescribed for holding such election, is sufficient; it being presumed that such election was legal.—United States v. Johnson, Case No. 15,488.

An allegation that an election was held at East Portland precinct *held* equivalent to an averment that an election was held in such precinct.—United States v. Johnson, Case No. 15,488.

An allegation that defendant knowingly offered to give O. a bribe to vote, the said O. being then under 21 years of age, sufficiently charges knowledge of such nonage.—United States v. O'Neill, Case No. 15,949.

Whether an indictment for unlawfully preventing certain citizens of African descent from registering or voting at a municipal election should charge that the acts were done on account of race, color, or previous condition of servitude, quære.—United States v. Petersburg Judges of Election, Case No. 16,036.

§ 12. Actions to enforce penalties or forfeitures.

Sufficiency of allegations of complaint in action for penalty under Act May 31, 1870, § 2.—McKay v. Campbell, Case No. 8,839.

In an action for the forfeiture provided for by Act May 31, 1870, § 4, the declaration must aver that plaintiff was prevented from voting by force, bribery, threats, intimidation, or other such unlawful means.—Seeley v. Koox, Case No. 12,630.

A declaration averring that plaintiff was prevented from voting by an erroneous decision of defendant, an election officer, upon a question of law, without averring that the decision was willfully wrong, is insufficient.—Seeley v. Koox, Case No. 12,630.

ELEVATED RAILROADS.

See "Street Railroads."

EMANCIPATION.

Of slaves, see "Slaves," §§ 19, 20.

EMBARGO.

See "War," §§ 7–25.

EMBEZZLEMENT.

§ 1, Nature and elements of offense—By officer or agent of corporation. § 2, —— By public officer. § 3, Indictment. § 4, Evidence. § 5, Sentence and punishment.

By salvors, see "Salvage," § 29.
By seamen, see "Seamen," §§ 75, 104.
Of mail, see "Post Office," §§ 12, 23.

§ 1. Nature and elements of offense—By officer or agent of corporation.

Where the president of a national bank converts its funds to his own use, he is guilty of embezzlement, under Act June 3, 1864, § 55, unless he show authority for so doing.—In re Van Campen, Case No. 16,835.

"Embezzle," as used in Rev. St. § 5209, in relation to officers and agents of national banks, describes a crime which a person has opportunity to commit by reason of some office or employment, and which is some breach of confidence or trust.—United States v. Conant, Case No. 14,844.

"Moneys," as used in Rev. St. § 5209, for punishing embezzlement, etc., by officers of national banks, includes national bank bills.—United States v. Johnson, Case No. 15,483.

§ 2. —— By public officer.

Act Aug. 13, 1841, and Act Aug. 6, 1846, apply to persons intrusted by law with the legal possession of public moneys, and not to those subordinates who, not being intrusted with such possession, may be punished for fraudulent conversion.—United States v. Hutchinson, Case No. 15,432.

A deputy collector is a "public officer," within the meaning of the act of 1846 relating to the embezzlement by public officers of public moneys intrusted to them.—United States v. Bowerman, Case No. 14,630.

A clerk appointed by the direction and with the approbation of the secretary of the treasury at a fractional currency counter of a subtreasury department is an officer of the United States.—United States v. Bloomgart, Case No. 14,612.

One appointed under Act Jan. 18, 1837, as clerk to the treasurer of the mint, is not indictable, under Acts Aug. 13, 1841, and Aug. 6, 1846, for embezzling public moneys.—United States v. Hutchinson, Case No. 15,432.

A postmaster who uses the money received through his office in paying his private debts, so that, upon examination, his accounts do not balance, is guilty of embezzlement (Act June 8, 1872, § 122), though he intended to replace the money, and made the same good shortly after his arrest.—United States v. Gilbert, Case No. 15,205.

A postmaster who takes money out of a letter will be *held* guilty of embezzlement, though the addressee was an illiterate person, whose letters he was in the habit of reading to him.—United States v. Bramham, Case No. 14,636.

Moneys collected from engineers and pilots under the act of 1852, and the proceeds of forfeited goods under the revenue laws, paid to the deputy collector, are "public moneys," within the statute.—United States v. Bowerman, Case No. 14,630.

§ 3. Indictment.

In an indictment under Act March 3, 1825, c. 65, § 16, punishing any one who shall "fraudulently embezzle," etc., the word "feloniously" will not supply the place of "fraudulently."—United States v. Forrest, Case No. 15,131.

An indictment of the president of a national bank for embezzling its moneys must show that the moneys were lawfully intrusted to his possession.—United States v. Johnson, Case No. 15,483.

An indictment under Rev. St. § 5209, charging defendant with drawing bills of exchange, and assigning notes without authority, need not allege an intent to injure and defraud the association.—United States v. Johnson, Case No. 15,483.

An indictment under Act March 3, 1825, must state that defendant was employed in the bank or an office of discount and deposit, etc., in some state or territory of the United States.—United States v. Forrest, Case No. 15,131.

In an indictment for embezzling a letter containing a bank note (Act March 3, 1825) it is not necessary to state the particular office held by the accused, or that the note was of an incorporated bank, or of any value.—United States v. Clark, Case No. 14,801.

§ 4. Evidence.

The items in a treasury transcript, if estimated and made up from hearsay, are not admissible in evidence against a public officer.—United States v. Forsythe, Case No. 15,133.

On indictment of a bank cashier under Act June 3, 1864, § 55, for embezzling funds of the bank, evidence that the funds were used in stock speculations with the consent of the officers of the bank, and for its benefit, is inadmissible to disprove the averments in the indictment that the acts were done with intent to injure and defraud the bank.—United States v. Taintor, Case No. 16,428.

On the preliminary examination of the accused, charged with embezzlement, evidence of the actual existence of a certain national bank, and of acts done by the accused as president thereof, is sufficient evidence of the legal incorporation of the bank, and of the connection of the accused with it.—In re Van Campen, Case No. 16,835.

§ 5. Sentence and punishment.

For the crime of embezzlement by a federal officer the court sentenced the convicted person to confinement for six years at hard labor, and to pay a fine to the extent of his embezzlements.—United States v. Bloomgart, Case No. 14,613.

EMBRACERY.

§ 1. What constitutes.

It is a crime, under Act March 2, 1831, § 2, to endeavor to influence a juror by conveying or imparting information to him, out of the jury box, for the purpose of affecting his conduct or judgment, or to endeavor to persuade him by arguments or appeals of any kind except those addressed to him by counsel in open court.—Charge to Grand Jury, Case No. 18,251.

It is a crime, under the act of 1872, for a person, in violation thereof, and for the pur-

pose of influencing the action of a grand jury, to send to them any letter or communication relating to any matter pending before them, or pertaining to their duties, without a previous order of the court.—Charge to Grand Jury, Case No. 18,255.

EMINENT DOMAIN.

§ 1, Nature and extent of power. § 2, Compensation—Necessity and sufficiency. § 3, —— Taking or injuring property as ground for compensation. § 4, —— Measure and amount. § 5, Proceedings to take property and assess compensation—In general. § 6, —— When proceedings necessary. § 7, —— Tribunal to determine compensation. § 8, —— The inquisition. § 9, —— Parties. § 10, —— Evidence. § 11, —— Trial. § 12, Remedies of owners of property. § 13, Title or rights acquired.

Public improvements by municipalities, see "Municipal Corporations," §§ 14–18.
Removal of proceedings to federal court, see "Removal of Causes," § 2.

§ 1. Nature and extent of power.

The legislature only can determine when and in what cases private property shall be taken for public use. Its determination is final on such question, but not on the question of what is a public use.—Horton v. Squankum & Freehold Marl Co., Case No. 6,710.

To condemn land for the use of a canal is to take private property for a public use.—Bonaparte v. Camden & A. R. Co., Case No. 1,617; Chesapeake & O. Canal Co. v. Key, Id. 2,649.

The constitution gives congress authority to condemn lands situated in a state for use as a post-office site.—United States v. Inlots, Case No. 15,441.

Land may be taken for a railroad, under legislative authority, upon just compensation being made.—Baltimore & O. R. Co. v. Van Ness, Case No. 830; Bonaparte v. Camden & A. R. Co., Id. 1,617.

The legislature may constitutionally authorize the fee of private property to be taken for a boom, to be built and operated by an incorporated company over which, and its charges, legislative control is reserved.—Patterson v. Mississippi & R. R. Boom Co., Case No. 10,829.

Property destroyed by city officers to stay the progress of a conflagration is not private property taken for public use.—Bowditch v. Boston, Case No. 1,719.

Contractors of the government *held* to derive no power, by virtue of their contract, to take private property, or apply the same to fulfill their contract obligations, without the owner's consent.—Brady v. Atlantic Works, Case No. 1,794.

An authority to appropriate private lands will be implied as necessary to effectuate the object of state statutes providing for the construction of state railroads and canal.—Baring v. Erdman, Case No. 981.

Act June 10, 1872, appropriating money for the "purchase, at private sale or by condemnation," of a site for a post office at Cincinnati, recognized the previous act (March 12, 1872) as conferring power to condemn the lands, if necessary.—United States v. Inlots, Case No. 15,441.

Act Md. 1785, c. 49, respecting taking of land for private ways, is valid.—Ex parte Barnard, Case No. 1,000.

Such act is in force in the county of Washington, D. C.—Ex parte Barnard, Case No. 1,000.

The state, under its power of eminent domain, may make public roads through the lands of the United States, unrestricted by the proprietary right of the latter.—United States v. Railroad Bridge Co., Case No. 16,114.

Authority to construct and repair railway, and take materials therefor, does not give right to divert waters for use of engines.—Baring v. Erdman, Case No. 981.

Authority to take materials or divert water for use of railroad from lands contiguous to, adjoining, or near the railroad, is not limited to lands bounding the road.—Baring v. Erdman, Case No. 981.

§ 2. Compensation—Necessity and sufficiency.

The legislature of a state cannot take lands of a person without making just compensation in money, to be fixed by agreement with the parties, or by arbitration, or by a jury.—Vanhorne v. Dorrance, Case No. 16,857.

A law is not void because it contains no provision for compensation for property taken, or the mode of ascertaining it, where a subsequent law contains such provision.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

Congress has no power to authorize a telegraph company to construct its line over private property without making compensation.—Atlantic & P. Tel. Co. v. Chicago, R. I. & P. R. Co., Case No. 632.

The title of owners of land in the state of Tamaulipas could be devested by a decree of its congress without compensation.—Brownsville v. Cavazos, Case No. 2,043.

The obligation to make compensation is concomitant with the right to take private property for public use.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

Private property cannot be taken for public use until compensation is actually made. A provision for ascertaining and making compensation afterwards is not sufficient.—Avery v. Fox, Case No. 674.

The payment for land taken must be simultaneous with the disseisin and the appropriation.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

The assessment of damages by a jury fulfills the requirement that no private property shall be taken for public use without compensation.—Chesapeake & O. Canal Co. v. Key, Case No. 2,649.

§ 3. —— Taking or injuring property as ground for compensation.

The rule giving damages for injury to part of the land not taken *held* inapplicable where property taken on one side of an alley was leased for use in connection with a livery stable on the opposite side.—United States v. Inlots, Case No. 15,441a.

The mere entry on land for the purpose of making a survey of a road is not a taking requiring compensation to be made.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

The use of land in a public street for the purposes of an ordinary railroad is a new burden, which cannot be imposed without previous compensation to the owner of the fee of such land.—Van Bokelen v. Brooklyn City R. Co., Case No. 16,830.

The use of land in a city street for the purposes of an ordinary horse railroad is not a new burden, and the owner of the fee is not entitled to compensation.—Van Bokelen v. Brooklyn City R. Co., Case No. 16,830.

§ 4. —— Measure and amount.

The measure of compensation, both under the constitution of the United States and the laws of Ohio, is the fair market value at the time of condemnation, not at forced sale, but at a sale by the owners themselves.—United States v. Inlots, Case No. 15,441a.

The measure of compensation for property condemned by the United States is the full, fair market value in cash, without allowance for loss of custom, etc., by persons having stores in the condemned buildings.—United States v. Inlots, Case No. 15,441.

If condemnation take place during a temporary depression due to stringency in the money market, it seems that the property may be valued as of a time immediately preceding such depression.—United States v. Inlots, Case No. 15,441a.

Measure of damages for property appropriated for boom purposes.—Patterson v. Mississippi & R. R. Boom Co., Case No. 10,829.

§ 5. Proceedings to take property and assess compensation—In general.

Proceedings under Act Minn. March 1, 1856, § 10, and Act Minn. Feb. 1, 1864, § 20, for the condemnation of land for a railroad right of way.—Secombe v. Milwaukee & St. P. Ry. Co., Case No. 12,601.

§ 6. —— When proceedings necessary.

Condemnation proceedings are necessary where lien owners are not willing to surrender, though the owners and the government have agreed upon the price. Act Ill. Dec. 14, 1871.—United States v. Block 121, Case No. 14,610.

§ 7. —— Tribunal to determine compensation.

The legislature cannot take land, and give it to a corporation, even for a public purpose, and fix by statute the compensation. The compensation must be judicially ascertained.—United States v. Illinois Cent. R. Co., Case No. 15,437.

An act incorporating a company to build a railroad, and providing for the assessment of damages to the owners of land through which it passes, *held* not unconstitutional.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

§ 8. —— The inquisition.

It is not necessary that the inquisition contain the names of jurors summoned, but not sworn.—Chesapeake & O. Canal Co. v. Binney, Case No. 2,645.

A day certain must be fixed in the warrant for the meeting of the jury, and the want thereof is fatal.—Chesapeake & O. Canal Co. v. Key, Case No. 2,649.

Where several warrants have been returned with inquisitions, and each inquisition refers to the warrant returned therewith, it can be shown by parol which warrant is applicable to each inquisition.—Chesapeake & O. Canal Co. v. Union Bank, Case No. 2,653.

Circuit court of the District of Columbia *held* to have jurisdiction to quash inquisition taken under a turnpike charter.—Georgetown Turnpike Road Co. v. Custis, Case No. 5,348.

Inquisition will be quashed where the jurors are not disinterested.—Georgetown Turnpike Road Co. v. Custis, Case No. 5,348.

An inquisition condemning more land than necessary will be set aside.—Chesapeake & O. Canal Co. v. Mason, Case No. 2,650.

A reference in the inquisition to the description of the land in the warrant is sufficient.—Chesapeake & O. Canal Co. v. Binney, Case No. 2,645.

It is not necessary that the inquisition state the value of the land separately from the damages.—Chesapeake & O. Canal Co. v. Union Bank, Case No. 2,653.

The jury should describe the boundaries of the land, and the quality and duration of the estate in the same.—Chesapeake & O. Canal Co. v. Union Bank, Case No. 2,653.

Four days' notice of meeting of jury to fix damages is sufficient.—Baltimore & O. R. Co. v. Van Ness, Case No. 830.

Where a charter does not require notice to the party whose lands are to be condemned, the inquisitions need not state that such notice has been given.—Chesapeake & O. Canal Co. v. Union Bank, Case No. 2,653.

§ 9. —— Parties.

Under the Ohio statute, all persons interested in the land are made parties, and their rights adjudged, so that the taking of leased lands or lands in which interests are held by contract puts an end to all the rights and obligations between the contracting parties.—United States v. Inlots, Case No. 15,441a.

§ 10. —— Evidence.

Where an interest was claimed under an informal lease, *held*, that the government might show a parol agreement that the same was only to be used to support a claim for compensation in case of condemnation.—United States v. Inlots, Case No. 15,441a.

§ 11. —— Trial.

Under the Ohio Statute (69 Laws, 88), separate trials are allowed as to separate parcels, but not as to separate interests therein; but the separate interests may be separately presented to the jury.—United States v. Inlots, Case No. 15,441.

The company condemning the land is the sole judge of what interest will be necessary for its operations.—Chesapeake & O. Canal Co. v. Union Bank, Case No. 2,653.

§ 12. Remedies of owners of property.

Where a law contains no provision for compensation for property taken, its execution will be enjoined till such provision is made by law and the compensation paid.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

The taking of private property where payment or a deposit is not made, will be enjoined where the constitution requires payment of compensation before such property can be appropriated, and the injury is irreparable.—Eidemiller v. Wyandotte City, Case No. 4,313.

The making of an embanked roadway for public use *held* to be an irreparable injury, within the meaning of the rule.—Eidemiller v. Wyandotte City, Case No. 4,313.

In such a case the landowner may have an injunction pending an appeal taken by him from the assessment of damages, where compensation has not been paid or deposited, and no different provision is made by law.—Eidemiller v. Wyandotte City, Case No. 4,313.

§ 13. Title or rights acquired.

Under a special act authorizing a street or highway to be laid out, providing for damages in a special manner, and barring any action for possession or damages, the fee does not pass.—United States v. Harris, Case No. 15,315.

Where the state of Indiana condemned land for a canal, and the benefits were assessed as equal to the damages, *held*, that the state acquired only a conditional fee, and having failed to construct the canal, so that the benefits were never realized by the landowners, the fee reverted to them, and did not pass to the state's grantees.—Kennedy v. Indianapolis, Case No. 7,703.

The right of one whose property has been taken for public use, arising on a change in its destination, is of an equitable character, not cognizable at law.—De Varaigne v. Fox, Case No. 3,836.

A state legislature, under the right of eminent domain, may transfer to a municipal corporation for a public use, such as an almshouse, an absolute title to private lands, without possibility of reverter, on making just compensation to the owner.—De Varaigne v. Fox, Case No. 3,836.

When the public purpose for which expropriation is exercised is accomplished, or has ceased to exist, the residue of the property belongs to the original owner. — Brownsville v. Cavazos, Case No. 2,043.

But this reverter must be subject to any bona fide rights that may have lawfully accrued in the meantime. — Brownsville v. Cavazos, Case No. 2,043.

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ENTAILS.

See "Estates Tail."

ENTRY.

In book as evidence, see "Evidence," § 52.
Of appeal, see "Appeal and Error," § 15.
Of appearance, see "Appearance," § 3.
Of decree, see "Equity," § 121.
Of imported goods, see "Customs Duties," §§ 28–31, 79–81.
Of judgment, see "Judgment," §§ 9, 18–24.
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To foreclose mortgage, see "Mortgages," § 17.

ENTRY, WRIT OF.

See, also, "Ejectment"; "Real Actions."

§ 1. When writ will lie.

The appropriate remedy of a tenant in fee tail is by a writ of formedon, and not by a writ of entry.—Webster v. Gilman, Case No. 17,335.

A tenant in fee simple cannot maintain a writ of entry founded upon his supposed seisin of a freehold only, but must count upon his seisin in fee simple.—Webster v. Gilman, Case No. 17,335.

EQUITABLE ASSIGNMENTS.

See "Bankruptcy," § 235.

EQUITY.

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Infringement of copyright, see "Copyrights," §§ 39–49.
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I. JURISDICTION, PRINCIPLES, AND MAXIMS.

See, also, "Courts," §§ 21, 87, 95.

(A) GROUNDS OF JURISDICTION IN GENERAL.

§ 1. Mistake.

Mistakes are relievable in equity.—Dunlap v. Stetson, Case No. 4,164.

Relief on the ground of mistake will not be granted unless the parties can be put in statu quo, except where the clearest and strongest equity imperatively demands it.—Kinney v. Consolidated Virginia Min. Co., Case No. 7,827.

Where, on the partition of lots, quitclaim deeds are given, and it is subsequently discovered that a building which represents more than 90 per cent. of the value of the property laps over on an adjoining lot, equity has jurisdiction to grant relief on the ground of mistake.—Yates v. Little, Case No. 18,128.

A mistake which is nothing more than a misconception of the law is no ground for equitable relief.—Sims v. Lyle, Case No. 12,892.

And this is the rule, although the mistake was mutual.—Magniac v. Thomson, Case No. 8,957.

A mistake of law, in the absence of fraud, is no ground of relief in equity.—Robinson v. Cathcart, Cases Nos. 11,946, 11,947.

Equity will not relieve a party who takes personal security for money, instead of a mortgage on property, under a mistake of law, by all parties, that the former was as safe as the latter, and substitute for it a lien or mortgage on the property.—Hunt v. Rousmaniere, Case No. 6,898.

Equity will not enforce, as against general creditors of an insolvent estate, an agreement for a lien or security for a debt, where the lien or security has failed by a mistake of law.—Hunt v. Rousmanier, Case No. 6,897.

Nor will it direct a new security to be given where an old one, chosen by the parties, has, from a mistake of law, become a nullity.—Hunt v. Rousmanier, Case No. 6,897.

§ 2. Fraud.

Fraud is relievable in equity.—Dunlap v. Stetson, Case No. 4,164; United States v. Archer, Id. 14,464.

Courts of equity possess a general concurrent jurisdiction with courts of law in cases of fraud.—Cady v. Whaling, Case No. 2,285; Mason v. Jones, Id. 9,240; Rhoades v. Selin, Id. 11,740.

The court first obtaining jurisdiction must settle the matter conclusively.—Mason v. Jones, Case No. 9,240.

A bill charging that defendant, by fraudulent practices, secured the transfer to his name of shares of corporate stock, to which complainant held the equitable title, and praying that complainant be declared the owner, makes a case of equity jurisdiction.—Kilgour v. New Orleans Gas Light Co., Case No. 7,764.

To found a claim for relief in equity, it is not sufficient for the plaintiff to raise suspicion of bad faith, but he must establish it beyond reasonable doubt.—Gould v. Gould, Case No. 5,637.

An averment of fraud in the sale of a promissory note, and a request for a discovery of facts accompanying the sale, furnish sufficient ground for jurisdiction.—Foster v. Swasey, Case No. 4,984.

Where the vendor of land is clearly shown to have been overreached in a material degree by imposition, concealments, or misrepresentations made by the vendee, on which he properly relied,

he will be relieved in equity.—Warner v. Daniels, Case No. 17,181.

While equity will not interpose in behalf of parties in particeps criminis, it will interpose to recover the property of one on behalf of his creditors.—Odenheimer v. Hanson, Case No. 10,429.

§ 3. Surrender of property.

Equity has jurisdiction to decree the surrender of negotiable notes unconscientiously withheld by the defendant.—White v. Clarke, Case No. 17,540.

§ 4. Equitable estates and trusts.

Equity has jurisdiction of a suit in which the legal title is not disputed, though the entire equitable title is claimed by certain defendants, which is disputed by complainants.—Lamb v. Burbank, Case No. 8,012.

A court of equity may direct an equity to be sold, but in such case the interest sold should be ascertained, and made known at the time of the sale.—Wescott v. Cole, Case No. 17,417.

As between the heirs at law and the assignee of a military land warrant, a court of equity will investigate the proceedings under which the assignment and warrant were obtained.—Ware v. Brush, Case No. 17,171.

In equity, property may be taken from the possession of a defendant, having a clear legal title, when the relief sought is founded on a disputed equity.—Schenck v. Peay, Case No. 12,450.

Equity extends its control, not only over the acts of trustees, but over the acts of those who have any agency in enabling the trustees to violate their trust.—Wallis v. Thornton, Case No. 17,111.

Equity has no cognizance of executed trusts enforceable at law.—Baker v. Biddle, Case No. 764.

Where the party has a legal remedy, but a trust is created, equity has concurrent jurisdiction.—United States v. Myers, Case No. 15,844.

In a court of equity, a party holding an equitable title cannot be ousted of his equitable rights by the holder of the legal title, who in such case stands in a court of equity as trustee for the use of the party beneficially interested.—Whiting v. Graves, Case No. 17,577.

§ 5. Enforcement of liens.

Equity has jurisdiction of a bill to enforce an equitable lien.—Vallette v. Whitewater Canal Co., Case No. 16,820.

If one creditor has lost his legal lien and priority, equity will not set it up again as against other creditors equally meritorious.—Kurtz v. Hollingshead, Case No. 7,952.

A creditor who has a specific lien upon the income of property which has gone from the debtor into the hands of a third person may maintain a suit in equity against him to enforce it.—Ritten v. Union Pac. Ry. Co., Case No. 11,865a.

§ 6. Enforcement of forfeiture.

The process of a court of equity will not be afforded for the purpose of enforcing a forfeiture.—Goesele v. Bimeler, Case No. 5,503; Morse v. O'Reilly, Id. 9,858.

§ 7. Relief against penalties.

A court of equity will relieve against a penalty, but not against stipulated damages.—Goesele v. Bimeler, Case No. 5,503.

A court of equity has no right to interfere with the strict legal rights of the United States under the revenue laws. Relief against the injustice of enforcing their provisions, in respect to penalties and forfeitures, must proceed from the treasury department.—Powell v. Redfield, Case No. 11,359.

§ 8. Relief of parties to illegal transaction.

As between parties who enter into a fraudulent combination against an individual, no relief will be given either at law or in equity.—Warburton v. Aken, Case No. 17,143.

§ 9. Relief against and construction of contract.

Nor will a court of chancery give relief against a bona fide contract of a party, entered into for a valuable consideration.—Goesele v. Bimeler, Case No. 5,503.

In equity, the court may give effect, upon equitable terms, to the valid part of a contract which is fraudulent in part.—Whiston v. Smith, Case No. 17,523.

A party claiming rights under a contract must act at his peril. He cannot come into equity for its interpretation to save himself the consequences of a misconstruction.—Florence Sewing Mach. Co. v. Singer Mfg. Co., Case No. 4,884.

§ 10. Retention of jurisdiction to award complete relief.

Where a bill is dismissed for want of equity, jurisdiction will not be retained to settle priorities or equities as between the defendants.—Smith v. Little, Case No. 13,072.

Equity will determine the whole cause where damages are claimed as incident to the equitable relief sought.—Ferson v. Sanger, Case No. 4,751.

(B) REMEDY AT LAW AND MULTIPLICITY OF SUITS.

§ 11. Adequate remedy at law—In general.

Where there is a remedy available at law, equity will not grant relief.—Bowman v. Wathen, Case No. 1,740; Kidwell v. Masterson, Id. 7,758.

Equity jurisdiction is not ousted by the existence of a remedy at law which is not adequate, plain, and complete.—Baker v. Biddle, Case No. 764; Crane v. McCoy, Id. 3,354; Garrison v. Markley, Id. 5,256; Mayer v. Foulkrod, Id. 9,341; Blakeley v. Biscoe, Id. 18,239.

"Adequate remedy at law" does not mean ability to employ every form of legal procedure. If any form will give such remedy, equity will not interfere.—La Mothe v. Fink, Case No. 8,032.

The bare fact that parties who hold an equitable title to land cannot sue at law does not give the court jurisdiction.—Young v. Porter, Case No. 18,171.

Where the remedy at law involves a large number of actions, and questions of values and accounts practically impossible for a jury to settle, such remedy is inadequate.—Plummer v. Connecticut Mut. Life Ins. Co., Case No. 11,232.

To deprive equity of jurisdiction on the ground of remedy at law, the latter must be as efficient to the ends of justice, and its complete and prompt administration, as the remedy in equity.—Brown v. Pacific Mail S. S. Co., Case No. 2,025.

A suit may be brought to give effect to a decree where the conditions of the original decree are not appropriate to the powers of a court at law.—Bank of Circleville v. Iglehart, Case No. 860.

As the federal circuit court can issue a writ of mandamus only in those cases in which it may be necessary to the exercise of its jurisdiction, such court may entertain a bill in equity in cases where mandamus would be an ample remedy in a state court, if it is not a necessary remedy in the federal court.—Wheeling v. Baltimore, Case No. 17,502.

The fact that a creditor of a partnership has lost his remedy at law against some of the

partners by recovering a judgment against one partner alone in ignorance of the existence of the partnership, is no ground of relief against them in equity.—United States v. Ames, Case No. 14,440.

The objection that the plaintiff has an adequate remedy at law cannot be first made at the hearing. A court of equity will not refuse jurisdiction on the ground of complete remedy at law, where the parties have submitted their rights to the jurisdiction of the court.—Post v. Corbin, Case No. 11,299. CONTRA, see Baker v. Biddle, Case No. 764; Pierpont v. Fowle, Id. 11,152.

The judiciary act of 1798, § 16, settles the law as to cases of equity jurisdiction in the nature of an exception to its exercise.—Baker v. Biddle, Case No. 764.

§ 12. —— Right of action at law.

Equity has no jurisdiction where the bill, in substance and effect, is nothing more than a claim for damages for breach of contract.—Smith v. Cincinnati, H. & D. R. Co., Case No. 13,025.

Negligence by an attorney at law in collecting claims is not a subject of equity jurisdiction, there being an adequate remedy at law.—Marsh v. Whitmore, Case No. 9,122.

In the case of a sale under a decretal order in equity, where the purchaser enters into a covenant with surety to pay the purchase money, and has defaulted, the remedy at law is inadequate, and a court of equity will compel performance.—Wood v. Mann, Case No. 17,954.

Equity will not maintain a bill for redress in cases of loss or injury to a principal from the negligence or misconduct of his agent; the appropriate remedy being at law for damages.—Vose v. Philbrook, Case No. 17,010.

If the plaintiff has a legal claim, he must pursue his remedy at law so far as he can, before resorting to equity.—Coombe v. Meade, Case No. 3,188.

If fraud is charged against executors in proving a will, and acting under it, and notice of such fraud before their purchase of the property is alleged against the other defendants, a suit at law could not give adequate relief.—Gaines v. Mausseaux, Case No. 5,176.

Corporate assets are regarded in equity as held in trust for payment of the corporate debts, which equity will enforce, though the matter in controversy may not be cognizable in a court of law.—Bradley v. Converse, Case No. 1,776.

Where a bill is brought on equitable grounds other matters, though open at law, are subject to inquiry.—Gass v. Stinson, Case No. 5,260.

Equity has jurisdiction, on the ground of an inadequate remedy at law, of a bill asking a disclosure and an account of sales under the disposal of a copyright alleged to belong to complainant, and praying an injunction against further sales.—Pierpont v. Fowle, Case No. 11,152.

An impediment to navigation by a bridge, causing sail vessels to strike their masts, may be adequately compensated in damages, and equity will not interfere.—Atkinson v. Philadelphia & T. R. Co., Case No. 615.

A bill in equity is not the proper remedy to enforce a decree in equity for the payment of money, as the remedy at law is adequate and complete.—Tilford v. Oakley, Case No. 14,038a.

It is no objection to the equity jurisdiction of the federal court that there is a remedy at law under the local law.—Gordon v. Hobart, Case No. 5,609; Cropper v. Coburn, Id. 3,416.

§ 13. —— Defenses at law.

Equity will not entertain jurisdiction of defenses available in another court in prior case.—Baker v. Whiting, Case No. 786.

One threatened with proceedings under a void act has an adequate remedy at law.—Baker v. Portland, Case No. 777.

Equity has no jurisdiction of a suit on a bond alleged to have been delivered up to be canceled by the fraud of a third person, where no discovery was sought, and where the bill furnished a substantial copy of the bond.—Girard Fire & Marine Ins. Co. v. Guerard, Case No. 5,461.

The rights of parties to an agreement for a license under letters patent, with a proviso for a corresponding reduction in the fee on a license to others at a lower rate, *held* to be purely legal, giving no right to the interposition of equity for the interpretation of the contract.—Florence Sewing Mach. Co. v. Singer Mfg. Co., Case No. 4,884.

Where a contract is not enforceable at law, and there is a fund to which the creditor has a right to resort, equity will relieve.—Beckwith v. Racine, Case No. 1,213.

§ 14. Prevention of multiplicity of suits.

A suit in equity may be maintained on an insurance policy in which several parties claim adverse interests.—Newcomb v. Mutual Life Ins. Co., Case No. 10,147.

(C) PRINCIPLES AND MAXIMS OF EQUITY.

§ 15. In general.

Changes since the Revolution in rules and principles in English chancery not followed by federal courts.—Baker v. Biddle, Case No. 764.

§ 16. He who seeks equity must do equity.

A party compelled to ask the aid of a court of equity to enforce his legal rights will be compelled to do equity, and relief will be granted only to the extent of his equitable rights.—Ridgway v. Hays, Case No. 11,817.

The vendee, coming into equity to obtain the legal title of a lot upon which the purchase money has been fully paid, must pay the balance due the vendor upon other lots.—Bank of Columbia v. Dunlop, Case No. 866.

§ 17. He who is first in time is preferred in right.

It is only between equal equities that the rule applies, "Prior tempore, potior jure."—Robinson v. Cathcart, Case No. 11,946.

II. LACHES AND STALE DEMANDS.

See, also, post, § 135.

§ 18. What constitutes laches, and effect thereof.

Mere delay in enforcing equitable rights is not a defense to a suit except in cases where the statutes of limitation apply, or where the party has slept upon his rights, and acquiesced for such a length of time, that his claim has become stale.—Williams v. Boston & A. R. Co., Case No. 17,716.

Even if there were no statutes of limitation, equity would not disturb a purchaser under a mortgage who had been in possession 15 years with knowledge of a junior mortgagee.—Cleveland Ins. Co. v. Reed, Case No. 2,889.

In a case of gross laches in prosecuting, or long acquiescence in the assertion of adverse rights, where the statute of limitations does not apply, the court will consider the claim barred.—Sullivan v. Portland & K. R. Co., Case No. 13,596.

In cases of concurrent jurisdiction, the party will be left to his legal remedy, where he has slept on his rights until, through a change of circumstances, the court is powerless to do equal justice between parties.—Ferson v. Sanger, Case No. 4,751.

A party seeking relief on the ground of mistake must act promptly, especially in the case of speculative property. — Kinney v. Consolidated Virginia Min. Co., Case No. 7,827.

A person who, by negligence, has failed to avail himself of a defense at law, cannot have relief in equity.—Hendrickson v. Hinkley, Case No. 6,357; Sedam v. Williams, Id. 12,609; Wynn v. Wilson, Id. 18,116.

Fifty years' delay by complainant's ancestor to enforce an alleged claim to property, which he was in a position to know was claimed and enjoyed by others, *held* inexcusable laches, barring a recovery.—Livingston v. Proprietors of Ore Bed, Case No. 8,418.

Lapse of time is a sufficient bar to a bill in equity to rescind a sale on the ground of fraud where the plaintiff might have acquainted himself at the time of the sale with the facts, and especially if the circumstances be greatly changed, and the evidence be lost or obscured.—Veazie v. Williams, Case No. 16,907.

The lapse of six years is no bar to a suit to set aside a sale for fraudulent representations brought immediately upon discovering the fraud.—Doggett v. Emerson, Case No. 3,960.

Courts of equity will refuse to interfere in the case of stale demands.—United States v. Flint, Case No. 15,121; Lewis v. Baird, Id. 8,316; Gould v. Gould, Id. 5,637.

§ 19. Following statute of limitations.

Courts of equity apply the statute of limitations.—Amory v. Lawrence, Case No. 336; Cleveland Ins. Co. v. Reed, Id. 2,889; Ferson v. Sanger, Id. 4,751; Lewis v. Marshall, Id. 8,327; Putnam v. New Albany, Id. 11,481; Williams v. Boston & A. R. Co., Id. 17,716.

But state statutes of limitation are inapplicable to suits in equity in the federal courts.—Stevens v. Sharp, Case No. 13,410.

Courts of equity, in the consideration of purely equitable rights and titles, act in analogy to the statute of limitations; they are not bound by it.—Badger v. Badger, Case No. 718; Hall v. Russell, Id. 5,943; Hayman v. Keally, Id. 6,265, Robinson v. Hook, Id. 11,956; Sullivan v. Portland & K. R. Co., Id. 13,596; Miller v. McIntire, Id. 9,582.

In cases of concurrent jurisdiction, courts of equity are bound by the statute of limitations.—Hall v. Russell, Case No. 5,943; Hayman v. Keally, Id. 6,265; Pratt v. Northam, Id. 11,376; Robinson v. Hook, Id. 11,956; Sherwood v. Sutton, Id. 12,782; Sullivan v. Portland & K. R. Co., Id. 13,596.

In cases of concurrent jurisdiction, equity will sometimes hold the lapse of time a bar to relief, when the prescription is not fully acquired at law.—Ferson v. Sanger, Case No. 4,751.

Lapse of time may be applied to bar an equity which would not be barred under the statute of limitations.—Piatt v. Vattier, Case No. 11,117.

Length of time, short of the statute of limitations, is not a bar if fraud exists, or if the delay is accounted for, or if such a course would work injustice. — Warner v. Daniels, Case No. 17,181.

§ 20. Excuse for delay and effect of legal disability.

Poverty may excuse delay, within the period of limitation, so as to relieve plaintiff's claim from the imputation of staleness.—Mason v. Crosby, Case No. 9,235.

Lapse of time does not operate against minors, especially where they reside in a different state, and had no knowledge of their rights.—Ware v. Brush, Case No. 17,171; Copen v. Flesher, Id. 3,211.

A claim is rendered stale after 10 years from removal of involuntary disability of infancy, notwithstanding further disability of coverture.—Bedilian v. Seaton, Case No. 1,218.

§ 21. Pleading laches.

Staleness of demand may be relied on at hearing, though not presented by pleadings.—Baker v. Biddle, Case No. 764; Farmers' & Mechanics' Bank v. Melvin, Id. 4,656; Fisher v. Boody, Id. 4,814.

The statute of limitations of California must be pleaded in equity suits as in suits at law.—Norton v. Meader, Case No. 10,351.

In the case of concealed fraud, complainant must set forth and prove the particularities of the discovery.—Badger v. Badger, Case No. 718.

Where a plea of the statute of limitations is overruled, it cannot be again put in by the same parties or their privies.—Fisher v. Rutherford, Case No. 4,823.

III. PARTIES AND PROCESS.

§ 22. Parties in general.

In equity it is not essential, as at law, that the parties litigant should be on opposite sides of the case, to have a decree between them.—Piatt v. Oliver, Case No. 11,116.

The court will not allow a rule respecting parties, adopted for convenience, to operate so as to defeat the ends of justice.—Hall v. Sullivan R. Co., Case No. 5,948.

§ 23. Necessary parties.

Equity will not proceed to final decree in absence of party whose interests will be affected thereby.—Abbot v. American Hard Rubber Co., Case No. 9; Branch v. Macon & B. R. Co., Id. 1,808; Bunce v. Gallagher, Id. 2,133; Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., Id. 2,990; Garnett v. Macon, Id. 5,245; Hoxie v. Carr, Id. 6,802; Northern Indiana R. Co. v. Michigan Cent. R. Co., Id. 10,321; Ward v. Arredondo, Id. 17,148; West v. Randall, Id. 17,424.

But there are exceptions to the rule, as where the other party is without the jurisdiction, or in case of a creditor suing in behalf of all creditors, etc.—West v. Randall, Case No. 17,424; Gray v. National S. S. Co., Id. 5,726.

Relief will not be granted in equity where the decree, because of the absence of parties beyond the jurisdiction of the court, would not bar a future suit as to the parties in court.—Stenchfield v. Robinson, Case No. 13,359a.

Where the interest of one is involved in that of another, and the former possesses the legal right, so that the interest may be asserted in his name, it is not always necessary to bring both parties before the court. — Hopkirk v. Page, Case No. 6,697.

The legal owner of land, which he holds in trust for another as security for advances made by him on account of the purchase for the latter, is a necessary party to a bill brought by the latter in respect to a claim arising upon such land.—Upham v. Brooks, Case No. 16,796.

The assignor of a chose in action is not in equity a necessary party, where the suit is by the assignee, and the assignment is absolute.—Trecothick v. Austin, Case No. 14,164.

Purchasers pendente lite are bound by the decree, though not brought in as parties to the bill.—Pullan v. Cincinnati & C. Air-Line R. Co., Case No. 11,461.

Where all the creditors of a debtor join in a release, they must all join in a bill in equity to set it aside.—Joy v. Wirtz, Case No. 7,553.

Where one of such creditors is a resident of the same state with defendants, he may be omitted as a party plaintiff in a bill by the others, who are nonresidents.—Joy v. Wirtz, Case No. 7,554.

A., owning, alone, certain property, joined with B., who was tenant in common with him of other property, in conveying all of the property to C. *Held*, that A. could alone sue in equity both B. and C. for neglect in managing the estate, and for an account of proceeds.—Jewett v. Cunard, Case No. 7,310.

Bill to obtain benefits of verbal promise to dying person by heirs to convey his property in a certain way must make executors or administrators parties.—Bedilian v. Seaton, Case No. 1,218.

Where an agreement with A. and B. is to reconvey to each separately the different estates conveyed by them, a separate action will lie by either party for his separate proportion. —Jewett v. Cunard, Case No. 7,310.

Act Feb. 28, 1839, does not enable the federal circuit courts to make a decree in equity which may affect a resulting interest in the subject of controversy vested in a party not before the court.—Winter v. Ludlow, Case No. 17,891.

§ 24. Proper parties and joinder.

A person not an indispensable party to a bill may be omitted for the purpose of exercising jurisdiction as to others whose rights can be determined without his presence.—Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., Cases Nos. 2,989, 2,990.

Complainants allowed to dispense with parties on account of their numerousness cannot take advantage of the neglect of defendants, to the prejudice of those not named.—Campbell v. Texas & N. O. R. Co., Case No. 2,366.

Only those whose interests are in harmony should be joined as plaintiffs.—Bunce v. Gallagher, Case No. 2,133; Parsons v. Lyman, Id. 10,779.

Persons having distinct claims against same defendant cannot maintain joint suit in equity. —Baker v. Portland, Case No. 777.

§ 25. Bringing in new parties.

Plaintiff, suing to enjoin infringement of a trade-mark belonging to a firm of which he alleged that he was the sole member, allowed to amend to bring in another, whom the proof showed was also a member.—Frese v. Bachof, Case No. 5,110.

An amendment will not be allowed by introducing a new party to the bill whose interest was known to the original plaintiffs or their agent when the bill was filed. Equity Rule 29.—Ross v. Carpenter, Case No. 12,072.

Leave to amend a bill for adding new parties defendant after replication was filed will be denied where plaintiff could have made the amendment before replication.—Clifford v. Coleman, Case No. 2,894.

Persons not parties to the original bill shown to be necessary on the cross bill brought for relief as well as defense are properly made parties.—Brandon Mfg. Co. v. Prime, Case No. 1,810.

A complainant cannot be compelled to add new parties to his bill if he chooses to take the responsibility of their not being made parties.—Searles v. Jacksonville, P. & M. R. Co., Case No. 12,586.

Where an objection for the want of a party has been sustained at a final hearing, the court, instead of dismissing the bill, usually retains the cause, in order that he may be made a party.—Winter v. Ludlow, Case No. 17,891.

§ 26. Striking out party.

The court may permit an amendment to a bill by omitting a nonresident named thereon as defendant, but not served, without prejudice to a motion for injunction.—Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., Case No. 2,989.

§ 27. Intervention.

In equity, a person who becomes interested in the subject matter pending litigation may come in and protect his interests, if application is made within reasonable time.—The Jennie Lind, Case No. 7,287; Scott v. Mansfield, C. & L. M. R. Co., Id. 12,541. But see Drake v. Goodridge, Case No. 4,062; Anderson v. Jacksonville, P. & M. R. Co., Id. 358.

A person applying to be made a party plaintiff will be made a party defendant, if he can equally have the benefit of the suit, where making him a party plaintiff would oust the jurisdiction of the court. Equity rules 47, 48, applied.—Brown v. Pacific Mail S. S. Co., Case No. 2,025.

A corporation which has obtained the title of one of original defendants pendente lite may become a defendant, and seek relief by cross bill, although it has also acquired the sole complainant's title pendente lite.—Barnard v. Hartford, P. & F. R. Co., Case No. 1,003.

Bill will be dismissed as to defendants against whom it contains no allegations, though they answered. — Andrews v. Solomon, Case No. 378.

§ 28. Designation and description of parties.

Persons cannot be made parties by designating them by a fictitious name in the introductory part of the bill and in the prayer for process. —Kentucky Silver Min. Co. v. Day, Case No. 7,719.

See, also, post, §§ 42, 90.

§ 29. Objections to parties.

A misjoinder, apparent on the face of a bill, should be taken advantage of by demurrer or answer, or it will be deemed waived.—Bunce v. Gallagher, Case No. 2,133.

An objection to parties cannot be made at the hearing.—Bowman v. Wathen, Case No. 1,740.

Unless the case is one in which the court cannot proceed to a decree between the parties before it, without prejudice to the rights of those who are proper to be made parties, but are not brought in.—Wallace v. Holmes, Case No. 17,100.

§ 30. Process—Necessity and waiver.

A person residing out of the jurisdiction of the court, though named as defendant in a bill, is, substantially, not a party to the action, till service of process or appearance.—Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., Case No. 2,989.

§ 31. —— Time returnable.

A subpœna on a bill in equity in the district court by an assignee in bankruptcy is properly made returnable on the first Tuesday of the month, where there is a new term on that day.—Hyslop v. Hoppock, Case No. 6,988.

§ 32. —— Service.

A service of a subpœna in equity by a person other than the marshal, unless specially appointed by the court, will be set aside on motion.—Deacon v. Sewing Mach. Co., Case No. 3,694a.

A subpœna on a bill in equity by the assignee is not properly served when left at a dwelling house which the parties have not occupied for over two years.—Hyslop v. Hoppock, Case No. 6,988.

Service of subpœna upon persons whose names are alleged in the bill to be unknown, and who are designated therein by fictitious names, is void.—Kentucky Silver Min. Co. v. Day, Case No. 7,719.

The general doctrine of courts of equity in relation to parties out of the jurisdiction.—Gray v. Larrimore, Case No. 5,721.

Substituted service of a cross bill against alien complainants in the original bill cannot be made upon their solicitors, where they file a stipulation that the answers may be amended by setting up the matter contained in the cross bill.—Heath v. Erie Ry. Co., Case No. 6,307.

Jurisdiction cannot be acquired in equity by a substituted service, although defendants, who are not inhabitants of the district, remain continually absent therefrom to avoid service of process.—Hyslop v. Hoppock, Case No. 6,989.

Service of subpœna in an equity suit brought by defendant in an action at law against the nonresident plaintiff therein, to restrain its further prosecution, may be made upon the attorney for such nonresident party.—Segee v. Thomas, Case No. 12,633.

The service of a subpœna in equity on the attorney of a nonresident plaintiff, in a judgment at law, will be deemed good where the subject in controversy is the same as that in the suit in which the judgment was rendered.—Hitner v. Suckley, Case No. 6,543.

In cases of injunctions to stay proceedings at law and in cross suits in equity, the court will direct service of the subpœna to be made on the attorney at law, or upon the adverse solicitor in the cross suit.—Eckert v. Bauert, Case No. 4,266; Ely v. Elliott, Id. 4,429a; Lowenstein v. Glidewell, Id. 8,575; Read v. Consequa, Id. 11,606; Sawyer v. Gill, Id. 12,399; Ward v. Seabring, Id. 17,160; Same v. Seabry, Id. 17,161.

In case of a bill in equity to stay proceeding at law or a cross bill, an order for the service of a subpœna upon the attorney for the absent plaintiff will not be made when the judgment in the action at law has been enforced.—Kamm v. Stark, Case No. 7,604.

It is sufficient service of the subpœna, in a suit to enjoin ejectment, to serve it on the attorney of the plaintiff in the ejectment.—Doe v. Johnston, Case No. 3,958.

A proceeding to bring into court a person who becomes a necessary party in consequence of an act performed by himself, after the commencement of the suit, though supplemental as to the former parties, is original as to the new party, and, though the former suit was commenced before the passage of Act May 4, 1858, it may, if afterwards instituted, be, within the meaning of the law, a suit brought after its enactment.—Winter v. Ludlow, Case No. 17,891.

Under that act, and under the previous law and practice of the circuit courts in equity, a subpœna issued in such a case, out of the circuit court for either of two districts of a state, may be served in the other district of the same state.—Winter v. Ludlow, Case No. 17,891.

§ 33. —— Return of service.

A return reciting that the subpœna had been handed to a person at defendant's domicile, who resided there, the defendant being absent, is not a sufficient return of service.—Von Roy v. Blackman, Case No. 16,997.

The return, where the service is by leaving a copy of the subpœna at the dwelling house or usual place of abode of the defendant, must show that the copy was handed to a member of or resident in the family of defendant.—Von Roy v. Blackman, Case No. 16,997.

Service on defendant by leaving a copy of the process at his residence, it not appearing that it was left with any person, is not valid. Equity Rule 13.—Day v. Phelps, Case No. 3,689.

§ 34. —— Waiver of defects in process or service.

A defendant who appears and puts in an answer waives all objections to the regularity of the service of the subpœna.—Goodyear v. Chaffee, Case No. 5,564; Segee v. Thomas, Id. 12,633.

Where a cause is set down for hearing on the plea that defendant has not been served with process within the state, docket entries showing a prior appearance by a solicitor cannot be considered.—Harrison v. Rowan, Case No. 6,140.

IV. PLEADING.

See, also, post, § 122.

(A) ORIGINAL BILL.

See, also, post, § 92.

§ 35. Statement of cause of action.

Complainant is not required to set out all the minute facts of his case; the general statement of a precise fact is usually sufficient.—Dunham v. Eaton & H. R. Co., Case No. 4,150.

A general allegation of fraud and duress or mistake is not sufficient.—Sullivan v. Sullivan, Case No. 13,598; Magniac v. Thomson, Id. 8,957; Stearns v. Page, Id. 13,339.

A bill in equity to recover lands, claiming only an equitable title thereto, which does not set up any facts tending to show that defendants were in any way affected by their equity, cannot be maintained.—Young v. Porter, Case No. 18,171.

A bill for relief on account of fraud in a sale may be broad enough to justify a decree if gross mistake appears.—Mason v. Crosby, Case No. 9,234.

A bill charging notice of the fraud against one of defendants, "that the defendant then and there, well knowing all and singular the premises," etc., is bad.—Wood v. Mann, Case No. 17,951.

A party may frame his bill in the alternative, if the title to relief will be the same in either alternative, although the case be presented upon allegations resting on wholly distinct and independent grounds.—Bradley v. Converse, Case No. 1,775.

§ 36. Negativing defenses.

A bill brought after a great lapse of time must state the reasons why it was not brought before, to repel the presumption of laches or improper delay.—Stearns v. Page, Case No. 13,339; Van Bokkelen v. Cook, Id. 16,831.

A court of equity will not relieve against fraud after 20 years from its discovery; and, when the statute is set up in bar, the bill must show when and how the fraud was discovered.—Moore v. Greene, Case No. 9,763.

§ 37. Multifariousness.

There is no absolute rule in regard to the multifariousness of a bill.—McLean v. Lafayette Bank, Case No. 8,886.

Several causes of action may be joined in a single bill, but not when the effect would be to embarrass the defendant, or introduce unnecessary confusion.—Horman Patent Mfg. Co. v. Brooklyn City R. Co., Case No. 6,703.

Courts of equity will not allow a multifarious bill as a remedy for a multiplicity of suits.—Haines v. Carpenter, Case No. 5,905.

A bill cannot be sustained in equity which is multifarious and embraces distinct matters, affecting distinct parties, who have no common interest in the distinct matters.—West v. Randall, Case No. 17,424.

Where all matters alleged in a bill are relevant to one defendant, he cannot object to it, as multifarious, because it is not relevant to the other defendants. — Atwill v. Ferrett, Case No. 640.

An alternative prayer does not necessarily make a bill multifarious.—Kilgour v. New Orleans Gas Light Co., Case No. 7,764.

A bill is multifarious which mingles independent claims of plaintiff with those which he has as administrator.—Carter v. Treadwell, Case No. 2,480.

A bill filed by an execution creditor in aid of his execution against the debtor and others who have fraudulently combined with him to conceal his property, *held* not multifarious, though it do not aver a conspiracy.—Prevost v. Gorrell, Case No. 11,405.

A bill by a trustee of a bankrupt praying that a transfer of an undivided half in a vessel be adjudged void, but, if it be declared valid, for an accounting and a sale of the vessel and a distribution of the proceeds, is multifarious. —Wilkinson v. Dobbie, Case No. 17,670.

A bill alleging infringement of several different patents by one machine of defendants is not multifarious.—Meerse v. Allen, Case No. 9,393a.

A bill for the discovery of the application for a policy of insurance, and the policy, and specific performance of the contract to deliver it is bad for multifariousness.—Markey v. Mutual Ben. Life Ins. Co., Case No. 9,091.

A bill uniting a controversy as to the validity of a will, with claims of heirs, with the suit of a creditor, and with a demand for an account by the executor, *held* multifarious.— Haines v. Carpenter, Case No. 5,905.

A bill in equity to establish an equitable title to land, and to compel a certain person to be made a defendant, and to disclose the nature of his claim, and to account for rents and profits, *held* multifarious.—Copen v. Flesher, Case No. 3,211.

A bill is not multifarious because it joins defendants holding distinct tracts of land, under distinct conveyances, if the main ground of defense is common to all.—Gaines v. Mausseaux, Case No. 5,176; Central Pac. R. Co. v. Dyer, Id. 2,552.

A bill by railroad company to restrain the collection of taxes, joining as defendants the various counties through which the railroad runs, *held* not multifarious. — Union Pac. R. Co. v. McShane, Case No. 14,382.

§ 38. The prayer for relief.

Under a prayer for general relief, such relief may be given as the pleadings and proofs warrant, though complainant is not entitled to the relief specifically prayed for.—Moore v. Mitchell, Case No. 9,770.

Complainant is not entitled, under the prayer for general relief, to a decree inconsistent with his own statement in his bill, or not supported thereby.—Connolly v. Belt, Case No. 3,117.

§ 39. Reference to other pleadings and exhibits.

The writings mentioned in a bill, or copies of them, need not be filed as exhibits with the bill.—Putnam v. City of New Albany, Case No. 11,481.

Praying that a bill in another cause may be made a part of the present bill is the same as repeating all its statements. — Mason v. Jones. Case No. 9,240.

See, also, post, § 90.

§ 40. Interrogatories.

A bill which requires an answer must contain interrogatories.—Wilson v. Stolley, Case No. 17,839.

An interrogatory, not so full and precise as it should have been, *held* still sufficient to call for a full answer to its plain import.—Langdon v. Goddard, Case No. 8,061.

§ 41. Entitling.

Where a bill is entitled in a cause before it is filed, the entitling may be rejected as surplusage.—Sterrick v. Pugsley, Case No. 13,379.

A bill addressed to the "circuit court," etc., "in chancery sitting," *held* sufficient.—Sterrick v. Pugsley, Case No. 13,379.

§ 42. Designation of parties.

A bill is defective which does not give full names of all parties to whom it refers.—Barth v. Makeever, Case No. 1,069.

See, also, ante, § 28.

(B) PLEA AND ANSWER.

See, also, ante, § 21; post, §§ 90, 93.

§ 43. Pleas.

An objection that plaintiff is not entitled to relief because he is a bankrupt, and his assignee is not made a party, should be taken by plea.—Kittredge v. Claremont Bank, Case No. 7,858.

Where the bill shows apparent jurisdiction, new matter in avoidance must be set up by plea, and not by motion on affidavits.—Pond v. Vermont Val. R. Co., Case No. 11,265.

Where the allegations of a plea to a bill in equity are qualified by a reference to a paper annexed to the plea, the plea must be read as if the paper were introduced, in its very terms, into the body of the plea.—Wheeler v. McCormick, Case No. 17,498.

Where more than one point of defense is stated by way of plea, the court will allow defendant either to set down the pleas as an answer, or will put him to his election as to which of the pleas he will abide by.—Reissner v. Anness, Case No. 11,686.

Where a defendant in equity has filed several pleas without leave of the court, he will be put to his election as to which he will stand upon.—Noyes v. Willard, Case No. 10,374.

A defendant may plead facts to show that he has no interest in the subject-matter of the suit.—Williams v. Empire Transp. Co., Case No. 17,720.

In equity, defendant is entitled to only one plea without leave of court.—Lamb v. Starr, Case No. 8,021; Wheeler v. McCormick, Id. 17,498.

And leave will be given only in a case of obvious necessity.—Lamb v. Starr, Case No. 8,021.

An objection that a plea is defective in not responding to all the allegations of a bill is not sustainable, for a plea may be to a part only.— Beard v. Bowler, Case No. 1,180; Kirkpatrick v. White, Id. 7,850.

A plea containing matter proper for a demurrer, for a plea in bar, for a plea in abatement, and for an answer, is bad for duplicity.— Gaines v. Mausseaux, Case No. 5,176.

A plea in bar, which does not set up a bar to every equitable allegation in the bill, will be set aside.—Piatt v. Oliver, Case No. 11,114.

A plea is not good as to matter apparent on the face of the bill, where the objection is available by demurrer. — Noyes v. Willard, Case No. 10,374.

A demurrer to evidence is not a good plea to a bill in equity.—Blackburn v. Stannard, Case No. 1,468.

The practice, with reference to a plea in bar for want of parties, stated. — Hammond v. Hunt, Case No. 6,003.

Matter in abatement must be set up by plea.—Chapman v. School Dist., Case No. 2,607.

A plea for want of parties is not matter in abatement, but goes in bar to the whole bill.—Tobin v. Walkinshaw, Case No. 14,068.

A plea to a bill for the removal of trustees, that the acts alleged were done by them in other capacities, under the direction of a state court, *held* bad.—Brooks v. Vermont Cent. R. Co., Case No. 1,964.

A plea professing to go to the whole bill, and in fact covering the whole subject to which it applies, does not require the support of an answer merely because it does not admit or deny all the allegations of the bill.—Sims v. Lyle, Case No. 12,891.

§ 44. Answer—Necessity and sufficiency.

Where more than one point of defense is relied on, such points should be stated by way of answer, and not of plea.—Reissner v. Anness, Case No. 11,686.

Under rule 40, defendant is not bound to answer unless special interrogatories be put in the bill.—Treadwell v. Cleaveland, Case No. 14,155.

Where bill sets up facts taking an oral agreement averred out of the statute of frauds, defendant will be required to respond by answer to such facts.—Bailey v. Wright, Case No. 749.

In an action against persons to enforce a conveyance of certain trust estates and for an account, defendants must answer all interrogatories in relation to the title to the estate and their dealings therewith.—Ross v. Gibson, Case No. 12,074.

A defendant who sets up the bar of the statute of limitations is excused from further answer to such parts of the bill as are covered by it.—Samples v. City Bank, Case No. 12,278.

Where fraud is asserted as a ground of relief, as against third persons, a mere denial of all fraud in themselves and all knowledge of fraud in their grantor, is insufficient, without a denial of a knowledge of the facts from which fraud is inferred.—Wormeley v. Wormeley, Case No. 18,047.

A general answer is sufficient for general allegations. Defendant will be required to answer specifically only specific interrogatories.—Parsons v. Cumming, Case No. 10,775.

Defendant must either call for proof or admit or waive all controversy as to facts stated in the bill to which he is interrogated.—Brooks v. Byam, Case No. 1,947.

Defendant may, under equity rule 39, set up a bar in his answer to excuse him from answering further.—Gaines v. Agnelly, Case No. 5,173.

Where the bar set up is insufficient for any reason, complainant may except, and set the cause down on bill and answer only, or may file a replication, and proceed to proofs.—Gaines v. Agnelly, Case No. 5,173.

In the former case, the answer is taken as true, and the bar therein as proved; and, though insufficient as a defense, complainant cannot have a decree, unless the answer admits the allegations of the bill on which the prayer for relief is founded.—Gaines v. Agnelly, Case No. 5,173.

If the bar set up is a sufficient defense to the whole relief sought, it is immaterial whether the defendant answer the allegations of the bill or not.—Gaines v. Agnelly, Case No. 5,173.

If the plea is only to some part of the bill, the defendant must answer to the residue, unless it be proper for a demurrer.—Ferguson v. O'Harra, Case No. 4,740.

§ 45. —— Compelling answer, and commission to take.

On motion for a rule answer in chancery, *held*, that such rule need not be laid, but attachment might go of course after fourth day of next term.—Anonymous, Case No. 442.

Where defendants have been once ordered to answer more fully, and exceptions to omissions and evasions are again sustained, the court will allow further amendments only upon payment of costs, to be followed by harsher measures if there are further omissions.—Kittredge v. Claremont Bank, Case No. 7,859.

An attachment for not answering the bill must not be made returnable to the clerk at the rules, but to the court.—Dowson v. Packard, Case No. 4,049.

Where the defendant on a bill for injunction is merely nominal, the court will, on the application of the party really interested, direct the answer of the nominal party to be taken under a commission, and notice of such application is not necessary.—Wilkins v. Jordan, Case No. 17,665.

§ 46. —— Denials upon information and belief.

When required by the bill, interrogatories must be answered as to information and belief as well as to knowledge.—Kittredge v. Claremont Bank, Cases Nos. 7,858, 7,859.

Where respondent has no personal knowledge of matter alleged in the bill, a denial upon information and belief is sufficient to put complainant to his proof.—Robinson v. Mandell, Case No. 11,959.

Where fraud is charged to have been committed by an agent, denial by the principal on belief and on information from the agent is not sufficient.—Mason v. Jones, Case No. 9,240.

A denial according to defendant's "recollection and belief," in an answer to a direct charge of a thing done by defendant, will be treated as a mere evasion.—Taylor v. Luther, Case No. 13,796.

When the bill requires answer as to information and belief, and one of the respondents is a corporation, its officers are bound to make full inquiries on the matter before answering.—Kittredge v. Claremont Bank, Case No. 7,859.

Want of knowledge of allegations as to which defendant's knowledge, if any, must be direct and personal, must be directly stated. A denial upon information and belief does not raise an issue.—Burpee v. First Nat. Bank, Case No. 2,185.

A corporation is not excepted from such rule.—Burpee v. First Nat. Bank, Case No. 2,185.

§ 47. —— Denial of knowledge or information.

A statement in an answer that defendant has no knowledge that the fact is as stated is insufficient, either as an admission or denial.—Brooks v. Byam, Case No. 1,947.

An answer that defendant "had no knowledge, information, and belief that the charge was not true," is insufficient to an interrogatory "as to his knowledge, remembrance, information, and belief."—Brooks v. Byam, Case No. 1,947.

§ 48. —— Answer false in part.

Where an answer under oath is false in material particulars, as to which respondent could have made no mistake, it may be wholly disregarded.—Scammon v. Hobson, Case No. 12,434.

§ 49. —— Responsiveness.

Where a bill to set aside a conveyance calls for answers under oath as to the date of the contract relied upon, an answer that it was not executed until a day much later than its date

is responsive.—Walker v. Derby, Case No. 17,068.

An answer to a bill alleging an agreement of compromise, which goes into the history of the dispute compromised, is not responsive.—Sargent v. Larned, Case No. 12,364.

§ 50. —— Impertinent and irrelevant allegations.

Where an answer impeached the bona fides and validity of a codicil to a will already approved and allowed by the proper probate court, *held*, that the allegations should be expunged as impertinent.—Langdon v. Goddard, Case No. 8,061.

Matter in an answer which is responsive to the bill cannot be excepted to as impertinent, although it in fact is so.—Lownsdale v. Portland, Case No. 8,578.

An allegation in an answer, however insufficient, if responsive, is not impertinent.—Chapman v. School Dist., Case No. 2,607.

Allegations in the answer of an attempted settlement, the nature and terms of which were not given, and which was not acceded to by plaintiffs, ordered expunged as irrelevant.—Langdon v. Goddard, Case No. 8,061.

§ 51. —— Several defenses.

More than one defense may be presented in an answer in equity, but each should be separately and clearly alleged without condition or qualification.—Graham v. Mason, Case No. 5,671.

§ 52. —— Joint answer.

A joint answer is sufficient if all the parties swear to it.—Davis v. Davidson, Case No. 3,631.

Answer in name of three defendants, but signed and sworn to by two only, will be stricken from files, but with leave to amend.—Bailey Washing Mach. Co. v. Young, Case No. 751.

§ 53. —— Effect on pleas.

Where the answer is broader than the plea, and sets up other defenses, the plea will be considered merely as a part of the answer.—Lewis v. Baird, Case No. 8,316.

A general answer overrules the pleas.—Taylor v. Luther, Case No. 13,796.

An answer to the same matter covered by a plea, which alleges that defendant is not bound to answer, overrules the plea.—Ferguson v. O'Harra, Case No. 4,740.

An answer filed with a plea containing more than is strictly applicable to the support of the plea overrules the plea.—Stearns v. Page, Case No. 13,339.

§ 54. Time of filing plea or answer.

It is of right, and not of favor, that defendant may file his answer before the decree nisi is made absolute.—Mason v. Jones, Case No. 9,239.

An answer relying upon the statute of limitations is in time, if filed before the bill is taken for confessed.—Hayman v. Keally, Case No. 6,265.

There is no difference between dilatory pleas and any other pleas as to the time when they may be filed.—Ewing v. Blight, Case No. 4,589.

(C) CROSS BILL AND ANSWER THERETO.

§ 55. When cross bill is proper and necessary.

A controversy between co-defendants to a bill in equity cannot be the matter of a cross-bill unless its settlement is necessary to a complete decree upon the case made by the original bill.—Weaver v. Alter, Case No. 17,308.

In a suit by a nonresident against citizens of the state to have his title quieted as to one, and for a partition against the other, the former defendant may file a cross bill to have the title of both the other parties declared void.—Schenck v. Peay, Case No. 12,450.

A cross bill is properly filed to establish an equitable title to letters patent, the legal title to which is in the plaintiff in the original bill for an infringement.—Brandon Mfg. Co. v. Prime, Case No. 1,810.

A cross bill cannot introduce new parties or new and distinct matters, or differ in purpose from the original bill.—Randolph v. Robinson, Case No. 11,561.

Matters germane to and connected with the subject-matter of a suit may be introduced by cross bill, although new, and not mentioned in the original bill.—Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., Case No. 13,643.

A cross bill seeking a discovery from complainants is unnecessary, in view of Act July 6, 1862, § 1; Act July 2, 1864, § 3,—permitting parties to be witnesses.—Heath v. Erie Ry. Co., Case No. 6,307.

§ 56. Time of filing cross bill.

A defendant cannot file a cross bill until the original bill is answered.—Allen v. Allen, Case No. 18,223.

§ 57. Notice of cross bill.

A bill and cross bill do not necessarily constitute one suit, and defendants in the cross bill must be served unless they voluntarily appear.—Lowenstein v. Glidewell, Case No. 8,575.

A cross bill should be stricken from the files if filed without notice to the solicitor of the defendant.—Webster Loom Co. v. Short, Case No. 17,343.

§ 58. Effect of dismissal of original bill.

A decree dismissing the original bill does not dispose of cross bill, setting up additional facts, and praying affirmative relief.—Barnard v. Hartford, P. & F. R. Co., Case No. 1,003.

§ 59. Answer to cross bill.

An answer to a cross bill filed by a person not named in the bill nor admitted as a defendant will be stricken from the files.—Putnam v. New Albany, Case No. 11,481.

(D) REPLICATION.

§ 60. Necessity for replication and effect of failure to reply.

The answer of every defendant, when sufficient, must be replied to without reference to the state of the cause or of the pleadings in regard to any other defendant.—Coleman v. Martin, Case No. 2,986.

An order dismissing complainant's bill for want of a replication is of course, and may be entered in the clerk's office without any application to or action by the judge.—Robinson v. Satterlee, Case No. 11,967.

A motion to set aside such dismissal, made nearly five years after the entry of the order of dismissal, without offering any excuse for the delay, will be denied.—Robinson v. Satterlee, Case No. 11,967.

The want of a replication will not prejudice the case on the final hearing where the evidence has been taken as if it had been filed.—Jones v. Brittan, Case No. 7,455.

§ 61. Effect of replication.

Where a plaintiff in equity, instead of setting down the defendant's plea for argument, replies to it, he admits its sufficiency as a defense, if the facts it alleges shall be established.—Myers v. Dorr, Case No. 9,988.

Where the replication denies all the allegations in the plea, the plea must be supported by evidence.—Gernon v. Boccaline, Case No. 5,366.

Where a replication is put in to a plea, the parties proceed to the examination of witnesses in the same way as in case of a replication to an answer.—Reissner v. Anness, Case No. 11,687.

§ 62. Time of filing replication.

Plaintiff allowed to file a general replication after the cause was set down for hearing on bill and answer and a reference to an auditor.—Peirce v. West, Case No. 10,909.

Plaintiff will not be allowed to file replication and take testimony on payment of costs, after dismissal of bill after hearing on bill and answer, where no mistake or inadvertence is suggested.—Bullinger v. Mackey, Case No. 2,126.

The court may allow a replication to be filed nunc pro tunc, where reasonable excuse for delay is given, and defendant is not prejudiced.—Robinson v. Randolph, Case No. 11,963.

Where defendant neglects for a long time to take advantage of plaintiff's failure to reply to a plea or set it down for a hearing, the court will give plaintiff further time.—Sayles v. Erie Ry. Co., Case No. 12,418.

The pendency of negotiations for a settlement after the filing of the answer is a sufficient excuse for delay.—Robinson v. Randolph, Case No. 11,963.

§ 63. Waiver of replication.

It cannot be objected at the hearing that there was no replication to the answer, where proofs in support of the answer, and proofs in contradiction thereof, and in rebuttal, have been put in without objection.—Fischer v. Wilson, Case No. 4,812.

§ 64. Surplusage in replication.

New matter charged in a special replication, which denies all material parts of the answer, will be considered as surplusage.—Duponti v. Mussy, Case No. 4,185; Wren v. Spencer Optical Mfg. Co., Id. 18,062.

(E) DEMURRER AND EXCEPTIONS, AND MOTION.

See, also, post, § 90.

§ 65. Admissions by demurrer.

A demurrer admits allegations of bill for purposes of motion on bill and demurrer.—Bayerque v. Cohen, Case No. 1,134; Woodworth v. Edwards, Id. 18,014.

Reasonable presumptions are admitted by demurrer as well as matters expressly alleged.—Amory v. Lawrence, Case No. 336.

A demurrer to a bill in equity admits only facts well pleaded.—Dillon v. Barnard, Case No. 3,915.

It does not admit averments of conclusions of law, nor the construction of documents or parol agreements inconsistent with the written agreements alleged.—Dillon v. Barnard, Case No. 3,915.

§ 66. Demurrer as opening record.

A demurrer to a plea presents the question of the sufficiency of the bill, as well as of the plea.—Beard v. Bowler, Case No. 1,180.

§ 67. Speaking demurrer.

A demurrer stating facts not appearing on the face of the pleading demurred to is bad as a speaking demurrer.—Lamb v. Starr, Case No. 8,021.

§ 68. Filing demurrer.

A party takes no notice of the filing of a plea or demurrer unless notice thereof is entered in the order book, as required by equity rule 4.—Newby v. Oregon Cent. Ry. Co., Case No. 10,145.

§ 69. Demurrer to bill—Grounds.

If the bill contain no ground for relief, defendant ought to demur.—Gallagher v. Roberts, Case No. 5,194.

An objection to a bill describing complainant as an assignee, that he is not legally such assignee, is not a ground for demurrer but must be taken by plea.—Nicholas v. Murray, Case No. 10,223.

A demurrer for want of equity will not lie where the bill is sufficient in substance, but for some technical reason (as the lapse of time or want of jurisdiction) the relief sought is not attainable by the suit.—Nicholas v. Murray, Case No. 10,223.

A demurrer to a bill for want of equity cannot be sustained, unless no discovery or proof properly called for by, or founded on, the allegations of the bill, would make the subject-matter of the suit a proper case for equitable interference.—Hosmer v. Jewett, Case No. 6,713.

Where a bill states a case to which the act of limitation applies, without bringing it within one of the exceptions, a demurrer will lie thereto.—Wisner v. Odgen, Case No. 17,914.

Where want of jurisdiction appears upon the face of the bill, the objection should be taken by demurrer.—Noyes v. Willard, Case No. 10,374; Pond v. Vermont Val. R. Co., Id. 11,265.

A demurrer to a bill, which contains allegations of fraud, and strong circumstances of equity, must be overruled, and defendant compelled to answer the fraud.—Burnley v. Jeffersonville, Case No. 2,181.

A demurrer for want of facts constituting a cause of action is unknown to chancery practice, and is, at most, a general demurrer for want of equity.—Nicholas v. Murray, Case No. 10,223.

The objections of multifariousness and misjoinder of parties come too late, when raised by answer instead of demurrer, and not called to the court's attention until the hearing.—Bunnel v. Stoddard, Case No. 2,135.

A delay of 49 years to set up title to land, appearing on the face of the bill, is ground of demurrer.—Copen v. Flesher, Case No. 3,211.

A bill not signed by counsel is demurrable.—Dwight v. Humphreys, Case No. 4,216.

It is no cause of demurrer for want of parties that a lunatic is not made a party, but it is a good objection for want of parties.—Harrison v. Rowan, Case No. 6,143.

§ 70. —— Who may demur.

On demurrer, multifariousness of bill can only be taken advantage of by the party suffering therefrom.—Hill v. Bonaffon, Case No. 6,488.

§ 71. —— General demurrer.

A general demurrer to a bill will be overruled if any independent part of the bill is sufficient.—Atwill v. Ferrett, Case No. 640; Brandon Mfg. Co. v. Prime, Id. 1,810.

A general demurrer to the whole bill cannot be sustained as a demurrer to relief prayed in respect of persons who are not made parties to the bill.—Heath v. Erie Ry. Co., Case No. 6,306.

The defect of joining as a party plaintiff one who has no interest in the suit may be reached by a general demurrer for want of equity.—Hodge v. North Missouri R. R., Case No. 6,561.

§ 72. —— Special demurrer.

Special demurrer to bill must specifically point out parts to which it applies.—Atwill v. Ferrett, Case No. 640.

§ 73. —— Demurrer to bill good in part.

Where the bill is good in part, a demurrer covering the whole bill will be overruled.—Heath v. Erie Ry. Co., Case No. 6,306.

A demurrer in part to a bill, followed by an answer as to the rest, is not thereby overruled.—Pierpont v. Fowle, Case No. 11,152.

§ 74. —— Time of demurring.

The omission to make oath to the bill praying for an injunction cannot be raised by demurrer after a hearing and order to file evidence.—Woodworth v. Edwards, Case No. 18,014.

The objection that the remedy at law is adequate may be taken on demurrer when it appears on the face of the bill, but it is not too late at the hearing if, after an answer, no disclosure is obtained.—Foster v. Swasey, Case No. 4,984.

§ 75. Exceptions to answer.

In the case of an answer directed to be taken and sworn to in China, on objection to an answer previously filed, only one set of exceptions was allowed.—Read v. Consequa, Case No. 11,607.

On exceptions to an answer for impertinence and scandal, the court give the answer a liberal consideration, having regard to the nature of the case as made by the bill.—Griswold v. Hill, Case No. 5,835.

It is good cause of exception to an answer that, to the denial that defendant has no knowledge of the facts charged, it is not added "that he had no information or belief" of them.—Bradford v. Geiss, Case No. 1,768.

Exceptions to an answer for impertinence will be allowed where the matter is immaterial, or stated at undue length.—Chapman v. School Dist., Case No. 2,607.

Complainant *held* not limited in time for filing exceptions to answer, where rule to reply not left with the clerk.—Brent v. Venable, Case No. 1,842.

Exceptions to an answer for insufficiency may be filed after exceptions for impertinence.—Patriotic Bank v. Bank of Washington, Case No. 10,806.

Under the sixty-third rule, exceptions to an answer for insufficiency must be set down on a rule day for hearing before the judge; a reference of such exceptions on a different day and to a master is a nullity and an abandonment of the exceptions.—La Vega v. Lapsley, Case No. 8,123.

An exception to an answer should state the charges, the interrogatory, and the terms of the answer, verbatim.—Brooks v. Byam, Case No. 1,947.

Complainant allowed to withdraw his exceptions to defendant's answer, and to take at his peril a subpœna to rejoin, returnable forthwith.—Penn v. Butler, Case No. 10,931.

§ 76. Demurrer to cross bill.

It is no ground of demurrer to a cross bill that a state court had acquired prior jurisdiction of the subject-matter on bill brought by the plaintiff in the cross bill.—Brandon Mfg. Co. v. Prime, Case No. 1,810.

The demurrer to a cross bill having been sustained, defendant's motion to stay proceedings under the original bill will be denied.—Hunt v. Oliver, Case No. 6,894.

§ 77. Motion to strike out.

An objection that a bill in equity is filed under a champertous agreement must be raised by answer, and not by motion to take the bill from the files.—Sperry v. Erie Ry. Co., Case No. 13,237.

A bill in equity, filed without being signed by the plaintiff or his counsel, will be stricken from the files.—Roach v. Hulings, Case No. 11,874.

(F) AMENDED AND SUPPLEMENTAL PROCEEDINGS.

See, also, ante, §§ 25–27.

§ 78. Amendment of bill.

The staleness of the demand, or the want of proper parties, is no objection to amending the bill.—Fisher v. Rutherford, Case No. 4,823.

Bill in equity amended to conform to proofs and admissions in answer, where subject-matter not changed.—Battle v. Mutual Life Ins. Co., Case No. 1,109.

To avoid unnecessary delays, a motion to amend a bill, and exceptions to it, may be entertained at the same time, and defendants be required to answer the amended matter and the exceptions together.—Kittredge v. Claremont Bank, Case No. 7,858.

The court may allow an amendment of the bill after deciding against the bill on demurrer.—Hunt v. Rousmaniere, Case No. 6,898.

The averment of citizenship may be added at any stage if the amendment be moved for in a reasonable time after the defect is suggested.—Fisher v. Rutherford, Case No. 4,823.

An amendment will be allowed when its refusal will put plaintiff out of court, and defendant can avail himself, on appeal, of the matter on which he objects.—Fisher v. Rutherford, Case No. 4,823.

An amendment which will introduce a new cause of action will not be permitted.—In re Leonard, Case No. 8,255.

Equity will allow a bill of foreclosure, brought on an executed contract on the hypothesis that it was valid as a mortgage, to be converted, by amendment, into a bill for specific performance.—Randall v. Jaques, Case No. 11,553.

A defect in suing respondents as a partnership, when in fact they are a corporation, may be cured by amendment.—Needham v. Washburn, Case No. 10,082.

Matters existing at the time of filing the bill and omitted therefrom should be brought in by amendment, but matters arising thereafter and after answer filed can only be brought in by a supplemental bill.—Swatzel v. Arnold, Case No. 13,682.

§ 79. Amendment of answer.

Applications to amend an answer are in the discretion of the court.—Caster v. Wood, Case No. 2,505; Smith v. Babcock, Id. 13,008.

Before amendments to the answer are allowed, the court should be satisfied that the reasons for them are cogent and satisfactory, and that the applicant has not been guilty of gross negligence, etc.—Smith v. Babcock, Case No. 13,008.

An amendment setting up a new defense in the answer will not be allowed where the matter proposed, with reasonable diligence, could have been sooner introduced. Rule No. 60.—India Rubber Comb Co. v. Phelps, Case No. 7,025.

Defendant will not be permitted to amend his answer, after the opinion of the court and the testimony have indicated in what respect it may be modified so as to effect his purpose.—Calloway v. Dobson, Case No. 2,325.

A new defense not allowed to be inserted by amendment after a reference to a master before whom it was available to defendant.—Evory v. Candee, Case No. 4,582.

Amendments of the answer to let in writings and documents omitted by accident or mistake will be readily granted.—Smith v. Babcock, Case No. 13,008.

In matters of form, mistakes of dates, and verbal inaccuracies, courts of equity are very indulgent in allowing amendments of answers; but they are slow to allow amendments as to material facts or which change essentially the grounds of defense.—Smith v. Babcock, Case No. 13,008.

The court will not allow the theory of defense set up by the original answer to be changed in several important particulars merely on the ground that defendant filed the answer under a mistake, when no new facts are alleged, and there is no request to have a single fact in the bill changed.—Waterman v. Merrill, Case No. 17,258.

Equity is very reluctant to allow amendments to let in new facts or defenses, wholly dependent on parol evidence, as this would encourage carelessness in drawing answers, and encourage the manufacturing of testimony.—Smith v. Babcock, Case No. 13,008.

Where, to a complaint alleging fraud as a ground of relief, an answer is filed setting up the statute of limitations, complainant will be allowed to amend by alleging that the fraud was discovered within six years.—Wharton v. Lowrey, Case No. 17,481.

Leave to file an amended answer presenting only cumulative evidence will not be granted after a jury trial has been had on an issue made on the bill and answer.—New York Wire-Railing Co. v. Cake, Case No. 10,217.

§ 80. Notice of amendment.

Where the bill is amended it is not necessary to serve new subpœnas upon defendants who are in court.—Longworth v. Taylor, Case No. 8,491.

Where the case is continued on the docket, and the counsel presumed to be in court, no notice of an amendment is necessary.—Sprague v. Litherberry, Case No. 13,251.

§ 81. Sufficiency of amended pleading.

An amendment of a bill should be by a separate bill, and not by interlining the original bill.—Peirce v. West, Case No. 10,910.

An amended bill should state only so much of the original bill as may be necessary to introduce and make intelligible the new matter.—Peirce v. West, Case No. 10,910.

If an amendatory answer repeat what was said in the original answer without varying the defense, it may be considered as impertinent, and will be referred to a master, etc.—Gier v. Gregg, Case No. 5,406.

§ 82. Imposing conditions in allowing amendment.

A material amendment of a bill after answer must be on payment of all costs, including the solicitor's fee.—Wallace v. Taylor, Case No. 17,103.

§ 83. Effect of amendment.

An amendment of the bill when allowed after answer and replication does not open the pleadings unrestrictedly.—Keene v. Wheatley, Case No. 7,644.

In such case defendant cannot allege by way of plea a personal disability in the complainant as having existed at the commencement of the suit.—Keene v. Wheatley, Case No. 7,644.

§ 84. Supplemental pleadings—Bill.

A disclosure cannot be asked in a supplemental bill after the receiver, under a decree for complainants, has proceeded to reduce defendant's assets into his possession.—Dunham v. Eaton & H. R. Co., Case No. 4,150.

A supplemental bill to admit new evidence, which the party might by due diligence have originally introduced, is never granted after an interlocutory decree.—Jenkins v. Eldredge, Case No. 7,267.

New oral testimony tending merely to corroborate evidence on the one side, or to contradict evidence on the other, on the points in issue, is not a sufficient foundation for a supplemental bill.—Jenkins v. Eldredge, Case No. 7,267.

No new evidence is a sufficient foundation for a supplemental bill, unless it be of such a nature that it would, if unanswered, require a reversal of the decree.—Jenkins v. Eldredge, Case No. 7,267.

In a bill filed to set aside a sale at auction by defendant's agent on the ground that sham bidders were fraudulently employed to enhance the price, a release given by plaintiff to the agent, not set up in the bill or answer, can be brought in the case only by supplemental bill.—Veazie v. Williams, Case No. 16,906.

New evidence cannot be brought forward by a mere order on a petition for leave to file a supplemental bill, but can only be admitted in the supplemental bill.—Jenkins v. Eldredge, Case No. 7,267.

Where there is a transfer of interest in premises pending a suit in relation thereto, a supplemental bill may be filed by or against the purchaser.—Hoxie v. Carr, Case No. 6,802.

A party in equity can avail himself of a material fact accruing since filing the original bill, only by filing a supplemental bill. It cannot be introduced in an amended bill.—Copen v. Flesher, Case No. 3,211.

Leave to file a supplemental bill making a new party and containing new matter against the original party granted, on petition alleging that such new party had become interested in the subject-matter since filing the original bill.—Parkhurst v. Kinsman, Case No. 10,758.

The petition for leave to file a supplemental bill need not embrace the averments intended to be inserted therein; but it must show the ground upon which the relief is asked.—Parkhurst v. Kinsman, Case No. 10,758.

All that the court inquires into, on such a petition, is to see whether probable cause exists for granting the leave, and whether the petition states facts or circumstances which, if properly pleaded, would sustain a supplemental bill.—Parkhurst v. Kinsman, Case No. 10,758.

On application for leave to file a new bill upon the discovery of new facts, the counter affidavits must be examined and considered by the court.—Blandy v. Griffith, Case No. 1,530.

A delay of 18 months after the discovery of new facts *held* fatal to the application.—Blandy v. Griffith, Case No. 1,530.

The rules governing the federal court in determining whether a bill is original and independent or ancillary and auxiliary in the matter already before the court.—Schenck v. Peay, Case No. 12,450.

§ 85. —— Plea or answer.

A defendant will not be allowed, as a matter of course, to put in new pleas on the trial.—Childs v. Lenig, Case No. 2,680.

Leave will not be given to file a supplemental answer based upon a fact which was known to the party at the time of the original answer, and was not omitted through mistake.—Suydam v. Truesdale, Case No. 13,656.

A defendant who answers generally as to a matter of which he has no particular knowledge may file a supplemental answer after he has acquired particular knowledge.—Caster v. Wood, Case No. 2,505.

Leave to file a supplemental answer setting up a judgment in bar was granted after the same had become final by affirmance on appeal, on renewal of a former motion to set up the same judgment by way of amended answer

which had been denied because of the pendency of an appeal therefrom.—Robinson v. Satterlee, Case No. 11,967.

(G) SIGNATURE AND VERIFICATION.

§ 86. Signature.

A bill in equity must be signed by the plaintiff or his counsel.—Roach v. Hulings, Case No. 11,874.

A signing by counsel on the back of the bill is sufficient.—Dwight v. Humphreys, Case No. 4,216.

Signing a bill as "solicitor for complainant" in a court in which there is no distinction between an attorney and a counselor, is a sufficient compliance with equity rule 24, requiring all bills to be signed by "counsel."—Stinson v. Hildrup, Case No. 13,459.

Counsel must sign the answer unless it is taken by commissioners. — Davis v. Davidson, Case No. 3,631.

§ 87. Verification.

The verification of the bill may be taken before a notary.—Blake Crusher Co. v. Ward, Case No. 1,505.

Bill not sworn to, praying injunction and discovery under oath, *held* sufficient on demurrer. —National Hay-Rake Co. v. Harbert, Case No. 10,044.

The fact that a plea is not sufficiently verified will not justify complainant in treating it as a nullity.—Ewing v. Blight, Case No. 4,589.

Domicile or citizenship in a dilatory plea may be sworn to as of belief.—Ewing v. Blight, Case No. 4,589.

An answer by a defendant beyond sea will be taken and sworn to by a commission under a dedimus issued by the court.—Read v. Consequa, Case No. 11,607.

An answer is not sufficiently authenticated unless authority of justice of peace before whom it was sworn is shown.—Addison v. Duckett, Case No. 77.

Waiver by bill of oath in answer is ineffectual unless accepted.—Amory v. Lawrence, Case No. 336; Heath v. Erie Ry. Co., Id. 6,306.

And the defendant has a right to make his answer under oath, although an answer under oath is waived by the bill.—Holbrook v. Black, Case No. 6,590.

A justice of the peace has authority to administer to defendant an oath to an answer in chancery.—United States v. Cowing, Case No. 14,880.

(H) ISSUES, PROOF, AND VARIANCE.

§ 88. Joinder of issue.

The issues in equity cases must be raised by the allegations in the bill and answer. Special notices are irregular.—Doughty v. West, Case No. 4,029.

The cause is not at issue under equity rule 69 unless it is at issue as to all of the defendants not in default, and taken as confessed as to the others.—Gilbert v. Van Arman, Case No. 5,414.

§ 89. Variance.

Plaintiff can recover only upon the case made by his bill, and not upon that made in the evidence.—Battle v. Mutual Life Ins. Co., Case No. 1,109; Bradley v. Converse, Id. 1,775; Brooks v. Stolley, Id. 1,963; The Chusan, Id. 2,717.

A bill may be sustained on grounds not set up in terms therein, if they come within the facts duly alleged and duly proved.—Tufts v. Tufts, Case No. 14,233.

Evidence as to confessions and statements by defendant not charged in the bill are equally admissible in equity as at law. — Jenkins v. Eldredge, Case No. 7,266; Smith v. Burnham, Id. 13,018.

Complainant is not entitled to relief under a bill setting up a case of fraud, by establishing the facts independent of fraud, although they might create a case under a distinct head of equity.—Bradley v. Converse, Case No. 1,775; Fisher v. Boody, Id. 4,814.

A bill in equity averring a deed to have been a mortgage need not aver that it became so by a defeasance, in order to let in proof of a defeasance.—Bentley v. Phelps, Case No. 1,332.

A bill for the conveyance of land alleged to have been purchased in partnership, is sustained by proof that the land was purchased by partnership funds, without specifying the amount contributed by each.—Piatt v. Oliver, Case No. 11,115.

Where defendant is sued as sole owner of a railroad, and the proof is that he is jointly concerned with others as a stockholder, no decree can be entered against him unless the bill is amended.—Beard v. Bowler, Case No. 1,180.

Where the bill sets up title under a will, title by codicils thereto not mentioned in the bill cannot be shown.—Langdon v. Goddard, Case No. 8,060.

In a suit to set aside a contract, variances will be allowed to be cured by amendments on easy terms, where the substance of the contract appears; and so also as to mistakes in form in pleading the statute of frauds.—Tufts v. Tufts, Case No. 14,233.

Upon a hearing on an issue on a plea in bar, no question arises as to its sufficiency in point of law. It is only necessary to be proved in point of fact.—Hughes v. Blake, Case No. 6,845.

(I) DEFECTS, OBJECTION AND WAIVER THEREOF.

See, also, ante, § 63.

§ 90. Time of making objections and waiver thereof.

Defects in pleadings not objected to at trial usually considered waived.—Baker v. Whiting, Case No. 786.

Exceptions will not be allowed where made under circumstances calculated to effect a surprise on the party and might have been made at a different stage of the cause.—Surget v. Byers, Case No. 13,629.

Copies of deeds filed with the bill as exhibits become a part of it and can be objected to only before the hearing.—Surget v. Byers, Case No. 13,629.

An objection to evidence attacking a deed of confirmation set up in the answer in defense of a bill to set aside a conveyance for fraud, on the ground that its validity was not put in issue, is too late when first taken at the hearing.—Bunnel v. Stoddard, Case No. 2,135.

No appearance, demurrer, or answer to a bill will waive its omission to state the citizenship of every necessary party, and that complainants and defendants are citizens of different states.—Speigle v. Meredith, Case No. 13,227.

The want of the certificate and affidavit as required by rule 31 is waived where plaintiff demurs to the plea without objection.—Goodyear v. Toby, Case No. 5,585.

V. EVIDENCE.

See, also, ante, § 65; post, §§ 94–96.

§ 91. In general.

The rules of evidence, except the answer of the defendant, are the same in chancery as at law.—Harmer v. Gwynne, Case No. 6,075.

§ 92. Pleadings as evidence—Bill.

Every material averment in the bill not denied is admitted.—Surget v. Byers, Case No. 13,629.

§ 93. —— Plea or answer.

An answer under oath, denying the allegations of the bill, must be overcome by the testimony of two witnesses, or by one witness and corroborative circumstances.—Badger v. Badger, Case No. 718; Clark v. Hackett, Id. 2,823; Cushing v. Smith, Id. 3,511; Daniel v. Mitchell, Id. 3,562; Delano v. Winsor, Id. 3,754; Gernon v. Boccaline, Id. 5,366; Gould v. Gould, Id. 5,637; Harper v. Dougherty, Id. 6,087; Higbie v. Hopkins, Id. 6,466; Hughes v. Blake, Id. 6,845; Langdon v. Goddard, Id. 8,060; Parker v. Phetteplace, Id. 10,746; Powden v. Johnson, Id. 11,353; Searcy v. Pannell, Id. 12,584; Walker v. Derby, Id. 17,068.

Testimony of complainant in support of the allegation of the bill, directly contradicted by an officer of defendant corporation, *held* insufficient to overcome the denials in the answer.—Hayward v. Eliot Nat. Bank, Case No. 6,273.

Satisfactory proof may be made by circumstances alone, or partly by circumstances and partly by direct testimony, or entirely by the latter.—Parker v. Phetteplace, Case No. 10,746.

The answer of a defendant who has no personal knowledge of the facts alleged, though responsive to the bill, is not evidence.—Dutilh v. Coursault, Case No. 4,206; White v. Jones, Id. 17,550.

An allegation in an answer, which is not responsive to the bill, is not evidence.—Flagg v. Mann, Case No. 4,847; Gernon v. Boccaline, Id. 5,366; Randall v. Phillips, Id. 11,555; Robinson v. Cathcart, Id. 11,946, 11,947; Wren v. Spencer Optical Mfg. Co., Id. 18,062.

A plea set down for argument by complainant, without replying, must be considered as true.—Gallagher v. Roberts, Case No. 5,194; Hough v. Richardson, Id. 6,722; Mellus v. Thompson, Id. 9,405; Peirce v. West, Id. 10,909.

An answer admitting the right of complainant, but setting up new matter in bar, or an affirmative claim, or averring a discharge, is not evidence in defendant's favor.—Tilghman v. Tilghman, Case No. 14,045.

The answer of a defendant though good evidence against him, is not admissible against a codefendant.—Dexter v. Arnold, Case No. 3,859; Lenox v. Notrebe, Id. 8,246c; Robinson v. Cathcart, Id. 11,946.

But such rule does not apply where the defendants are all partners in the same transaction.—Van Reimsdyk v. Kane, Case No. 16,872.

The separate answer of one defendant is not evidence as against a codefendant unless the defendants' admissions out of court would be evidence against each other.—Dick v. Hamilton, Case No. 3,890.

VI. TAKING AND FILING PROOFS.

See, also, "Depositions."

§ 94. Manner of taking proof.

The testimony may be taken orally in open court.—In re Clark, Case No. 2,801.

Witnesses may be examined orally at the trial merely to verify some document referred to in the pleadings, or to establish some fact of a formal character which has been inadvertently omitted in the testimony.—Western Division of Western N. C. R. Co. v. Drew, Case No. 17,434; Schutte v. Florida Cent. R. Co., Id.

The court will not receive viva voce testimony at the hearing, unless to prove an exhibit.—De Butts v. Bacon, Case No. 3,717.

An oral examination before an examiner without a written agreement between the parties to waive written interrogatories, is irregular, but the objection is waived where the party, after due notice that such oral examination is to be taken, or has been taken, acquiesces in it.—Van Hook v. Pendleton, Case No. 16,852.

Practice as to taking testimony in equity causes, under section 30 of the judiciary act, and rules 67 and 68.—Bronson v. La Crosse & M. R. Co., Case No. 1,930.

Practice as to taking of testimony where the state constitution provides that testimony in equity causes shall be taken in the same manner as at law.—Bronson v. La Crosse & M. R. Co., Case No. 1,930.

§ 95. Time of taking proofs and publication.

The practice as to enlarging plaintiff's time to take proofs, when the state of the cause and of the pleadings differs as to different defendants, stated.—Coleman v. Martin, Case No. 2,986.

The court may, in the exercise of a sound discretion, allow the introduction of newly-discovered evidence of witnesses to facts in issue in the cause, after publication and knowledge of the former testimony, and even after the hearing. But it will not exercise this discretion to let in merely cumulative testimony.—Wood v. Mann, Case No. 17,953.

The same rule holds in cases of bills of review and supplementary bills in the nature of bills of review.—Wood v. Mann, Case No. 17,953.

After publication of the testimony, no new witnesses can be examined, and no new evidence can be taken, except where the judge himself entertains a doubt, or when some additional fact or inquiry is indispensable to enable him to make a satisfactory decree.—Wood v. Mann, Case No. 17,953.

Where a time rule is waived, and no other substituted, some special order must be obtained before either party can force the other to proceed.—Mellus v. Howard, Case No. 9,403.

Exhibits in the cause may be proved after publication, and even viva voce at the hearing, when there has been an omission of the proof in due season, and they are applicable to the merits.—Wood v. Mann, Case No. 17,953.

A witness may be examined to the mere credit of the other witnesses, whose depositions have been already taken and published in the cause, but he will not be allowed to be examined to prove or disprove any fact material to the merits of the case.—Wood v. Mann, Case No. 17,953.

It is discretionary with the court, under rule 78, to stay the proceedings to allow a party to take a new deposition or to cross-examine a witness already examined by deposition for the opposite party, under Act Sept. 24, 1789, § 30.—Van Hook v. Pendleton, Case No. 16,852.

The time for publication will be enlarged after publication has past, though not in fact made, on good cause shown by affidavit, such as surprise, accident, or other circumstances which repel any imputation of laches.—Wood v. Mann, Case No. 17,953.

§ 96. Filing proofs.

Where defendant fails to pay the examiner's fees, plaintiff cannot compel defendant's proofs to be filed without paying such fees.—Frese v. Biedenfeld, Case No. 5,111.

VII. DISMISSAL BEFORE HEARING.

See, also, ante, § 58.

§ 97. Voluntary dismissal.

An original bill may be dismissed as of course at complainant's cost at any time before decree.—Lowenstein v Glidewell, Case No. 8,575.

§ 98. Involuntary dismissal.

A bill will not be dismissed for want of proceeding for three terms, without giving one term's notice of the application.—Delauney v. Hermann, Case No. 3,757.

Where complainant unreasonably delays compelling an issue, or taking the bill for confessed as to any of defendants, the defendants as to whom the cause is at issue may have an order to compel complainant to speed the cause or have his bill dismissed.—Gilbert v. Van Arman, Case No. 5,414.

The bill will not be dismissed for want of prosecution for the failure of plaintiff to take testimony within the three months after issue formed, as allowed by rule 90.—Sargeant v. First Nat. Bank, Case No. 12,359.

Nonjoinder or misjoinder is not ground of dismissal in equity, where the difficulty can be remedied, or where the relief sought can be given without impairing or jeopardizing the interest of any one.—Bunce v. Gallagher, Case No. 2,133.

A bill in equity will be dismissed where, after objection for want of necessary parties, complainant neglects to bring them in.—Jones v. Brittan, Case No. 7,455.

Where a party not within the jurisdiction files his answer, disclaiming all interest, the bill may be dismissed as to him and continued as to the others.—Hinde v. Vattier, Case No. 6,512.

The nonappearance of a necessary party who cannot be compelled to appear is good ground for the dismissal of the suit on motion by the other defendants.—Picquet v. Swan, Case No. 11,135; Abbot v. American Hard Rubber Co., Id. 9.

If no benefit or advantage whatever appears to be gained by proceedings in equity, rather than at law, the bill will be dismissed without prejudice, in order that the rights of the parties may be adjusted at law.—Pierpont v. Fowle, Case No. 11,152.

The court will not make a decree, the execution of which would affect the right of a party not before it, or throw a cloud upon his title; and where such party is necessary to a final decree the bill should be dismissed without prejudice.—Young v. Cushing, Case No. 18,156.

A dismissal of a bill, except upon the merits, is no bar to a subsequent bill for the same cause.—Grubb v. Clayton, Case No. 5,849a; Jenkins v. Eldredge, Id. 7,267.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.

§ 99. Hearing.

Complainant is bound at the argument by the allegation of a particular fact in the pleading.—Prevost v. Gratz, Case No. 11,407.

Complainant in a bill to stay proceedings on a warrant of distress has the right to open and close.—Armstrong v. United States, Case No. 548.

A case heard and decided in vacation before one judge, by agreement of the parties, is to be considered as if heard and decided before and by the court.—Doggett v. Emerson, Case No. 3,961.

§ 100. Continuance.

Time for preparation to argue a legal point will not be given where counsel had previous notice that it would arise.—Greigg v. Reade, Case No. 5,804.

§ 101. Dismissal at final hearing.

In the federal courts a bill will not be dismissed for want of equity except on demurrer or on final hearing.—La Vega v. Lapsley, Case No. 8,123.

Where plaintiff cannot sustain his bill, it must be dismissed at his costs, regardless of grounds of equity.—Barns v. Omally, Case No. 1,035.

§ 102. Submission of issues to jury.

It rests in the sound discretion of a chancellor to grant or refuse a feigned issue, and it will not be awarded where there is sufficient proof to enable him to decide.—United States v. Samperyac, Case No. 16,216a.

On a motion to send to a jury issues arising on a petition against a receiver for injuries causing death, the court may determine whether the case is one for damages, and, if it finds adversely, may finally dismiss the petition.—Miles v. Receivers of Atlantic, M. & O. R. Co., Case No. 9,544.

A question of fact, essential to the decision, may be referred to a jury upon an issue framed.—Flagg v. Mann, Case No. 4,847.

Where a feigned issue for trial of a fact is directed by the court, no declaration of any sort is requisite. The case is put on the trial list, and the jury sworn to try the issue, in the words of the order of issue itself.—Wilson v. Barnum, Case No. 17,786.

On the trial of an issue from chancery, the bill and answer cannot be read in evidence, unless the chancery court so directed when the issue was ordered.—King v. Force, Case No. 7,791.

Issue directed out of chancery to ascertain whether a partnership, asserted by complainant and denied by defendant, was formed as alleged.—Drope v. Miller, Case No. 4,092a.

§ 103. Effect of verdict or findings of jury.

The finding of a jury in an equity case is not conclusive.—Ely v. Monson & B. Mfg. Co., Case No. 4,431; United States v. Samperyac, Id. 16,216a.

It is not final until adopted by the court.—Allen v. Blunt, Case No. 216.

It may be set aside, and even overruled.—Goodyear v. Providence Rubber Co., Case No. 5,583.

A verdict on an issue at law directed by a court of chancery has the same effect as a verdict on conflicting evidence in an action at law.—Brooks v. Bicknell, Case No. 1,946.

§ 104. New trial on issue submitted to the jury.

A motion for a new trial of a feigned issue must be heard on the merits of such issue singly, and cannot be affected by the equities arising on the bill and answer.—Cohen v. Gratz, Case No. 2,963.

Such motion must be disposed of before the cause will be heard on bill and answer.—Cohen v. Gratz, Case No. 2,963.

§ 105. Rehearing—Nature of right to.

Rehearings in equity after a decree are not a matter of right, but rest in the sound discretion of the court.—Daniel v. Mitchell, Case No. 3,563.

§ 106. —— Grounds for granting.

A rehearing should be allowed in equity only for reasons sufficient to justify a new trial at law.—Bentley v. Phelps, Case No. 1,332.

A rehearing in the case of the death of the judge will be granted only where the opinion

was not actually delivered.—Doggett v. Emerson, Case No. 3,961.

The failure of counsel to properly apply the testimony or to give it due weight, in argument, is not ground for a rehearing.—Hunter v. Marlboro, Case No. 6,908.

Error of judgment or mistake of counsel as to effect of evidence no ground for rehearing. —Baker v. Whiting, Case No. 786.

Proper practice in case of surprise in testimony not noticed by answer.—Barker v. Stowe, Case No. 995.

Where newly-discovered testimony would not change the result, a rehearing will not be granted.—Bentley v. Phelps, Case No. 1,332.

A rehearing, when granted on newly-discovered evidence of confessions of complainant affecting the merits of the bill. — Daniel v. Mitchell, Case No. 3,563.

Rehearing not granted if newly-discovered evidence is merely cumulative.—Baker v. Whiting, Case No. 786.

Rehearing after interlocutory decree granted upon filing supplemental bill, for newly-discovered evidence, if of such nature as to entitle party to relief upon bill of review after final decree, but not otherwise.—Baker v. Whiting, Case No. 786.

Rehearing not granted on ground of newly-discovered evidence of which the party, by reasonable diligence, might have obtained knowledge.—Baker v. Whiting, Case No. 786; Prevost v. Gratz, Id. 11,406.

Rehearings are only allowed where some plain omission or mistake has been made, or where something material to the decree has been overlooked.—Jenkins v. Eldredge, Case No. 7,267; Tufts v. Tufts, Id. 14,232.

The accidental omission to make technical proof of an uncontroverted fact, such as corporate capacity to sue, may be supplied, in the discretion of the court.—Goodyear v. Blake, Case No. 5,560.

A bill of review will not lie for error in law where the original decree is not enrolled. The remedy is a rehearing.—Dexter v. Arnold, Case No. 3,856.

An application for a rehearing on the same facts and cases and arguments will not be considered.—Tufts v. Tufts, Case No. 14,232.

§ 107. —— Time of granting and proceedings to obtain.

The court has no power to order a rehearing after the close of the term at which the final decree was rendered.—Poole v. Nixon, Case No. 11,270.

Cause in equity, in which no appeal lies to the supreme court, may be reheard, if petition is filed before end of next term after final decree.—Clarke v. Threlkeld, Case No. 2,865.

The proper practice to obtain a rehearing before final decree is by petition to the court for leave to file a supplemental bill setting forth the newly-discovered evidence.—Reeves v. Keystone Bridge Co., Case No. 11,661.

Necessary averments in affidavits on motion for rehearing.—Barker v. Stowe, Case No. 995.

An application for a rehearing must state some reason which would constitute good ground for a new trial at common law.—Hunter v. Marlboro, Case No. 6,908.

A rehearing will not be granted on the mere certificate of counsel as to the sufficiency of the reasons therefor.—Emerson v. Davies, Case No. 4,437.

The petitioners must show due diligence to discover and obtain the new evidence at the original hearing, and that it is material to the issue.—Reeves v. Keystone Bridge Co., Case No. 11,661.

Neither a petition nor an order for a rehearing of itself stops proceedings under the decree. —Vose v. International Imp. Fund, Case No. 17,008.

§ 108. —— Proceedings upon rehearing.

As to the evidence admissible on a rehearing. —Jenkins v. Eldredge, Case No. 7,267.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

§ 109. Authority to refer.

The authority to refer to a master is inherent in the courts of the United States in the exercise of their chancery jurisdiction.—Thompson v. Smith, Case No. 13,976.

§ 110. Authority of master.

The master is bound to follow the orders and directions of the court in the decretal order under which he is appointed.—Felch v. Hooper, Case No. 4,718.

§ 111. Objections to and testing credibility or competency of witness.

Proper practice to test the competency of a witness who has previously testified, after the cause has been referred to a master by interlocutory decree.—Gass v. Stinson, Case No. 5,261.

On an examination to test the credibility of a witness after publication and before the hearing, the interrogatories should be so framed as not to call for evidence on the merits.—Gass v. Stinson, Case No. 5,261.

When a witness has been cross-examined by a party, with a full knowledge of an objection to his competency, he will not be allowed to raise the objection at the hearing.—Flagg v. Mann, Case No. 4,847.

An objection to the competency of a witness cannot be made after publication, if the incompetency was known before the commission issued.—Gass v. Stinson, Case No. 5,261.

§ 112. Application for additional time to take testimony.

No enlargement of the time for taking testimony in equity before the master can be made unless notice of the application be given to the opposite party.—Hunt v. Oliver, Case No. 6,894.

§ 113. Report of master.

The master cannot report as to matters embraced in the bill, but not within his commission.—Gordon v. Hobart, Case No. 5,608.

§ 114. Reopening case.

A witness, who has given his deposition, which has been read at the hearing, cannot be examined anew before the master, without a special order of the court.—Gass v. Stinson, Case No. 5,261.

Defendant's request to introduce further evidence *held* rightly denied by the master where made after he had submitted a draft of his report.—Piper v. Brown, Case No. 11,181.

Witnesses cannot be examined the second time by a master without a special order of the court, and then only in respect to facts not before testified to by them, and not then in issue.—Jenkins v. Eldredge, Case No. 7,267.

The testimony of a witness thus examined the second time without a special order cannot be admitted to impeach his testimony on the original examination.—Jenkins v. Eldredge, Case No. 7,267.

The master or auditor should be requested to report specially such evidence as furnishes ground of exception. The facts will not be

opened except to correct unquestionable error.—Donnell v. Columbian Ins. Co., Case No. 3,987.

§ 115. Exceptions to rulings and report of master.

Exceptions to a master's report, not made before the master, will not be heard by the court, in the absence of special circumstances.—Gaines v. New Orleans, Case No. 5,177; American Nicholson Pavement Co. v. Elizabeth, Id. 309; Gass v. Stinson, Id. 5,261.

Exceptions not taken at the time objections are filed to the draft report of the master are waived after the final report.—Troy Iron & Nail Factory v. Corning, Case No. 14,196.

Questions raised before the master are considered as waived or abandoned if not made matter of exception, unless it appears on the face of the report that the master has committed an error.—Gordon v. Lewis, Case No. 5,613.

An exception should always be taken on the spot to each ruling of the master which the party intends to contest, though it need not then be drawn up in form.—Troy Iron & Nail Factory v. Corning, Case No. 14,196.

Exceptions to a master's report must be founded on the facts stated in the report, or in the accompanying documents and proofs.—Dexter v. Arnold, Case No. 3,858.

The party excepting should require the evidence upon which the exception is grounded to be stated by the master.—Greene v. Bishop, Case No. 5,763.

In exceptions to a master's report, a general assignment of errors is insufficient, unless specific errors are shown.—Dexter v. Arnold, Case No. 3,858; Greene v. Bishop, Id. 5,763; Stanton v. Alabama & C. R. Co., Id. 13,296.

An exception which merely alleges that the master has arrived at a wrong conclusion upon the evidence is insufficient.—Greene v. Bishop, Case No. 5,763.

A master's report cannot be objected to on the ground that he was not sworn, where the order of reference did not require him to be sworn.—Thompson v. Smith, Case No. 13,976.

After the case has been heard, neither party has a right to file any paper therein except by leave of court.—Union Sugar Refinery v. Mathiesson, Case No. 14,398.

§ 116. Hearing exceptions.

There is no rule in the circuit court forbidding a report to be considered at the term to which it is made.—Coates v. Muse, Case No. 2,916.

A new hearing of exceptions to a master's report will not be allowed.—Felch v. Hooper, Case No. 4,718.

§ 117. Setting aside report and recommitment.

Unless a particular error is pointed out, or an erroneous principle is shown to have been adopted, the master's report will not be disturbed.—Gaines v. New Orleans, Case No. 5,177; Mason v. Crosby, Id. 9,236.

Error of the master, producing results not materially different from what would be reached if there was no error, is no ground for setting aside or recommitting his report.—Mason v. Crosby, Case No. 9,236.

The court may direct further investigation where the master's report discloses facts which, in its opinion, should be further investigated.—Magic Ruffle Co. v. Elm City Co., Case No. 8,950.

§ 118. Compensation.

Fees of masters in equity suits, the amount, and how determined.—Doughty v. West, Bradley & Cary Mfg. Co., Case No. 4,030.

A special allowance made to a master for his services in executing a decree.—Erie Ry. Co. v. Heath, Case No. 4,516.

X. DECREE AND ENFORCEMENT THEREOF.

§ 119. Decree pro confesso.

Before a bill can be taken for confessed, defendant must have been ruled to answer.—Halderman v. Halderman, Case No. 5,908; Pendleton v. Evans, Id. 10,920.

The court will not permit the bill to be taken for confessed where defendant offers to file his answer.—Halderman v. Halderman, Case No. 5,908.

Where the allegations of the bill are so defective or vague that a precise decree cannot be rendered upon them, proof must be adduced before a decree can be made.—United States v. Samperyac, Case No. 16,216a.

The decree on a bill taken pro confesso is always nisi, to be made absolute at the term succeeding that at which service of a copy of a decree shall be returned executed, unless cause is shown to the contrary.—Pendleton v. Evans, Cases Nos. 10,920, 10,921.

Where a bill is taken pro confesso at one session of the court, and service of the decree is made and returned at the same session, it may be made absolute at the following session; otherwise it cannot be made absolute until the third session of the court.—Pendleton v. Evans, Case No. 10,921.

§ 120. Final decrees.

A decree against administrators for money in their hands unadministered is not a final decree.—Coates v. Muse, Case No. 2,916.

A decree requiring the payment of past and future annuities, and making provision for the execution of the same by the appointment of a commissioner and the sale of land, *held* a final decree.—Scott v. Hore, Case No. 12,535.

A decree nisi on default of appearance does not become absolute until the end of the term succeeding that to which the decree shall be returned "executed."—Stewart v. Smith, Case No. 13,436.

§ 121. Time of entry.

If the decree be not actually entered till after the death of the judge who drew it up and announced it, an entry may be made at the next term.—Doggett v. Emerson, Case No. 3,961.

The court cannot enter a final decree in case of default and decree pro confesso during the term when the default was taken.—Walz v. Brookville Nat. Bank, Case No. 17,137.

Since the amendment of equity rule 18, a final decree may be taken at any time after 30 days after the bill is taken pro confesso.—Consolidated Fruit-Jar Co. v. Strong, Case No. 3,130.

Orders and final decree taken under stipulation in pending case, in vacation, without sanction of court, not set aside on summary motion.—Bayerque v. Jackson Water Co., Case No. 1,136.

§ 122. Pleadings and proof to sustain.

The decree cannot be founded on proof of matters not alleged.—Robinson v. Cathcart, Case No. 11,947.

§ 123. Modification and amendment.

The court has power to modify a final decree until after the expiration of the term at which it was entered.—Reeves v. Keystone Bridge Co., Case No. 11,661.

The court may alter its judgment at any time before it is entered up, or, if entered, before it is made final; but after it has been announced it should not be altered without adequate reason and full hearing.—Doggett v. Emerson, Case No. 3,961.

Previous to entering the final decree the cause remains under the control of the court; any

interlocutory decree is subject to examination and modification.—Pullan v. Cincinnati & C. Air-Line R. Co., Case No. 11,462; Reeves v. Keystone Bridge Co., Id. 11,661.

§ 124. Opening, vacating, or setting aside.

The fact that any interest, however small, will profit thereby, is not sufficient ground to revoke a decree; the preponderance of equity on the whole case will be looked to.—In re Morris, Case No. 9,825.

A decree entered by mistake, though final, may be vacated by the court after the term in which it was rendered.—United States v. Castro, Case No. 14,754.

Where many terms have elapsed since the entering of a decree by consent and the payment of damages by defendant, leave will not be given him to file a supplemental bill to set aside the decree on the ground of a mistake of fact.—In re Pentlarge, Case No. 10,962.

§ 125. Operation and effect.

A decision of the supreme court, on appeal in a suit in equity, that plaintiff's remedy was by action at law, and remanding the cause for trial at law, is conclusive as to plaintiff's right thus to sue.—Central Ohio R. R. v. Thompson, Case No. 2,550.

The recitals in a judgment or decree by a competent court that defendants have been legally summoned are prima facie evidence thereof.—Norton v. Meader, Case No. 10,351.

Neither a decree ordering the conveyance of land situated in another state, nor a conveyance made pursuant to it, can operate beyond the jurisdiction of the court unless a conveyance is made by the person holding the title.—King v. Tuscumbia, C. & D. R. Co., Case No. 7,808.

A decree in equity will not be declared void for fraud because of suspicious circumstances connected with its rendition.—Jones v. Brittan, Case No. 7,455.

§ 126. Enforcement of decree.

An order need not be made limiting the time within which a decree rendered shall be performed before the party may be proceeded against for nonperformance.—Souter v. La Crosse R. R., Case No. 13,180.

Where a court of equity obtains control of a fund and the parties entitled to it, its distribution will be directed to the parties ultimately entitled thereto.—Thomson v. Bradford, Case No. 13,981.

XI. BILL OF REVIEW.

§ 127. Jurisdiction.

A circuit court has cognizance of a bill of review founded on newly-discovered evidence, pending an appeal to the supreme court from the decree sought to be reviewed.—Poole v. Nixon, Case No. 11,270.

The court may permit such a bill to be filed as an amendment by adding new matter and parties to the original record.—Poole v. Nixon, Case No. 11,270.

Act May 26, 1824, confers on the superior court of the territory of Arkansas the powers of a court of chancery for the purpose of trying the validity of claims mentioned therein, and a bill of review may be maintained therein.—United States v. Samperyac, Case No. 16,216a.

§ 128. Grounds.

Bill of review can only be sustained upon ground of error in the record, which does not include the evidence.—Barker v. Barker's Assignee, Case No. 987.

A bill of review lies for matter of error apparent on the face of the decree or record.—Dexter v. Arnold, Case No. 3,856; Yerrington v. Putman, Id. 18,137.

Miscalculation leading to an excessive decree may be obviated as a ground of review by entering a credit for the excess.—Massie v. Graham, Case No. 9,263.

A bill of review does not lie where the party seeks to set out a new title, and not to support the title in the original cause.—Dexter v. Arnold, Case No. 3,856.

A bill of review lies for errors in law.—Massie v. Graham, Case No. 9,263; Ross v. Prentiss, Id. 12,078; United States v. Samperyac, Id. 16,-216a.

A bill of review lies for newly-discovered evidence.—Dexter v. Arnold, Case No. 3,856; Massie v. Graham, Id. 9,263; Ross v. Prentiss, Id. 12,078; United States v. Samperyac, Id. 16,-216a.

But it must appear that such evidence was not known until after the period in which it could be used in the cause, and could not have been obtained by reasonable diligence before the original hearing.—Dexter v. Arnold, Case No. 3,856; Massie v. Graham, Id. 9,263; Yerrington v. Putman, Id. 18,137.

An entirely new title, in a new party, claiming adversely to all the original parties to a suit in which a title was established, cannot be considered newly-discovered matter, for the purpose of opening the decree in such suit by a bill of review.—Poole v. Nixon, Case No. 11,270.

Where the question of pedigree was decisive of the case, and the most trustworthy evidence was accessible in parish registers, in England, and the new evidence consisted merely of confirmatory writings, *held*, that the bill could not be maintained.—Poole v. Nixon, Case No. 11,270.

§ 129. Time of filing.

A bill in the nature of a bill of review lies only after a final decree, and not upon an interlocutory decree.—Jenkins v. Eldredge, Case No. 7,267.

If the decree be not enrolled, a bill in the nature of a bill of review, and not strictly a bill of review for newly-discovered evidence, lies.—Dexter v. Arnold, Case No. 3,856.

§ 130. Discretion of court.

The granting of a bill of review for newly-discovered evidence is matter of discretion.—Dexter v. Arnold, Case No. 3,856.

§ 131. Who may file.

A bill of review lies only in favor of a party or privy to the original suit, or of one who is aggrieved by the decree.—Poole v. Nixon, Case No. 11,270.

A bill of review lies for the party who obtained the original decree in his own favor, if the original decree was injurious to him.—Dexter v. Arnold, Case No. 3,856.

§ 132. Form and sufficiency.

A bill of review should state the former proceedings and wherein the party exhibiting it considers himself aggrieved.—Kellom v. Easley, Case No. 7,668.

§ 133. Conditions precedent.

A party is not entitled to bring a bill of review unless he obeys and performs the decree.—Swan v. Wright, Case No. 13,670.

Or the party must give security for its performance.—Poole v. Nixon, Case No. 11,270.

It is not necessary in all cases to comply with a decree before it can be reviewed, as where a conveyance is required by it.—Massie v. Graham, Case No. 9,263.

Neither the bill to foreclose a mortgage given to secure three notes, nor the decree, accounted or provided for one of the notes. *Held*, that a bill of review would lie by defendants even though the decree had not been executed.—Phillips v. Mariner, Case No. 11,105.

§ 134. Proceedings to procure bill of review.

The proper practice in respect to filing bills of review is by petition stating the grounds and asking leave to file the bill.—Massie v. Graham, Case No. 9,263; Dexter v. Arnold, Id. 3,856.

A petition for review in the orphans' court is analogous to a bill of review in chancery.—Mauro v. Ritchie, Case No. 9,312.

Where a bill of review is sought on the ground of errors in law, the bill is filed without leave of court, but, where the ground for the bill is newly-discovered evidence, such leave must be obtained.—Ross v. Prentiss, Case No. 12,078.

A petition to the court for a bill of review must describe the new evidence distinctly and specifically, and when discovered, and its bearing on the decree.—Dexter v. Arnold, Case No. 3,856.

A bill of review must be supported by affidavit showing that the new matter was not known, and could not have been ascertained, at the time of the decree—Poole v. Nixon, Case No. 11,270.

Upon a bill of review for newly-discovered evidence, the other party may controvert by plea or answer that it is newly discovered.—Dexter v. Arnold, Case No. 3,856.

On filing a bill of review, complainant must give security, or deposit a sum of money for satisfying the costs, and damages for delay.—Swan v. Wright, Case No. 13,670.

Where complainant fails to give security or make a deposit, the bill will not be instantly dismissed, but he will be required, on motion, to give the security or make the deposit.—Swan v. Wright, Case No. 13,670.

§ 135. Laches.

Lapse of time will bar a review, especially where death of persons interested leaves no probability of explanation.—Massie v. Graham, Case No. 9,263.

A bill of review is brought for errors apparent on the face of the decree, and the time in which the bill may be filed is limited to five years by analogy to the limitation of the writ of error.—Whiting v. Bank of United States, Case No. 17,576.

ERROR, WRIT OF.

See "Appeal and Error."

ESCAPE.

Attempts as evidence, see "Criminal Law," §§ 56, 57.
Liability for, see "Execution," § 26; "Sheriffs and Constables," § 4.

ESCHEAT.

§ 1. Real property.

An inquest of office for lands escheating to the government by reason of alienage is not conclusive against a person neither party nor privy thereto, nor a tenant at the time, and he may show that there are lawful heirs, not aliens, in esse.—Stokes v. Dawes, Case No. 13,477.

Seisin by the commonwealth under such inquest will be deemed to continue until the title is lawfully parted with.—Stokes v. Dawes, Case No. 13,477.

A resolve of the legislature, releasing such title to another, may be construed as a grant if necessary to give it effect.—Stokes v. Dawes, Case No. 13,477.

ESCROWS.

§ 1. Who may be depositary.

A deed can never be delivered as an escrow to the grantee himself.—Flagg v. Mann, Case No. 4,847.

§ 2. What constitutes and effect of delivery in escrow.

It is not necessary to a delivery in escrow that the obligee shall be privy thereto, or that the condition is to be performed by him.—Mayor and Commonalty v. Moore, Case No. 9,359.

Mortgagee in good faith from grantee in deed deposited in escrow, and recorded by depositary without notice to grantor, will be protected.—Bailey v. Crim, Case No. 734.

ESTABLISHMENT.

Of boundaries, see "Boundaries," § 5.
Of canals, see "Canals."
Of highways, see "Highways," § 1.
Of lost instruments, see "Lost Instruments."
Of railroads, see "Railroads," §§ 21–24.
Of telegraphs or telephones, see "Telegraphs and Telephones," § 1.
Of trust, see "Trusts," §§ 41–48.
Of will, see "Wills," §§ 13–22.

ESTATES.

Created by deed, see "Deeds," § 11.
—— by will, see "Wills," §§ 31–38.
Decedent's estate, see "Descent and Distribution"; "Executors and Administrators."
Reservation of rents on conveyance in fee, see "Ground Rents."
Restrictions on creation of future estates, see "Perpetuities."

Particular estates.

See "Curtesy"; "Dower"; "Estates Tail"; "Joint Tenancy"; "Life Estates"; "Remainders"; "Tenancy in Common."
Estates for years, see "Landlord and Tenant."

§ 1. Merger of estates.

Where a devisee in remainder in fee purchases the life estate, he becomes tenant in fee simple, and the life estate becomes merged in the remainder.—Webster v. Gilman, Case No. 17,335.

Where the legal estate and the trust estate are coextensive, and both become vested in the same person, there is a merger of the trust estate in the legal estate.—Robison v. Codman, Case No. 11,970.

A mortgagee purchased the mortgaged premises at a sale under a judgment obtained by him on his mortgage bond. *Held*, that the equity of redemption was merged in the legal title.—Hill v. Smith, Case No. 6,499.

The union of the mortgage and the fee in the mortgagee does not merge the estates, where the mortgagee transfers the mortgage before dealing with the property, although the transfer is not recorded.—Oregon & W. Trust Inv. Co. v. Shaw, Cases Nos. 10,556, 10,557.

A legal estate in a term for years does not merge in an equitable title to the reversion.—Litle v. Ott, Case No. 8,389.

ESTATES TAIL.

See, also, "Trusts," § 10.
Created by will, see "Wills," § 34.

§ 1. Conveyance to bar entail.

The issue in tail, with assets, are barred by their ancestor's deed of bargain and sale, with warranty; and where other land descends, liable to a charge, it is assets pro tanto.—Minge v. Gilmour, Case No. 9,631.

ESTOPPEL.

§ 1, By record—Pleading. § 2, Estoppel by deed—Grantors, mortgagors, and privies. § 3, —— Grantees. § 4, —— Parties to bond. § 5, —— Estates and

rights subsequently acquired. § 6, Equitable estoppel—Nature and essentials in general. § 7, —— To whom doctrine applies in general. § 8, —— Grounds of estoppel. § 9, —— Pleading estoppel.

As to notice or proofs of loss of property insured, see "Insurance," §§ 152–157.
By patent, see "Patents," § 124.
Of municipal corporation, see "Municipal Corporations," §§ 13, 31.
Of principal by agent's act, see "Principal and Agent," § 22.
Of United States, see "United States," § 21.
To allege or deny corporate existence, see "Corporations," § 11.
To avoid or forfeit insurance policy, see "Insurance," §§ 89–95.
To claim appeal, see "Appeal and Error," § 7.
To deny partners authority, see "Partnership," § 30.
—— relation of partnership, see "Partnership," § 3.
To set up act of bankruptcy, see "Bankruptcy," § 90.
—— usury, see "Usury," § 12.

§ 1. By record—Pleading.

See, also, "Judgment," §§ 46–51, 65, 66.

Estoppel by statements in pleadings does not arise except as to matters necessarily alleged as the basis of the cause of action or defense. —In re Kitzinger, Case No. 7,861.

Allegations in a complaint that the three defendants were partners, and that plaintiff loaned money to them as such, does not estop him, after recovering judgment against the three, from showing, in another proceeding, that one was not a partner, but was liable as a surety by reason of holding himself out as a partner.—In re Kitzinger, Case No. 7,861.

A verified complaint by persons in possession of land to compel a transfer of legal title from persons alleged to hold in trust for them estops them in subsequent ejectment to allege an adverse holding.—Adams v. Burke, Case No. 49.

An admission, in an answer to a bill in equity, that a deed bears a certain date, does not estop the defendant from showing the deed was not then delivered, and was fraudulently antedated. —Holbrook v. Worcester Bank, Case No. 6,597.

Facts stated in a defense do not amount to an estoppel unless pleaded as such.—Moreland v. Marion County, Case No. 9,794.

The statute of limitations intervening after the dismissal of a suit on plea of a defense which was subsequently held by a court of last resort in another action not to be good may be pleaded by defendant in a second action against him for the same cause.—Turner v. Edwards, Case No. 14,254.

§ 2. Estoppel by deed—Grantors, mortgagors, and privies.

The parties to a deed are estopped to deny the consideration stated therein.—Powell v. Monson & Brimfield Mfg. Co., Case No. 11,356.

The recitals in a deed estop only parties or privies claiming under or against it, and in a controversy founded upon its covenants.—Burr v. Duryee, Case No. 2,190.

The question whether the recitals of a deed tending to show the execution of a former deed by the same grantor to another grantee estopped the grantor, and those claiming under him, from denying the fact of the execution of such deed, cannot be determined unless the fact of its execution is put in issue by bringing a bill to set it up as a lost deed.—Vint v. King, Case No. 16,950.

The grantor is not estopped by recitals in the deed to show in an action for the purchase price that the consideration has not been paid.—Taggart v. Stanbery, Case No. 13,724.

Where a state grants to a town the use of certain land for the benefit of the town, it is estopped from claiming a forfeiture by reason of a condition broken before the grant was made.—Vermont v. Society for Propagation of the Gospel, Case No. 16,920.

A person claiming an interest in land, who assists in its conveyance to another, without giving notice of his claim, is estopped from subsequently setting it up.—Shapley v. Rangeley, Case No. 12,707.

Where the vendor of mill property led the vendee to believe that certain machinery was on the premises, and induced him to contract with such understanding, he is estopped to claim that it did not pass by the deed.—Smith v. Schroeder, Case No. 13,103.

§ 3. —— Grantees.

A vendee who enters into possession under the vendor cannot dispute the latter's title unless he yields up possession.—Pintard v. Goodloe, Case No. 11,171.

The assumption of a mortgage in a deed estops the grantee to claim as an innocent purchaser, where the mortgage contained a fatally defective description.—Reeves v. Vinacke, Case No. 11,663.

A grantee in possession under an unrecorded deed *held* not estopped, as against a subsequent mortgagee from his grantor, by signing a written appraisement on the application for the loan, in ignorance of the fact that his land was included.—Gum v. Equitable Trust Co., Case No. 5,867.

A person receiving a deed in fee from a tenant in tail is not estopped in ejectment, by the issue in tail to deny the validity of plaintiff's title, as the alleged estoppel is not mutual.—Gardner v. Sharp, Case No. 5,236.

A purchase by a city of the rights of parties occupying ground claimed as dedicated to the public does not affect its claim under the dedication.—Ruch v. Rock Island, Case No. 12,105.

§ 4. —— Parties to bond.

An assignor of a bond is not estopped to deny its validity at law.—Moncure v. Dermott, Case No. 9,707.

Recitals in bond estop parties thereto in action thereon.—Allen v. Magruder, Case No. 230.

§ 5. —— Estates and rights subsequently acquired.

A subsequently acquired title will not inure to the benefit of a grantee under a quitclaim deed; but, under a warranty, such title will inure by way of estoppel.—Farmers' Loan & Trust Co. v. McKinney, Case No. 4,667.

A quitclaim deed made before, but acknowledged after, the date of the title of the grantor will pass the same.—Farmers' Loan & Trust Co. v. McKinney, Case No. 4,667.

One who undertakes by deed to convey an indefeasible estate in fee simple, though there are no covenants of warranty, will not be allowed to set up against his vendee, or one claiming under him, a subsequently acquired title.—McGill v. Jordan, Case No. 8,795a.

§ 6. Equitable estoppel—Nature and essentials in general.

See, also, "Ejectment," § 6.

Where a person, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.—Willis v. Carpenter, Case No. 17,770; Griffin v. Clinton Line Extension R. Co., Id. 5,816.

To constitute an estoppel, there must be some intended deception of the party to be estopped,

or such gross negligence on his part as to amount to a constructive fraud, by which another has been misled to his injury.—Wyckoff v. Page, Case No. 18,106b.

Declarations and conduct of party *held* insufficient to create an estoppel in pais.—Fields v. Squires, Case No. 4,776.

The doctrine of estoppel in pais does not extend so far as to enable a person or corporation to do in effect what is forbidden by law, or what they are otherwise incapable of doing.—In re Comstock, Case No. 3,078.

§ 7. —— To whom doctrine applies in general.

The principle of estoppel applies to acts of corporations equally with those of individuals.—Toppan v. Cleveland, C. & C. R. Co., Case No. 14,099.

The doctrine of estoppel applies to a state as well as to private persons.—Vermont v. Society for Propagation of the Gospel, Case No. 16,920.

The government having prescribed the terms upon which a person can engage in the business of distilling, a person having accepted those terms and entered upon the business cannot afterwards question their binding force.—Nusbaum v. Emery, Case No. 10,380.

Where the duly-authorized agent expresses himself as satisfied with work done, and with the account rendered therefor, the owner is estopped to object either to the price or the workmanship. —The Planter, Case No. 11,207.

§ 8. —— Grounds of estoppel.

The purchase of a license to use a patented machine does not estop the licensee, in an action for infringement, from showing any defense available to a stranger.—Burr v. Duryee, Case No. 2,190; Mitchell v. Barclay, Id. 9,659.

Defendant held estopped from contesting the validity of complainant's patent by an agreement to discontinue manufacture.—Brooks v. Moorhouse, Case No. 1,956; Parkhurst v. Kinsman, Id. 10,757. CONTRA, see Mannie v. Everett, Case No. 9,039.

One who recommends an invention to another, disclaiming all interest therein, is estopped from claiming a prior invention.—Carroll v. Gambrill, Case No. 2,454.

Persons swearing to registry and license of vessel estopped to deny truth of its recitals.—Adams v. The Wyoming, Case No. 71.

One representing a vessel to be either foreign or domestic is estopped from setting up the contrary.—The George T. Kemp, Case No. 5,341.

Admission by opposite party to prevent continuance that absent witness would testify as stated in affidavit will not estop him to meet such testimony at the trial.—Bestor v. Sardo, Case No. 1,363.

A person is estopped to deny the existence of the authority exercised by another claiming to represent him where he neglects to look after his interests for an unreasonable length of time. —In re Jewett, Case No. 7,306.

Testimony of the author and assignor of the copyright of a book on an issue of ownership in an action of infringement brought by the assignee, that by the agreement produced he intended to assign all his rights, will estop his legal representatives from subsequently claiming that the assignment was confined to the original term of 14 years.—Cowen v. Banks, Case No. 3,295.

The owner who stands by and knowingly suffers an innocent person to be misled by his silence, and to purchase his property, without giving him notice of his title, is estopped in equity thereafter to claim it.—The Sarah Ann, Case No. 12,342.

The owners of property, who continue their superintendence and payments on account of work done after the time fixed for its completion, *held* estopped to claim damages for the delay.—The Isaac Newton, Case No. 7,089.

Where defendants under contract to sell and deliver bonds to plaintiffs, subsequently state that they must be at plaintiffs' risk as to genuineness, and give opportunity for examination, and plaintiffs pay for the bonds, and telegraph defendants that they are all right, plaintiffs are estopped to insist upon their rights under the original contract.—Utley v. Donaldson, Case No. 16,807.

Where the judgment creditor is a competitor in bidding on a sale under his execution, he is not estopped, by receipt of the purchase money from the successful bidder, to subsequently set up his want of capacity to take the title.—Russell v. Topping, Case No. 12,163.

A person who, by overt act, deprived himself of the legal capacity to do an act, *held* estopped from denying that he had such capacity.—Bleecker v. Bond, Case No. 1,534.

An agreement made by plaintiff with a warehouseman to take certain winter wheat in part payment for a special deposit of spring wheat converted by him will not estop plaintiff from suing for the conversion where defendant had no title to the winter wheat.—Thielman v. Reynolds, Case No. 13,883.

A person who took a bill of sale as security, and persisted, in an action to recover the goods, in claiming the absolute ownership, is estopped from thereafter claiming them as security.—Willis v. Carpenter, Case No. 17,770.

The maker of a note given for stock, which has been held out as an asset of the corporation for two years, was not allowed, as against its assignee in bankruptcy, to set up the defense that the sale of stock was induced by the fraudulent representations of the officers of the corporation.—Farrar v. Walker, Case No. 4,679.

Mortgagor assisting judicial sale of premises, by his signature, waiving matters of form, and surrendering possession, *held* estopped from asserting want of proper authority to sell.—Cromwell v. Bank of Pittsburg, Case No. 3,409.

An acquiescence for nearly 20 years in a boundary established by a government official in discharge of his duties, in conformity to which improvements have been made, will estop one of the owners to assert that the line is erroneous.—United States v. Castro, Case No. 14,750.

What considerations, by way of equitable estoppel, will not operate to prevent a recovery by a plaintiff in an action at law to recover the possession of land.—De Mill v. Lockwood, Case No. 3,782.

§ 9. —— Pleading estoppel.

Form of plea of estoppel.—Moreland v. Marion County, Case No. 9,794.

Estoppel by a former suit is not available unless alleged in anticipation of the defense.—Blandy v. Griffith, Case No. 1,529.

A plea of estoppel by conduct, not showing that the defendant was ignorant of the truth of the matter or could not have conveniently ascertained the same, nor that the defendant had acted upon the matter claimed as an estoppel, will be stricken out on motion.—Wythe v. Salem, Case No. 18,121.

EVICTION.

Of tenant, see "Landlord and Tenant," § 7.

EVIDENCE.

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In suits for forfeiture, see "Customs Duties," §§ 102–105; "Forfeitures," §§ 9, 23; "Internal Revenue," §§ 84–86; "War," § 20.

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As to particular facts or issues.

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See "Admiralty," §§ 93–96; "Assault and Battery," § 4; "Assumpsit, Action of," § 6; "Bankruptcy," §§ 130–132, 424; "Cancellation of Instruments," § 9; "Collision," §§ 130–134; "Contempt," § 2; "Covenant, Action of," § 5; "Creditors' Suit," § 9; "Debt, Action of," § 4; "Ejectment," §§ 12–14; "Equity," §§ 91–93; "False Imprisonment," § 5; "Habeas Corpus," § 11; "Libel and Slander," §§ 18–21; "Malicious Prosecution," § 8; "Money Received," § 2; "Reformation of Instruments," § 7; "Replevin," § 10; "Salvage," § 67; "Trespass to Try Title"; "Trover and Conversion," § 3.
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I. JUDICIAL NOTICE.

§ 1. Acts of congress and state laws.

The federal courts take judicial notice of the acts of congress, and they need not be set forth or specially referred to in the proceedings before them.—United States v. Randall, Case No. 16,118.

Act Cong. March 3, 1817, entitled "An act to incorporate the subscribers to certain banks in the District of Columbia," is a public law.—Central Bank v. Tayloe, Case No. 2,548.

The federal courts take judicial notice of the state laws.—Gordon v. Hobart, Case No. 5,609; Jasper v. Porter, Id. 7,229; Merrill v. Dawson, Id. 9,469; Smith v. Tallapoosa County, Id. 13,113; Woodworth v. Spafford, Id. 18,020.

Judicial notice will be taken of the laws of a state whose territory once included the lands in controversy.—Brownsville v. Cavazos, Case No. 2,043.

§ 2. Official positions and acts.

The federal courts are bound to take notice of the officers of the respective courts of the United States.—Buford v. Hickman, Case No. 2,114a.

The federal courts and judges cannot take judicial notice of justices of the peace of another state.—In re Keeler, Case No. 7,637.

It is the duty of the court to take notice of the sufficiency of the returns of its officers.—Von Roy v. Blackman, Case No. 16,997.

§ 3. Manner and usage of trade.

The court will not take judicial notice of how long it may take an express company to carry money between two places.—Rice v. Montgomery, Case No. 11,753.

The court will take judicial notice that commerce is carried on by the inhabitants of Astoria on Long Island by means of ferry boats.—The Sunswick, Case No. 13,624.

A prize court will take judicial notice of the notorious course of trade between a certain neutral port and blockaded ports of the enemy.—The Mersey, Case No. 9,489.

§ 4. Geographical facts.

The court will take judicial notice that Astoria is on Long Island.—The Sunswick, Case No. 13,624.

Judicial notice will be taken that the collection district of Oregon is within limits of the United States.—The Active, Case No. 33.

Courts are bound to take judicial notice of public navigable waters, the boundaries of states and counties, and the location of cities and towns.—King v. American Transp. Co., Case No. 7,787.

§ 5. Political and municipal divisions.

The court will take judicial notice of the subdivision of the state into counties and the county seats.—Gager v. Henry, Case No. 5,172.

As counties are established by public law, their existence need not be proved.—Lyell v. Lapeer County, Case No. 8,618.

§ 6. Powers of municipal corporations.

The courts will judicially notice powers of a public nature conferred upon a municipal corporation, created by legislative act, though the act is not in terms declared to be public.—Fauntleroy v. Hannibal, Case No. 4,691.

§ 7. Jurisdiction of courts.

The federal court will take cognizance of the constitution and laws of the state on the subject of her courts, and ascertain which are courts of general jurisdiction.—Nelson v. Foster, Case No. 10,105.

§ 8. Particular instances.

The conditions of war and peace are purely for political determination, and courts will not

take judicial notice that hostilities of the late Civil War ceased, and peace was restored, by the surrender of any particular army. Case No. 15,957 reversed.—United States v. One Thousand Five Hunded Bales of Cotton, Case No. 15,958. But see Cuyler v. Ferrill, Case No. 3,523.

Judicial notice will be taken of the legal coins made at the United States mint, and of foreign coins made current by law.—United States v. Burns, Case No. 14,691.

The federal court will take judicial notice of the seals of the various states.—Ex parte Garnet, Case No. 5,243.

Judicial notice will be taken of the general condition of the country and of the titles to lands in Oregon prior to the donation act.—Lamb v. Davenport, Case No. 8,015.

The federal courts will take judicial notice of the existence of all national banks.—United States v. Williams, Case No. 16,706.

The judges of the supreme court of the United States, whose jurisdiction is coextensive with the country, are bound to take judicial notice of the existence of slavery in those states where it prevails.—Miller v. McQuerry, Case No. 9,583.

The court will take judicial notice that a shipper from a certain neutral port is a person shown by its records to be actively engaged in running the blockade.—The Minna, Case No. 9,634.

II. PRESUMPTIONS AND BURDEN OF PROOF.

In criminal prosecutions, see "Counterfeiting," § 11; "Criminal Law," § 52; "Homicide," § 6; "Internal Revenue," § 105; "Larceny," § 9.

As to particular facts or issues.

See "Adverse Possession," § 10; "Collision," § 130; "Death," § 1; "Dedication," § 5; "Deeds," § 14; "Domicile," § 5; "Payment," §§ 14, 19, 20.

Cause of injury to goods shipped, see "Shipping," §§ 171, 178.

Construction of will, see "Wills," § 25.

Contributory negligence, see "Negligence," § 4.

Credit to vessel, see "Maritime Liens," § 11.

Legitimacy, see "Bastards," § 1.

Malice, see "Libel and Slander," § 6.

Sanity, see "Insane Persons," § 1; "Wills," § 5.

In particular actions or proceedings.

See "Appeal and Error," § 32; "Bankruptcy," §§ 130, 576; "Ejectment," § 12; Libel and Slander," § 19.

Accounting of profits for infringement, see "Patents," § 258.

Against carrier, see "Carriers," §§ 15, 25, 46.

For forfeiture, see "Customs Duties," § 102; "Internal Revenue," § 84.

For infringement of patents, see "Patents," §§ 228, 258.

On bills and notes, see "Bills and Notes," § 100.

On insurance policy, see "Insurance," §§ 174–176.

Prize proceedings, see "War," § 60.

§ 9. Of possession and ownership.

A person seised in fee simple has constructive possession, and will be presumed to be in actual possession until the contrary appears.—Lamb v. Burbank, Case No. 8,012.

When certain property is shown to belong to a particular person, the presumption is that the ownership remains unchanged, until the contrary appears.—United States v. Mathoit, Case No. 15,740.

A recital in a deed under which possession has been held for 60 years, that the grantor is heir, and sells as such, is prima facie evidence of the fact.—Stokes v. Dawes, Case No. 13,477.

§ 10. Of freedom.

In assault and battery, the plaintiff, being a mulatto, cannot, at the trial upon the general issue, be compelled to prove his freedom.—Murray v. Dulany, Case No. 9,960.

§ 11. As to mailing and delivery of mail matter.

Letters not presumed to have been received on proof of mailing only.—Allen v. Blunt, Case No. 217.

The deposit of a letter in the post office, postage prepaid, directed to a person at his usual place of residence, is evidence from which its receipt by the addressee may be inferred.—United States v. Babcock, Case No. 14,485.

§ 12. As to delivery of telegrams.

The delivery of telegraphic dispatches addressed to defendant to the doorkeeper at the executive mansion, where defendant had an office as private secretary of the president, *held* sufficient evidence from which their delivery to defendant might be inferred.—United States v. Babcock, Case No. 14,485.

§ 13. Of nature of transaction from previous transaction.

A deed stating a nominal consideration cannot be presumed to have been made for an illegal consideration from the fact that a deed on the day before was made on such consideration.—Ridgeway v. Ogden, Case No. 11,814.

§ 14. From spoliation and failure to produce testimony.

All doubts will be resolved adversely to defendant, who failed to produce his books of account, which would have assisted his defense if made in good faith.—United States v. Chaffee, Case No. 14,774.

All doubts will be resolved adversely to a party who has voluntarily destroyed proof or placed it beyond the reach of the party.—United States v. Chaffee, Case No. 14,774.

§ 15. Burden of proof.

In cases of negative allegations, the burden of proof rests on the party holding the affirmative, especially where the facts lie particularly in his privity and knowledge.—United States v. Hayward, Case No. 15,336.

Non assumpsit, sworn to, puts in issue the execution of the writing sued on, and it then devolves on the plaintiff to prove the execution.—Gray v. Tunstall, Case No. 5,730.

Defendant has the burden of sustaining, by record evidence, his plea of another action pending.—Fowler v. Byrd, Case No. 4,999a.

III. RELEVANCY AND COMPETENCY IN GENERAL.

§ 16. Facts relevant to issues.

Facts which, if standing alone, would be irrelevant, are admissible upon the statement of counsel that they constitute a part of a chain of evidence which, as a whole, would be relevant.—United States v. Flowery, Case No. 15,122.

The court may direct at what part of such proposed chain of evidence counsel shall begin.—United States v. Flowery, Case No. 15,122.

A representation by the seller to a stranger, and by him communicated to a third person, so as to become the basis of a purchase by the latter, is not res inter alios acta.—Crocker v. Lewis, Case No. 3,399.

Evidence to prove a particular course of trade, or other matters in the nature of facts, is proper; but not to prove how a law is considered

by merchants.—Ruan v. Gardner, Case No. 12,100.

In a civil suit, evidence in support of defendant's good character is inadmissible, when his character has not been impeached.—Ketland v. Bissett, Case No. 7,742.

§ 17. Similar transactions.

Evidence of similar previous fraudulent transactions with third persons is admissible on the question of fraud in a particular transaction.—Bottomley v. United States, Case No. 1,688. But see Jones v. Knowles, Case No. 7,474.

Representations by an agent that certain invoices exhibited to him by a purchaser were true invoices sent by the principal are admissible against the principal for the purpose of showing the falsity of certain other invoices under which the goods were entered.—United States v. Three Cases, etc., Case No. 16,497.

§ 18. Res gestæ.

What constitutes a part of the res gestæ.—Westcot v. Bradford, Case No. 17,429.

Statements by the parties at the time of making an agreement *held* admissible as evidence of the agreement.—Hunter v. Marlboro, Case No. 6,908.

Declarations of a person at the time of changing his residence are admissible to show the intent, but not to make out a case for himself.—Doyle v. Clark, Case No. 4,053.

The statements of the bearer of a key of leased premises, made on returning it, are admissible as a part of the act.—United States v. Tarr, Case No. 16,434.

In an action against a steamboat company for an injury to a passenger accidentally caused in a disturbance among soldiers on board the boat, evidence of a conversation between military officers, at about the time of the disturbance, *held* admissible as part of the res gestæ.—Flint v. Norwich & N. Y. Transp. Co., Case No. 4,874.

Conversations of a party with other persons on a subject of a kindred character near the time of the transaction, and illustrating his intention, are competent evidence for the other party.—Warner v. Daniels, Case No. 17,181.

Agreements between partners before fitting out a vessel may be proved on their part by their conversations, as a part of the res gestæ.—Macy v. De Wolf, Case No. 8,933.

The acts and declarations of a person as to his intention in remaining in or removing from a country, though not simultaneous therewith, are admissible to prove his intention.—Tobin v. Walkinshaw, Case No. 14,070.

§ 19. Competency.

When the intent or guilty knowledge of a party is material to the issue, collateral facts tending to establish such intent or knowledge are properly admissible in evidence.—United States v. One Hundred and Forty-Six Thousand Six Hundred and Fifty Clapboards, Case No. 15,935.

Reputation is competent proof of the name of a person, place, or house.—United States v. Dodge, Case No. 14,974.

Evidence of general reputation of a fact can only be given where the persons are dead, or where their death may be presumed from length of time.—Joice v. Alexander, Case No. 7,435.

A power to release a debt cannot be proved by general reputation.—Bennett v. Adams, Case No. 1,316.

Testimony that a particular person's pedigree was a matter of common reputation construed, and its effect determined.—Dussert v. Roe, Case No. 4,200.

Authenticated public documents, giving account of all the mines and all the abandoned mines in a certain place, are not evidence to prove that a certain mine did not exist.—United States v. Gardiner, Case No. 15,186a.

In an action for the fraudulent sale of a mine, statements of third persons to defendants, favorable to its character and value are admissible in reply to evidence of unfavorable statements made to defendants.—Emma Silver Min. Co. v. Park, Case No. 4,467.

The testimony of a tax assessor as to whom property is assessed on the books *held* admissible to prove payment of taxes by such party.—Holmead v. Chesapeake & O. Canal Co., Case No. 6,626.

The acknowledgment of a debt by an alleged partner is not competent to prove the partnership as against the co-partner.—Corps v. Robinson, Case No. 3,252.

Evidence competent for one purpose, but incompetent for another, is admissible, subject to proper instruction.—Lastrapes v. Blanc, Case No. 8,100.

The lawfulness or unlawfulness of the mode by which evidence is obtained does not affect its admissibility.—United States v. The La Jeune Eugenie, Case No. 15,551.

IV. BEST AND SECONDARY EVIDENCE.

See, also, post, §§ 63–74.

§ 20. What is best and what secondary evidence—Of judicial acts, records, and proceedings.

Oral evidence as to the contents or purport of an indictment, verdict, or judgment is not admissible.—Gass v. Stinson, Case No. 5,261.

The verdict of the jury on the trial of a claim by a third person to property levied on under execution cannot be proved by parol.—Lawrence v. Sherman, Case No. 8,144.

Parol evidence cannot be given of a statement of account by a master in chancery in a suit pending in another court.—Sutton v. Mandeville, Case No. 13,648.

Naturalization cannot be proved by parol.—Slade v. Minor, Case No. 12,937.

Parol evidence is admissible to show that there was in fact no judgment rendered by a justice of the peace, as stated in the execution.—Devlin v. Gibbs, Case No. 3,842.

§ 21. —— Of official acts and proceedings and records.

Parol evidence is not admissible to prove the licensing of a pilot, where the statute requires a record to be made by the secretary of the board of pilot commissioners.—The California, Case No. 2,313.

The receipts of a collector of taxes are not evidence on proof of his handwriting, where he is within the jurisdiction of the court.—Milligan v. Mayne, Case No. 9,606.

A copy of a deed of land from the official record book is admissible, without accounting for the original.—Peltz v. Clarke, Case No. 10,914.

Record copy of deed *held* admissible without producing the original or accounting for its nonproduction.—Thomas v. Magruder, Case No. 13,904.

A record copy of a bill of sale of goods is not evidence, as such instrument need not be recorded.—Lemon v. Bacon, Case No. 8,241.

County surveyors who officially know that certain lands are covered with prior surveys are competent witnesses to prove the fact.—Jones v. Bache, Case No. 7,454.

A connected map of a number of surveys, duly recorded, is evidence, when accompanied by the

explanations of the surveyors, without producing the separate surveys.—Jones v. Bache, Case No. 7,454.

§ 22. —— Of private contracts and publications.

A note paid by a renewal note, and given up to the maker, may be proved by the former holder by parol.—Bank of Washington v. Peirson, Case No. 953.

In covenant by a lessor's assignee against the lessee's assignee, plaintiff may prove the lessee's assignment by parol evidence of possession and payment of rent by defendant.—May v. Sheehy, Case No. 9,335.

The original entries in a book of accounts must be produced, and not a copy.—James v. Wharton, Case No. 7,187; Ellicott v. Chapman, Id. 4,385; Lombard v. McLean, Id. 8,471.

A letter from defendant's agent to plaintiff's agent is not admissible on behalf of defendant where the former can be produced.—Vasse v. Mifflin, Case No. 16,895.

Oral evidence is inadmissible as to the contents of letters received by the witness.—De Tastett v. Crousillat, Case No. 3,828.

A letter-press copy made at the same time cannot be received as an original paper.—Chapin v. Siger, Case No. 2,600.

Testimony of the agent of a party that a certain amount was concluded upon after examination of an account current *held* prima facie sufficient, without producing the account.—Molson v. Hawley, Case No. 9,702.

Statements in a deposition that witness paid a sum of money and took a receipt may be read in evidence, though the receipt be not produced.—Meade v. Keane, Case No. 9,373.

A receipt for money is inadmissible to prove on whose account it was paid, as the person who paid it should be produced.—Jordan v. Wilkins, Case No. 7,527.

A copy sworn to be correct by the witness, who had access to, but did not produce, the original paper before the officer who took the deposition, is not good evidence.—Comstock v. Carnley, Case No. 3,081.

After notice given to produce the original policy of insurance, and proof of the existence thereof, the register in the hands of the company should be introduced in evidence, and not a copy therefrom.—United States v. The Paul Shearman, Case No. 16,012.

Evidence of an acknowledgment by defendant of the note sued on *held* inadmissible, where there was a subscribing witness, and his testimony was not produced.—Smith v. Carolin, Case No. 13,020.

§ 23. —— Testimony of several witnesses to the same fact.

The testimony of one of several eyewitnesses to the same facts is admissible without producing the others.—United States v. Gibert, Case No. 15,204.

§ 24. Admission of secondary evidence—Loss or inaccessibility of primary evidence.

A copy of a writing is admissible where the original is lost or destroyed, or beyond the power of the party to produce.—Halderman v. Halderman, Case No. 5,909; Moore v. Voss, Id. 9,778; Ransdale v. Grove, Id. 11,570; Spencer v. Spencer, Id. 13,233; United States v. Chenault, Id. 14,791; Same v. Lambell, Id. 15,553; Same v. Lynn, Id. 15,649; Same v. Porter, Id. 16,074; Same v. Wary, Id. 16,645; Wilson v. Young, Id. 17,849.

Secondary evidence will not be admitted where a written contract was not lost nor destroyed, but only mislaid, though the party makes oath that he has made diligent search, and cannot find it.—Riggs v. Tayloe, Case No. 11,832.

A witness, whose books are out of his reach, so that he cannot have access to them, may testify to their contents.—Gass v. Stinson, Case No. 5,262.

Secondary evidence may be given of the contents of a note which had been placed in the hands of an attorney for collection and could not be found on diligent search after his death.—Patriotic Bank v. Little, Case No. 10,809.

It is presumed, where a party holds under a deed of general warranty, that the title papers are in the hands of the warrantor, and the warrantee may give in evidence certified copies.—Cook v. Hunter, Case No. 3,161.

Where the clerk is dead who made the entries in a book of accounts, his handwriting may be proved.—James v. Wharton, Case No. 7,187.

One who has destroyed a paper to prevent its being used in evidence cannot prove its contents by secondary evidence.—The Ariadne, Case No. 526.

Where books produced under notice are not allowed to be used by the other side, parol evidence of their contents is competent.—Carr v. Gale, Case No. 2,435.

Marks on the heads of barrels may be described by a witness to identify them, without proving the loss or destruction of such heads.—United States v. Graff, Case No. 15,244.

An affidavit of loss and inability to produce a paper after the use of due diligence is sufficient to let in secondary evidence of its contents.—Boyle v. Arledge, Case No. 1,758; Nicholls v. White, Id. 10,235.

The loss of the warrant of survey cannot be proved by a certificate of the register of a vice admiralty court, but the fact of loss must be proved under a commission.—Robinson v. Clifford, Case No. 11,948.

An instrument can be proved only by the subscribing witness where it is not shown that he cannot be produced.—Rhodes v. Rigg, Case No. 11,749; Patton v. Brown, Id. 10,832.

If the subscribing witness to a note be not within reach of the process of the court, it is not necessary to produce him or to prove his handwriting.—Wellford v. Eakin, Case No. 17,379.

The testimony of a subscribing witness may be dispensed with where he is out of the country.—Jones v. Lovell, Case No. 7,478; Morgan v. Curtenius, Id. 9,799.

In the case of an instrument executed abroad, the presumption of law is that the subscribing witness is beyond the jurisdiction of the court.—Savage v. De Wolf, Case No. 12,383.

The testimony of a subscribing witness cannot be dispensed with because he resides in another state.—Whann v. Hall, Case No. 17,478.

Diligent search to find a subscribing witness is not sufficient to dispense with his testimony, if it appears that he was in the country.—Broadwell v. McClish, Case No. 1,911.

Subscribing witnesses will be presumed to reside at the place of execution of the instrument; and, where that is without the jurisdiction of the court, proof of signatures is admissible as secondary evidence of execution.—Manchester v. Milne, Case No. 9,006.

Evidence of the handwriting of a subscribing witness is not admissible if he has not been inquired for at the place to which he was last traced.—Cooke v. Woodrow, Case No. 3,181.

§ 25. —— Notice to produce.

Parol evidence cannot be given of contents of a writing without previous notice to produce.—Bank of Washington v. Kurtz, Case No. 950; Nicholls v. Warfield, Id. 10,233; Underwood v. Huddlestone, Id. 14,339; United States v. Winchester, Id. 16,739.

Admissibility of parol evidence of contents of papers in defendant's possession without notice to produce them.—United States v. Carrico, Case No. 14,733.

Plaintiff may give parol evidence of the contents of a paper in defendant's possession, which he after notice refuses to produce.—Garrett v. Woodward, Case No. 5,253.

Evidence of a statement made by defendant to a witness, of the contents of a letter of the defendant, not called for, is competent.—Paige v. Loring, Case No. 10,672.

§ 26. Character and sufficiency of secondary evidence.

Parol evidence of the contents of record books which were lost is inadmissible, where abstracts of such books were made and are in existence.—Polk v. Windel, Case No. 11,251.

Photographic copies of government departmental documents which cannot be removed without public detriment are admissible on proof of handwriting.—Leathers v. Salvor Wrecking & Transportation Co., Case No. 8,164.

A sworn copy of a paper is not evidence, unless the witness states that he compared it with the original.—Catlin v. Underhill, Case No. 2,523.

An account taken from the books of a merchant's clerk, who is dead, is not admissible in an action thereon, unless such books were original books of entry kept by the clerk, who could have proved, if living, the items; and his handwriting must be proved.—Owens v. Adams, Case No. 10,633.

Where subscribing witnesses cannot be produced the instrument may be proved by testimony as to the handwriting of the subscribing witnesses and of the maker.—Leonard v. Neale, Case No. 8,259; Wellford v. Eakin, Id. 17,379.

A deed 30 years old is sufficiently proved by the testimony of one subscribing witness as to her own signature, where the other witness and the grantor are dead.—Lonsdale Co. v. Moies, Case No. 8,496.

V. ADMISSIONS.

See, also, post, § 82.

§ 27. Nature, form, and incidents in general—In pleading.

A defense which has been stricken out of the case may be given in evidence as an admission.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,559.

In a suit by seamen against the master plaintiff may read in evidence an answer by defendant in a prior suit between the parties for wages.—Rambler v. Choat, Case No. 11,542.

Admissions in answer, not put in issue by some charge in the bill, are unavailing.—Battle v. Mutual Life Ins. Co., Case No. 1,109.

§ 28. —— Opinions and admissions.

Declarations of the master of a vessel charged with engaging in illegal traffic, as to his suspicions that the purpose of the voyage was not lawful, are to be regarded as admissions, especially where he is both master and owner.—United States v. The Isla De Cuba, Case No. 15,447.

§ 29. —— Offer of compromise.

Admissions made by a person in an offer of compromise, voluntarily made without any pending negotiation, and without stating it to be without prejudice are admissible against him.—Gibbs v. Johnson, Case No. 5,384.

§ 30. —— Understanding and voluntary nature of admission.

Where a person understands the language but imperfectly, his declarations and admissions are not admissible against him, without clear proof of his understanding of what was addressed to him.—The Lotty, Case No. 8,524.

Where a criminal act is set up in defense to a suit at law, confessions extorted from the plaintiff, or those not voluntarily made, cannot be regarded by the jury.—Scott v. Home Ins. Co., Case No. 12,533.

§ 31. Admissions by parties.

Declarations of plaintiff, after the date of the contract, may be given in evidence by defendant to mitigate damages for a breach, as well as to contradict plaintiff's evidence.—Goldsborough v. Baker, Case No. 5,516.

The admissions of a party to a suit may be given in evidence as independent testimony, though he has been sworn as a witness, and no impeaching questions asked him.—The Stranger, Case No. 13,525.

The admission of one defendant does not go to charge his co-defendant.—Buckingham v. Burgess, Case No. 2,089.

Where the complainant puts in confessions of the respondent, they may be used by either side.—Brown v. Brown, Case No. 1,994.

§ 32. Admissions by grantors, former owners, or privies.

Conversations as to the ownership of property, between the ancestor of plaintiff and a third person, *held* admissible in evidence for plaintiff.—Holmead v. Chesapeake & O. Canal Co., Case No. 6,626.

Declarations by a grantor impeaching his own deed are inadmissible.—Magniac v. Thompson, Case No. 8,956; Merrill v. Dawson, Id. 9,469.

Declarations of the seller prior to the making of a bill of sale are admissible to prove it fraudulent as to creditors.—Bowie v. Hunter, Case No. 1,731.

The declarations and admissions of the owner, made after he has parted with title to property, are inadmissible against the purchaser.—Many v. Jagger, Case No. 9,055; Palmer v. Cassin, Id. 10,687.

The declarations and admissions of prior owners of a vessel, not a part of the res gestæ, are not evidence against subsequent bona fide purchasers.—The Ruby, Case No. 12,104.

§ 33. Admissions by agents or other representatives—By agents or employés.

Declarations of agent, admissible against principal when part of res gestæ.—Aiken v. Bemis, Case No. 109; United States v. Martin, Id. 15,732.

The answer in chancery of an agent is not evidence against his principal.—United States v. Martin, Case No. 15,732.

The declarations of a person exercising authority, that he possesses it, are inadmissible to prove authority.—James v. Stookey, Case No. 7,184.

Declarations of a stage driver that the coach was overloaded are not admissible against his employers.—Maury v. Talmadge, Case No. 9,315.

Declarations of an agent made after the relation has ended are not binding upon the principal.—Blight v. Ashley, Case No. 1,541.

Declarations made by surveyor when laying off town are incompetent to impeach map of survey adopted by proprietors.—Barclay v. Howell, Case No. 975.

The declarations of defendant's agent by whose orders plaintiff had made insurance for defendant's benefit, are not admissible to prove defendant's liability for the premium.—Millick v. Peterson, Case No. 9,601.

In an action for enticing a servant, declarations of the servant are inadmissible.—Milburne v. Byrne, Case No. 9,542.

§ 34. —— By officers of corporations.
A paper sworn to and filed by an officer of a corporation is competent evidence against it but is not conclusive.—In re Oregon Bulletin Printing & Publishing Co., Case No. 10,559.

§ 35. —— By person having common interest.
In an action upon a joint promissory note, brought against one maker only after the bankruptcy of the other, the admissions of the latter are admissible against defendant.—Howard v. Cobb, Case No. 6,755.

Admissions by one underwritter are not admissible against another on the same policy.—Lambert v. Smith, Case No. 8,028.

Acts and admissions of one of several joint contractors or promisors are admissible against all.—Bank of United States v. Lyman, Case No. 924.

§ 36. —— By insolvent or assignee.
The admissions and statements of an insolvent in relation to his property after conveyance to his assignee in insolvency are not admissible against the assignee.—Whetmore v. Murdock, Case No. 17,509.

§ 37. —— By principal or surety.
In an action against a surety for money advanced to another, the admissions of the latter as to receipt of the money are admissible against defendant.—Ingle v. Collard, Case No. 7,042.

The declarations of the principal connected with transactions to which the contract of the surety relates are admissible against the surety.—United States v. Cutter, Case No. 14,911.

§ 38. Effect of admissions.
What a party has said on one day against his interest cannot be explained by declarations on a subsequent day.—Blight v. Ashley, Case No. 1,541; United States v. Gleason, Id. 15,216.

The unsupported evidence of a witness of admissions obtained by him from a party for the purpose of charging him thereby, is entitled to but little weight.—Sunday v. Gordon, Case No. 13,616.

Evidence of confessions, especially where it goes to the whole merits, is open to much objection.—Smith v. Burnham, Case No. 13,019.

VI. DECLARATIONS AND HEARSAY.

See, also, ante, § 18.

§ 39. Self-serving declarations.
Plaintiff cannot read his own statement of his account current as a statement of the particular items of his claim.—Crease v. Parker, Case No. 3,376.

Declarations of a party, made before a dispute arose, in connection with acts, may be competent evidence for him to prove the intentions existing at such time.—Hovey v. Stevens, Case No. 6,745.

A testamentary declaration *held* admissible, though impeaching negotiable paper signed by the declarant.—Blagg v. Phœnix Ins. Co., Case No. 1,477.

The declarations of a person in whose favor a letter of guaranty is given are inadmissible for plaintiff in an action thereon.—Reid v. Hodgson, Case No. 11,667.

§ 40. Declarations as to boundaries.
The admissions of parties are competent on the question of boundary.—Polk v. Robertson, Case No. 11,250.

The declarations of a chain man, since deceased, as to the beginning corner of a survey, are inadmissible.—Ellicott v. Pearl, Case No. 4,386.

On the question of a boundary, hearsay evidence that a particular object (such as a spring) was on the land of one of the parties is inadmissible.—Fraser v. Hunter, Case No. 5,063.

§ 41. Declarations as to pedigree.
Whether or not declarations post litem motam are evidence in matters of pedigree.—Hall's Deposition, Case No. 5,924.

Affidavits made ex parte, several years before, to prove pedigree, *held* admissible as hearsay.—Hurst v. Jones, Case No. 6,934.

§ 42. Admissibility of hearsay in general.
Hearsay evidence is admissible for the purpose of proving boundaries, ancient landmarks, pedigree, and prescription.—Beard v. Talbot, Case No. 1,182.

The hearsay evidence of a public officer is no better than that of any other individual.—Dubois v. Newman, Case No. 4,108.

Acts and monuments, and judicial and professional tradition, in the absence of more direct testimony, will be regarded as an authoritative means of ascertaining ancient opinion of fact.—Fisher v. Carter, Case No. 4,815.

VII. DOCUMENTARY EVIDENCE.

See, also, post, § 86.

(A) PUBLIC OR OFFICIAL ACTS, PROCEEDINGS, RECORDS, AND CERTIFICATES.

See, also, ante, §§ 20, 21.

§ 43. Judicial acts and records.
An execution *held* not admissible in evidence without the judgment on which it was issued.—Campbell v. Strong, Case No. 2,367a; Tindall v. Murphy, Id. 14,055a.

State statutes and judicial precedents are admissible in the federal courts as evidence of the law of the state without special plea or proof of witnesses.—Evans v. Cleveland & P. R. Co., Case No. 4,557.

A deed made in pursuance of a decree is admissible in evidence without the record of the decree.—Dunn v. Games, Case No. 4,176.

A sheriff's deed cannot be given in evidence, without producing the judgment and execution under which the sale was made.—Hartshorn v. Wright, Case No. 6,169; Lanning v. London, Id. 8,076.

Docket entries which are regarded, by the court which makes them, as the record, will be given the same consideration by another court.—In re Coleman, Case No. 2,980.

A libel and answer accompanying an issue sent from the orphans' court to be tried in the circuit court of the District of Columbia may be read in evidence.—Evans v. Evans, Case No. 4,561.

A deed recorded under a decree in chancery may be adduced in a subsequent action and identified, though it did not remain on file in the suit.—Bank of United States v. Benning, Case No. 908.

The original papers, documents, etc., in an equity suit, may be used in court as the record, where the proceedings have not been recorded at length.—Bank of United States v. Benning, Case No. 908.

A record of a state court, which sets forth proceedings warranted by the law of that state is entitled to verity, although not formal in some particulars.—In re Robinson, Case No. 11,939.

§ 44. Records of conveyances.
A record produced to prove a fact, and found defective, cannot be assisted by evidence dehors the same.—James v. Stookey, Case No. 7,184.

A will proved in another state, according to the laws of Tennessee, if recorded in that state,

is evidence. The record may be made any time before the will is offered in evidence.—Fleeger v. Pool, Case No. 4,860.

§ 45. Records of official acts and proceedings.

The books of account of a paymaster of the marine corps are so far public books as to authorize the United States to use them in evidence.—United States v. Kuhn, Case No. 15,545.

Signature and seal must be sufficiently legible and distinct to be read and distinguished to entitle paper to respect as official document.—The Atlantic, Case No. 620.

The indorsement of a clerk, in the office of a notary, on the protest of a note for nonpayment, that notice was duly served, is not evidence.—Whitehead v. Jones, Case No. 17,563.

The collector's books in the handwriting of a deceased clerk are evidence for the United States.—United States v. Howland, Case No. 15,406.

§ 46. Official certificates.

See, also, "Depositions," § 31.

Official certificate as to the custom of the office as to the time of affixing a seal *held* not evidence to show such time.—Brown v. Galloway, Case No. 2,006.

A consul's certificate of any fact is not evidence between third persons unless expressly or impliedly made so by statute.—Levy v. Burley, Case No. 8,300.

A consul's certificate is not evidence of acts not official, or within his personal knowledge.—Brown v. The Independence, Case No. 2,014.

Certificates of public officers authorized by law to certify to certain facts are competent evidence of such facts.—Levy v. Burley, Case No. 8,300.

The statement of an officer in his certificate of his official character is prima facie evidence of the fact.—Rhoades v. Selin, Case No. 11,740.

A certificate of a survey of a vessel is not evidence of the facts stated in it; but if the surveyors, in a deposition, refer to the certificate as containing all they know, it is evidence.—United States v. Mitchell, Case No. 15,791.

Rev. St. § 886, applies only to suits against persons accountable for public moneys as such, and is inapplicable to an action for moneys alleged to have been paid to defendant by the mistake of a government disbursing officer.—United States v. Radowitz, Case No. 16,112.

(B) EXEMPLIFICATION, TRANSCRIPTS, AND CERTIFIED COPIES.

See, also, post, §§ 56–62.

§ 47. Certified copies in general.

A certified copy made evidence by statute must show that the statutory requirements have been complied with.—United States v. Robinson, Case No. 16,178.

§ 48. Judicial records and proceedings.

A mere copy of docket entries not substantially in the form of a judgment is not sufficient evidence of a judgment.—Leveringe v. Dayton, Case No. 8,288.

A document attested by the clerk of a court with its seal and the certificate of its presiding judge, and called an "exemplified copy," is competent evidence of the judgment described in it under Act May 26, 1790, though not sufficient at common law or under the state laws.—Taylor v. Carpenter, Case No. 13,785.

Copies of judicial proceedings in bankruptcy in England *held* not admissible in evidence in Virginia, where not recorded in England.—Leay v. Wilson, Case No. 8,174.

The copy of an award, exemplified by the certificate of the proper officer of one of the courts of the state, is not primary evidence in Pennsylvania.—James v. Gordon, Case No. 7,181.

A transcript of the record of a justice of the peace, certified by him to the county court, and certified by the prothonotary and the presiding judge of that court, under the act of congress, *held* sufficient.—Hade v. Brotherton, Case No. 5,892.

§ 49. Official records.

A copy of an official letter of instruction from the state auditor to a county auditor, certified by the latter, is admissible.—Raymond v. Longworth, Case No. 11,595.

The transcript of the books and proceedings of the treasury department (Rev. St. § 886) in relation to the accounts of persons accountable for public money, is prima facie evidence of the facts stated therein, so far as the same are authorized by law.—United States v. Eggleston, Case No. 15,027.

A certified statement of a balance due, and a report thereof to the comptroller, is not such a transcript from the books and proceedings of the treasury as may be given in evidence under Act March 3, 1797, § 2.—United States v. Patterson, Case No. 16,008.

A transcript from the treasury, which contains sums charged in gross as balances, is not evidence as to such balances. The original items must be stated.—United States v. Edwards, Case No. 15,026; Same v. Hilliard, Id. 15,368.

Copies of accounts and papers in the office of the quartermaster general, certified by the third auditor of the treasury, whose official character is certified to by the secretary of the treasury, are admissible in evidence.—Thompson v. Smith. Case No. 13,976.

A duly-certified copy of the register of a ship, transmitted, on loss of the vessel, to the register of the treasury, to be canceled, is legal evidence.—Catlett v. Pacific Ins. Co., Case No. 2,517.

The treasury transcripts are admissible in a suit in a case of delinquency of a revenue officer or other person accountable for public moneys.—United States v. Cutter, Case No. 14,911.

An affidavit made in connection with a warrant of survey, but not certified as an office paper in the land office, is inadmissible.—Lanning v. Dolph, Case No. 8,073.

A paper purporting to be "a certified extract from the general draft of certain districts as framed by the surveyor general, remaining in his office, under the seal of the office," is not evidence.—Griffith v. Tunckhouser, Case No. 5,823.

A certified copy of a patent for land by the recorder of a county is not evidence, as there is no law requiring patents to be recorded in the county.—Lyell v. Maynard, Case No. 8,619.

A certified copy of an assignment from the patent office is prima facie evidence of the genuineness of the original, and is admissible.—Lee v. Blandy, Case No. 8,182; Goodyear v. Blake, Id. 5,560.

A genealogical table, certified under the seal of foreign office, is not evidence.—Banert v. Day, Case No. 836.

§ 50. Records of contracts and conveyances.

A certified copy of the record of an instrument which is required by law to be recorded is evidence.—New York Dry Dock v. Hicks, Case No. 10,204.

The record copies of deeds are admissible without proving execution or loss of originals.—Bank of United States v. Benning, Case No. 908.

A copy of the record of a deed is not evidence where the record is in one state and the lands lie in another.—Lewis v. Baird, Case No. 8,316.

A deed not recorded until 26 years after its date is not recorded, within the Indiana statute, which makes a duly-certified copy evidence.—Longworth v. Close, Case No. 8,489.

The copy of a recorded deed may be received in evidence to show that when recorded it had a seal on it, which had been removed from the original.—Gillespie v. Reed, Case No. 5,436.

Exemplification of record of copy of deed not evidence.—Barger v. Miller, Case No. 979.

The provision in Act March 3, 1797, § 2, relating to the admission of authenticated copies of bonds, contracts, and other papers, is not restricted to suits commenced under the authority given by section 2, but applies to all cases where the evidence is required.—United States v. Lent, Case No. 15,593.

A copy from the records of a deed of personal property, which derives no validity from being recorded, is not competent evidence.—Ormsby v. Tingey, Case No. 10,580.

(C) PRIVATE WRITINGS AND PUBLICATIONS.

See, also, ante, § 22.

§ 51. Conveyances and contracts.

A copy of a deed duly recorded is, after 60 years, admissible to establish a grant under which a person claims title to land.—Stokes v. Dawes, Case No. 13,477.

A deed of land in Maryland cannot be read in evidence unless recorded in Maryland.—McIver v. Kennedy, Case No. 8,830.

§ 52. Books and statements of account.

The books of a party, although correctly kept, are not evidence in his favor.—Bennett v. Wilson, Case No. 1,326; Jeffrey v. Schlasinger, Id. 7,253a.

Unless supported by other evidence.—Cambioso v. Moffet, Case No. 2,330.

The plaintiff's or defendant's ledger proved to contain original entries is not admissible.—Leveringe v. Dayton, Case No. 8,288.

The first entry of the charges must be produced in order to render a party's own books admissible as evidence in his favor.—Fendall v. Billy, Case No. 4,725.

Entries made in the regular course of business by a person since deceased are evidence, but the original book must be produced, and the entries must upon their face appear fair.—Gale v. Norris, Case No. 5,190.

Original entries made in testator's books by a clerk who subsequently became executor are competent evidence in an action by him for goods sold and delivered by testator to defendant.—Hodge v. Higgs, Case No. 6,558.

A book published by a deponent respecting the date, etc., of certain surveys, may be read in evidence, with a view to qualify his deposition.—Harmer v. Morris, Case No. 6,076.

Admissibility of contractor's account as certified under Act March 3, 1817, c. 45, § 11.—United States v. Griffith, Case No. 15,263.

Account of sales of entire cargo *held* inadmissible against one whose interest therein was separate.—Gilpins v. Consequa, Case No. 5,452.

A check book competent but for certain interpolations is admissible, after such interpolations are rejected.—Bechtel's Case, Case No. 1,204.

Books of a bank, not showing whether checks drawn upon it were payable to bearer or to order, nor the names of the payees, are not evidence of money paid to any particular person.—Boyd v. Wilson, Case No. 1,751.

A journal kept by the master of a ship alleged to be insane *held* admissible to prove his sanity, by the style in which it was kept.—United States v. Sharp, Case No. 16,264.

§ 53. Bank checks.

Bank checks drawn by plaintiff payable to defendant or bearer, and paid by the bank, are not, of themselves, evidence of money paid to defendant.—Burch v. Spaulding, Case No. 2,140; Lowe v. McClery, Id. 8,566.

And this is the rule though the party produced his check book with a corresponding memorandum.—Lowe v. McClery, Case No. 8,566.

§ 54. Letters.

The letter of a deponent *held* not admissible, except to contradict or qualify some of the statements made in his deposition.—Crocker v. Lewis, Case No. 3,399.

Letters between parties engaged in negotiating bonds *held* incompetent to impeach the bonds in the hands of parties claiming to be bona fide holders, who were not shown to have any connection with the letters.—Kennicott v. Wayne County, Case No. 7,710.

The letters of an agent to his principal are inadmissible against a third person.—United States v. Barker, Case No. 14,520.

In an action for the fraudulent sale of a mine, letters by one defendant to the other in relation to the mine, written at the time of the alleged conspiracy, are admissible in favor of both defendants.—Emma Silver Min. Co. v. Park, Case No. 4,467.

Correspondence, between the parties in a cause and others, called for by notice, but which the party who called for it does not read, cannot be read by the party producing it.—Willings v. Consequa, Case No. 17,767; Consequa v. Willings, Id.

Letters acknowledging in general terms a balance due are not admissible to verify an account which is itself inadmissible.—Owens v. Adams, Case No. 10,633.

§ 55. Memoranda.

A memorandum by a bank's note clerk, since deceased, that he had delivered a certain notice, is admissible in favor of the bank.—Bank of United States v. Davis, Case No. 915.

An old entry in a memorandum book, stating the ages of the members of the writer's family, is admissible to prove age of a witness.—Clara v. Ewell, Case No. 2,790.

(D) PRODUCTION AND AUTHENTICATION.

See, also, ante, §§ 25, 47–50; "Internal Revenue," § 10.

§ 56. Production of documents by adverse party.

Act June 22, 1874, § 5, providing for the production of books and papers is constitutional.—United States v. Distillery No. Twenty-Eight, Case No. 14,966; Same v. Hughes, Id. 15,416.

Act June 22, 1874, requiring the production of books and papers, applies to cases arising under the internal revenue laws.—United States v. Distillery No. Twenty-Eight, Case No. 14,966.

The penalty for not complying with an order to produce books and papers (Act June 22, 1874) is that the allegations in the motion shall be taken as confessed.—United States v. Distillery No. Twenty-Eight, Case No. 14,966.

A proceeding in rem is not within Act Sept. 24, 1789, which authorizes an order to produce books and papers on the trial of actions at law.—United States v. Twenty-Eight Packages of Pins, Case No. 16,561.

The ex parte affidavit of a party interested is competent evidence on a motion for an order to produce books and papers. Act Sept. 24, 1789.—

United States v. Twenty-Eight Packages of Pins, Case No. 16,561.

A notice at the trial to produce a letter will not be enforced unless it is in the possession of the party or his counsel.—Chapin v. Siger, Case No. 2,600.

Notice to produce an account book, given on the preceding evening, is sufficient when the countinghouse of the party is very near the courthouse.—Shreve v. Dulany, Case No. 12,817.

The court will not compel plaintiff to produce a charter party of which defendant has a counterpart.—Sampson v. Johnson, Case No. 12,281.

Respondent, who may be in possession or control of books referred to generally in the answer, may be ordered to produce them.—Russell v. McLellan, Case No. 12,158.

Such order will not be denied on presentation of an affidavit denying possession.—Russell v. McLellan, Case No. 12,158.

Evidence may be received to disprove possession of or power to produce papers.—Bas v. Steele, Case No. 1,088.

A suggestion that the opposite party is in possession of the paper which the other has given him notice to produce will put the burden upon the former of producing it, or showing by affidavit that he is unable to do so.—Hylton v. Brown, Case No. 6,981.

A party whose books have been called for and inspected by his adversary may show by a witness that they contain no entries relating to the matter in controversy.—Coote v. Bank of United States, Case No. 3,204.

That defendant has called upon plaintiff to produce an account does not give plaintiff a right to read it in evidence, after defendant has refused to introduce it.—Smith v. Coleman, Case No. 13,029.

Defendant not required to produce an account rendered to him by plaintiff, except as accompanied by his affidavit as to the circumstances under which it was received.—Bank of United States v. Wilson, Case No. 943.

A bank will not be required on motion to produce books and papers, when it does not appear that a subpœna duces tecum, directed to the proper officers of the bank, would not suffice.—Merchants' Nat. Bank v. State Nat. Bank, Case No. 9,448.

Proof of the existence of a paper, its pertinency to the issue, and its possession, is necessary before an order will be issued requiring its production.—Buell v. Connecticut Mut. Life Ins. Co., Case No. 2,103; Iasigi v. Brown, Id. 6,993.

The fact that a bill of discovery has been filed and answered, where the papers were not produced, is no bar.—Iasigi v. Brown, Case No. 6,993.

Notice to produce deeds, given to attorney of party living at a distance, and a reply of references to pages of records, *held* sufficient.—Geyger's Lessee v. Geyger, Case No. 5,375.

The order for production of papers at the trial must be served a reasonable time before they are required.—Macomber v. Clarke, Case No. 8,918.

Notice to the opposite party to produce at the trial all letters in his possession relating to moneys received by him under the award of the commissioners under the Florida treaty is sufficiently specific, as they are described by their subject-matter.—Vasse v. Mifflin, Case No. 16,895.

A writ directed to an officer of a telegraph company to produce messages, stating the names of the signers and addressees, with their dates, *held* sufficient.—United States v. Babcock, Case No. 14,484.

A call for all the letter books of defendant bank from its institution to the time when the cause of action arose, *held* too general.—Triplett v. Bank of Washington, Case No. 14,178.

The courts of the United States, in actions at law, can require the production of books and papers in the hands of the adverse party only where the relief might have been had by a bill of discovery, and as a substitute therefor. Act 1789, § 15.—Finch v. Rikeman, Case No. 4,788.

A retail dealer, who enters accounts in a customer's book, may compel him to produce the same on notice, or admit secondary evidence thereof.—Travers v. Appler, Case No. 14,148.

Where a party calling for books in possession of the opposite party inspects them, he makes them evidence for the other party.—Waller v. Stewart, Case No. 17,109; Wilkes v. Elliot, Id. 17,660.

The penalty of a nonsuit or default is inflicted for failure to produce a paper as ordered by the court.—Iasigi v. Brown, Case No. 6,993; Merchants' Nat. Bank v. State Nat. Bank, Id. 9,448.

But such penalty is not available except where there was an order of court to produce.—Bank of United States v. Kurtz, Case No. 920; Bas v. Steele, Id. 1,088; Maye v. Carbery, Id. 9,339.

If books and papers are in court, they may be called for after jury is sworn.—Banks v. Miller, Case No. 963; Waller v. Stewart, Id. 17,109.

A paper produced on notice by the adverse party who is not a party thereto and does not claim a beneficial interest under it must be proved by him who offers it in like manner as if he had himself produced it.—Rhoades v. Selin, Case No. 11,740.

A paper produced by one party on notice from the other does not become evidence unless, from its legal character, it is entitled to admission as such.—Hylton v. Brown, Case No. 6,982.

§ 57. Production of records.

A party producing a record in evidence is not obliged to read the whole of it; but the opposite party may read it.—Davis v. Forrest, Case No. 3,634.

Act May 26, 1790, prescribing mode of proving judicial records of a state, does not apply to their use in federal courts.—Bennett v. Bennett, Case No. 1,318.

§ 58. Proof of execution.

A paper signed by one person as attorney for another cannot be read in evidence, unless the power of attorney is produced.—James v. Gordon, Case No. 7,181.

A recorded deed, not properly acknowledged, though made notice to creditors and subsequent purchasers under Act Ill. July 21, 1817, when used in evidence, must be proved as similar instruments of writing.—Gillespie v. Reed, Case No. 5,436.

A power of attorney acknowledged before the mayor or chief magistrate of a city, and certified under the public or common seal, may be given in evidence.—Milligan v. Dickson, Case No. 9,603.

If a ship's log book be offered in evidence, it must be proved to be the book kept on the voyage. Proof of the mate's handwriting as to some of the entries is insufficient.—United States v. Mitchell, Case No. 15,792.

A bill of sale is properly admitted in evidence where the subscribing witness swears to his signature, though he has no recollection of the paper.—Hemphill v. Dixon, Case No. 6,346a.

A deed is admissible, though acknowledged or proved after suit brought.—Lanning v. Dolph, Case No. 8,073.

Act Mo. Feb. 22, 1868, does not repeal Rev. St. Mo. c. 109, § 38, pertaining to the admissibility in evidence of certified copies of deeds for military bounty lands, nor does it abrogate the common-law mode of proving the execution of deeds.—Wright v. Taylor, Case No. 18,096.

The person who took the acknowledgment was permitted to state, from his uniform practice in taking acknowledgments, he could not have taken it, in the case under consideration, had no seal been attached to the instrument.—Follett v. Rose, Case No. 4,900.

The execution of negotiable paper may be proved in New York without producing or accounting for the subscribing witness.—Savage v. D'Wolf, Case No. 12,383.

Proof of the handwriting of a deceased subscribing witness, unaided and unopposed by other evidence, *held* sufficient to establish execution of the instrument.—Murdock v. Hunter, Case No. 9,941.

§ 59. Ancient instruments.

A written instrument over 40 years old is admissible as an ancient document without strict proof of execution.—Walton v. Coulson, Case No. 17,132.

An instrument of 30 years' standing, not impeached, need not be proved by the subscribing witness.—Hinde v. Vattier, Case No. 6,512.

§ 60. Authentication and identification—Of judicial records.

Forms of authenticating the judicial proceedings of one state, in order to their admission in evidence in other states.—Craig v. Brown, Case No. 3,328.

The act of congress respecting the authentication of the records of state courts does not apply to the records of the federal courts.—Mason v. Lawrason, Case No. 9,242.

A federal court will take notice of the organization of a state court to uphold a certificate to a copy of its record.—Bennett v. Bennett, Case No. 1,318.

The record of a court in Virginia must be certified by the presiding magistrate.—Gardner v. Lindo, Case No. 5,231.

As a surrogate acts in the capacity of clerk and judge, he must certify to the copies of his proceedings under the act of congress.—Catlin v. Underhill, Case No. 2,523.

A copy of a judicial record, having a flourish with the pen on the margin of each page, instead of a seal, *held* not admissible.—Talcott v. Delaware Ins. Co., Case No. 13,734.

The attestation of a record of court proceedings must be in conformity with the form used in the state, the only evidence of which is the certificate of the presiding judge of such court.—Craig v. Brown, Case No. 3,328.

The certificate of the clerk and the seal of the court are sufficient authentication of a judgment of a state court offered in evidence in a federal court sitting in the same state.—Mewster v. Spalding, Case No. 9,513.

The omission of the certificate of the presiding magistrate to a record of another state, to state that the attestation of the clerk is in due form, under Act May 26, 1790, is fatal.—Trigg v. Conway, Case No. 14,172.

A certificate of the presiding judge, stating that the person whose name is signed to the attestation of a record is clerk of the court, and that the signature is in his own handwriting, is not sufficient under Act May 26, 1790.—Craig v. Brown, Case No. 3,328.

The certificate of a record made by the clerk of a district court is sufficient, where the seal of the court is affixed to the record, without any attestation of the presiding judge.—United States v. Wood, Case No. 16,757.

Records certified under the seals of state courts are admitted without other authentication in the circuit court of the District of Columbia, under an agreement of the bar.—Smallwood v. Violet, Case No. 12,962.

The record in a court of vice admiralty of the condemnation of the vessel is not evidence per se, but the seal of the court or the handwriting of the judge or clerk must be proved; and the certificate of the American consul is not sufficient to authenticate it.—Catlett v. Pacific Ins. Co., Case No. 2,517.

An examination under proceedings supplementary to execution is a "judicial proceeding" within the act of congress relating to authentication of records of state courts.—In re Rooney, Case No. 12,032.

A record of the proceedings against a bankrupt, attested by the clerk of the district court, is good evidence, the certificate of the presiding judge not being required in the case of records from federal courts.—Murray v. Marsh, Case No. 9,965.

A copy of the record of the appointment of a commissioner to take depositions is inadmissible without the certificate of the presiding judge.—Tooker v. Thompson, Case No. 14,097.

§ 61. —— Of official records and recorded instruments.

Forms of authenticating the legislative proceedings of one state to make them admissible in evidence in other states.—Craig v. Brown, Case No. 3,328.

The act of 1804 does not exclude every other mode of authentication of state records. A copy, when certified by the officer whose duty it is by law to keep the original on file in his office, is admissible.—Logansport Gas Light & Coke Co. v. Knowles, Case No. 8,466.

A register may certify by his deputy. The form is immaterial, so long as the facts appear.—Cook v. Hunter, Case No. 3,161.

A certified copy of a deed, not authenticated by the seal of the recorder, is not admissible in evidence.—Hotchkiss v. Glasgow, Case No. 6,717.

Certificate of clerk is no evidence of character or legal effect of paper, but only as to its being a true copy.—Alexander v. Knox, Case No. 170.

A printed pamphlet containing the law of a state without any seal affixed is not admissible.—Craig v. Brown, Case No. 3,328.

The certificate of a probate judge to the copy of a will is not invalid for want of a seal where the judge certifies that the court has no seal.—Morgan v. Curtenius, Case No. 9,799.

Ship's manifest *held* admissible in evidence on proof that it was produced from the usual place of deposit in the customhouse, and that no other manifest was on file for the voyage.—The Missouri, Case No. 9,653.

The keeper of the records is the proper person to certify to the copy of an instrument which is required by law to be recorded.—New York Dry Dock v. Hicks, Case No. 10,204.

The mode of authentication, as prescribed by law of transcripts from the executive department, must be strictly pursued, to make them evidence against public debtors.—United States v. Harrill, Case No. 15,310.

A register of the treasury department is not authorized to certify to copies of papers on file in his office.—Bleecker v. Bond, Case No. 1,534.

Power of the third auditor to authenticate copies of accounts, etc., of the treasury department. Act March 3, 1817, c. 45.—United States v. Griffith, Case No. 15,263.

§ 62. —— Of private writings and publications.

Notarial copy of a note *held* admissible.—Peabody v. Denton, Case No. 10,867.

A copy of a manifest of a cargo certified by a notary *held* not admissible.—Talcott v. Delaware Ins. Co., Case No. 13,734.

An assignment of a military warrant under which a claim has been asserted for half a century may be presumed to be genuine and to have been made for a valuable consideration.—Lewis v. Baird, Case No. 8,316.

A copy of a survey of a vessel, not purporting to have been made by any one connected with her, is not admissible against her, no witness able to prove or disprove its correctness being called or shown to be within reach.—The Vivid, Case No. 16,978.

A copy of a protest is admissible in evidence against a vessel, though its correctness is not proved, where it appears that a protest was made and signed by the mate of the vessel at the time and place where the copy purported to have been made, and the mate, though called as a witness, did not dispute it.—The Vivid, Case No. 16,978.

In a suit against sureties of contractors for army supplies, *held* that a letter from the war department, not authenticated, claiming advances made to the principal, was inadmissible, and the admission by the principal of its correctness was not binding on defendants.—Pendleton v. United States, Case No. 10,924.

VIII. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITING.

See, also, ante, §§ 20–26.

§ 63. Contradicting, varying, or adding to terms of written instrument—Documents in general.

Explanation of the rule that parol evidence is inadmissible to explain or vary a writing, by Washington, J.—McCulloch v. Girard, Case No. 8,737.

Where writing is manifestly incomplete, parol evidence is admissible as to matters not defined therein.—The Alida, Case No. 200.

Written documents certified by foreign notaries may be contradicted by parol testimony.—United States v. The Jason, Case No. 15,470.

§ 64. —— Contracts in general.

Oral evidence is not admissible to vary an agreement in writing.—Findlay's Ex'rs v. Bank of United States, Case No. 4,791; Smith v. Hoffman, Id. 13,061.

When a contract is in writing, conversations previous to and leading to it cannot be given in evidence.—Gilpins v. Consequa, Case No. 5,452.

Parol evidence is admissible to show what is reasonable time for performance of written contract which does not specify any time.—Cocker v. Franklin Hemp & Bagging Co., Case No. 2,931.

A written contract may be contradicted by parol evidence showing that the whole contract was not reduced to writing.—McCulloch v. Girard, Case No. 8,737.

Where parties have attempted to put their agreement in writing, and have expressed a clear meaning, parol evidence is inadmissible to contradict or vary it.—Phelps v. Clasen, Case No. 11,074; Sheffield v. Page, Id. 12,743; Steam Packet Co. v. Bradley, Id. 13,333.

Recitals in an agreement between two persons, that the note of one was received by the other in payment of a sum that the former was to furnish the latter to be used in his business, cannot be contradicted by parol.—In re Golder, Case No. 5,510.

Oral evidence of an agreement that defendant should retain certain notes as security against other notes may be given, although there be a written agreement to return them on demand. McIntosh v. Summers, Case No. 8,827.

Plaintiff may show by parol that an agreement in writing made by a member of a firm was made by him as agent of the firm.—Hutchinson v. Peyton, Case No. 6,958.

Parol proof of a consideration, additional to and different from that recited, may be given, where it does not appear that the intention of the parties was to state in the instrument all the consideration passing between them.—Phelps v. Clasen, Case No. 11,074.

A writing in which a person binds himself as principal cannot be contradicted, either at law or in equity, by showing that he was in fact a surety.—Sprigg v. Bank of Mt. Pleasant, Case No. 13,257.

§ 65. —— Deeds and patents.

Parol evidence is inadmissible to vary the obligation of the parties in a contract under seal.—Bank of Mt. Pleasant v. Sprigg, Case No. 891.

A father and son had the same name but different residences. A patent for land bought with the father's money named the son as grantee. *Held*, that parol evidence was inadmissible to show mistake.—Babcock v. Pettibone, Case No. 700.

§ 66. —— Contract of sale.

Parol evidence of the declarations of an auctioneer, contrary to the written terms of sale, is not admissible; but such evidence, as to the property intended to be sold by him, is proper.—Wright v. Deklyne, Case No. 18,076.

After the execution of a will bequeathing certain negroes, testator gave a bill of sale of such negroes, with others, to the father of the devisees, but made no delivery. *Held*, that parol evidence was admissible to show that the conveyance was made to more fully provide for the devisees.—Cripps v. Mudd, Case No. 3,391.

Parol evidence to show what time payment was to be made is not objectionable as varying or contradicting a written agreement of sale, silent on such subject.—Halsey v. Hurd, Case No. 5,967.

Parol evidence is not admissible to explain or contradict a contract to convey land or an agreement to give a bond or writing to convey, where the party to be charged derived his title from a stranger.—Tobey v. Leonard, Case No. 14,067.

A promissory note given for the purchase price of property is ineffectual to establish the fact of the sale as against the seller, and parol evidence is admissible to show the actual transaction.—Truman v. Hardin, Case No. 14,205.

One guarantying the purchase price of the sale of timber lands cannot show a parol warranty as a consideration, where such consideration is expressed to be a permit to enter and cut the timber.—Buchtel v. Mason Lumber Co., Case No. 2,077.

§ 67. —— Contracts of employment.

Parol evidence *held* inadmissible to impeach the measurement and valuation of work reduced to writing, under agreement of the parties.—Evans v. Blakeney, Case No. 4,553.

Where an assignment or sale of the time of service of a servant is in writing, parol evidence of a promise that the time of service was longer than the actual time is inadmissible.—Smallwood v. Worthington, Case No. 12,963.

§ 68. —— Negotiable instruments.

Parol evidence is inadmissible to charge a party on negotiable paper where neither his name nor any other circumstance appears on its face to connect him with it.—Dessau v. Bours, Case No. 3,825.

§ 69. —— Charter parties and bills of lading.

An unambiguous charter party cannot be varied by parol evidence of a usage.—Ladd v. Wilson, Case No. 7,976.

A bill of lading cannot be contradicted by parol.—Chapin v. Siger, Case No. 2,600. But see Blagg v. Phœnix Ins. Co., Case No. 1,477.

Where the charterer has the whole control of the vessel, the owner may contradict a bill of lading by parol evidence where the shipper proceeds against the vessel for the fault of the master, he being a third party.—The Phebe, Case No. 11,064.

A freight bill signed "W. T. Noell & Co., Agents," not appearing on its face to be the contract of a railroad company, cannot be shown by parol to be the contract of the company.—Dixon v. Columbus & I. R. Co., Case No. 3,929.

§ 70. —— Receipts.

Where a mortgage is satisfied by payment and receipt indorsed, parol evidence of any agreement contradicting the receipt is not admissible. —In re Dunham, Case No. 4,146.

§ 71. —— Rights of persons not parties to instrument.

The rule that parol evidence is inadmissible to vary or contradict a written instrument does not apply as against persons who are strangers to the instrument, and not in privity of estate or interest with the parties thereto, and such strangers may always show that any statements or recitals therein prejudicial to their rights are false.—Wickersham v. Singer, Case No. 17,610.

§ 72. Invalidating written instrument.

The rule that a party to an instrument shall not be permitted to discredit it by his testimony is applicable only to mercantile negotiable paper.—Bradley v. Knox, Case No. 1,782.

A party may show that a deed is void for fraud or illegality.—Ridgeway v. Underwood, Case No. 11,815.

§ 73. Separate or subsequent oral agreement.

Defendant in an action on a contract in writing not under seal may prove a parol contract not stated therein. — Corcoran v. Dougherty, Case No. 3,227.

In an action against an indorser of a note parol evidence is admissible to show an agreement with plaintiff whereby defendant was to be discharged on the happening of a particular event.—Susquehanna Bridge & Bank Co. v. Evans, Case No. 13,635.

A party, in order to establish the illegality of a written contract legal on its face, cannot show orally a simultaneous contract alleged to be illegal.—Porter v. Viets, Case No. 11,291.

In an action by the assignee of a bond against the assignor upon a written assignment, plaintiff cannot show a parol guaranty of payment. —O'Harra v. Hall, Case No. 10,468.

An agreement under seal compromising a suit does not prevent either party from setting up and proving a parol undertaking that one of the parties should pay accrued costs.—Morancy v. Quarles, Case No. 9,788.

A parol warranty, made at the time of a written contract of sale, cannot be shown to vary or add to its terms.—Buchtel v. Mason Lumber Co., Case No. 2,077.

Parol evidence is admissible to show that subscriptions to corporate stock pledged on a circulated paper were conditional upon a certain amount being pledged.—Brewers' Fire Ins. Co. v. Clauson, Case No. 1,851.

A new promise varying the terms of the original contract on which the action is brought cannot be given in evidence. — Lonsdale v. Brown, Cases Nos. 8,492, 8,494.

§ 74. Explanation of written instrument and construction of language.

See, also, "Seamen," § 34; "Trusts," § 1; "Wills," § 23a.

Parol evidence is equally inadmissible to explain as to contradict a written instrument.— Kemmil v. Wilson, Case No. 7,685; Stevens v. Vancleve, Id. 13,412.

Parol evidence not admissible to explain writing unless its expressions are shown to be equivocal.—Auld v. Hepburn, Case No. 650.

Where the terms of the instrument, in the light of all the circumstances, do not convey a clear meaning, parol evidence is admissible to show the meaning.—Goodyear v. Cary, Case No. 5,562; Phelps v. Clasen, Id. 11,074; Hurliki's Adm'r v. Bacon, Id. 6,921.

Instruments executed at same time with power of attorney to sell, relating to the same subject-matter, *held* admissible to elucidate meaning of latter.—Burckle v. The Tapperheten, Case No. 2,141.

A receipt may be explained by parol.—Butler v. The Arrow, Case No. 2,237; Maze v. Miller, Id. 9,362.

Where the policy on the cargo was expressed to be on account of owner, parol evidence is admissible to show who were intended.—Catlett v. Pacific Ins. Co., Case No. 2,517.

Where a policy refers to representations of the assured, and provides that it shall be void if they are untrue, evidence outside the policy is admissible to show what such representations were.—Clark v. Manufacturers' Ins. Co., Case No. 2,829.

Where there is sufficient on the face of negotiable paper to create a doubt to whom credit was given, parol evidence is admissible.—Dessau v. Bours, Case No. 3,825.

Where the intent with which an indorsement was made is doubtful, it may be explained by parol.—Dibble v. Duncan, Case No. 3,880.

Where the recitals tend to show interests of third persons in the contract, evidence is admissible to show that such persons are principals, and the contract is admissible in evidence in an action between them.—Somers v. Tayloe, Case No. 13,170.

In the case of a contract to pay on the happening of an event not clearly defined, parol evidence is admissible to show the fact.—Rutland & B. R. Co. v. Crocker, Case No. 12,176.

The rent rolls and books of the lord proprietors of Maryland may be explained by parol.— Contee v. Godfrey, Case No. 3,140.

Where the officer does not state his official character, the omission may be supplied by proof at the trial.—Bank of United States v. Benning, Case No. 908; Rhoades v. Selin, Id. 11,740.

Where the language is susceptible of more than one meaning, and it is uncertain which the parties intended, parol evidence is admissible to show the surrounding circumstances.—Phelps v. Clasen, Case No. 11,074.

Parol evidence is not admissible to show the meaning given by the parties to certain words in a written instrument which is free from ambiguity.—Kemble v. Lull, Case No. 7,683.

Where the language of an instrument is applicable to several persons, or to several species of goods, parol evidence is admissible of extrinsic circumstances tending to show what persons or what things were intended.—Peisch v. Dickson, Case No. 10,911.

Evidence is admissible to show that a cashier, in taking a note running to himself as "cashier,"

was acting as an agent of a certain bank.—Bank of Newbury v. Baldwin, Case No. 892.

Conversations between parties, at the time of making a contract, are competent evidence to show the sense which they attached to a particular term used in the contract.—Gray v. Harper, Case No. 5,716.

Neither the testimony of witnesses in general nor of experts is admissible to prove the construction of a written instrument; but such testimony is admissible to explain terms of art, etc., and to acquaint the court with the circumstances under which the writing was made.—Day v. Stellman, Case No. 3,690.

The surveyor's remarks on the plat beyond the objects which, in the discharge of his duty, he must ascertain, are not admissible to show the boundary.—Ellicott v. Pearl, Case No. 4,386.

The officer before whom a deed was acknowledged will be allowed to explain whether an amount received at the time the deed was executed was a part of the consideration named therein.—Somerville v. Lee, Case No. 13,172.

IX. OPINION EVIDENCE.

§ 75. Conclusions and opinions of witnesses in general.

The belief of a witness, together with the facts upon which it is founded, is admissible.—Bank of Columbia v. McKenny, Case No. 874; Wilson v. McClean, Id. 17,819.

The party need not prove the source of knowledge of his witness who swears positively to handwriting.—Goodhue v. Bartlett, Case No. 5,538.

A person who had seen the alleged author of a writing write but once, and had no other means of knowing his handwriting, *held* not a competent witness to prove his handwriting.—United States v. Crow, Case No. 14,895.

Evidence to prove handwriting commented on in charge to jury.—Murati v. Luciani, Case No. 9,936.

The private opinion of a witness as to the fraud or fairness of plaintiff's conduct, derived from facts which appeared before the witness as an arbitrator, is not admissible.—Zantzinger v. Weightman, Case No. 18,202.

§ 76. Subject of expert testimony and competency of experts.

Expert testimony is not admissible to prove that a rule of navigation does not exist in a particular locality.—The Clement, Case No. 2,879.

Witnesses experienced in the special business of ferriage without New York City may testify as to the value of use of ferry-boat in such waters.—The Cayuga, Case No. 2,537.

Witnesses acquainted with the mode of accounting of the treasury department cannot be called to give their opinion as to the effect of particular charges.—United States v. Willard, Case No. 16,698.

§ 77. Impeachment of experts.

The foundation for testimony to impeach an expert called to testify as to the process of manufacture, quality, etc., of certain fabrics may be laid by asking his opinion as to samples of other fabrics shown him.—Greenleaf v. Goodrich, Case No. 5,778.

§ 78. Comparison of handwriting.

Comparison of handwriting is admissible in evidence.—Dunlop v. Silver, Case No. 4,169; United States v. Darnaud, Id. 14,918; Hopkins v. Simmons, Id. 6,691; Reid v. Hodgson, Id. 11,667.

Handwriting cannot be proved by comparison before the jury.—Macubbin v. Lovell, Case No. 8,928.

The handwriting of a party cannot be proved by a comparison with the signature on a document filed in the case, whose execution is not proved.—Shannon v. Fox, Case No. 12,706.

Handwriting cannot be proved by comparing the paper in dispute with other papers acknowledged to be genuine.—Turner v. Foxall, Case No. 14,255.

Comparison of handwriting is evidence to prove the publication of a libel.—Brooke v. Peyton, Case No. 1,933.

A witness testifying as to the handwriting must have seen the writing which the one in question resembles, and must come to a conclusion in his own mind.—United States v. Dowden, Case No. 14,990a.

One who has often seen a person write is competent to compare the writing in question with the genuine handwriting, and to state his belief arising from both sources.—United States v. Larned, Case No. 15,565.

A witness is not competent to testify as to handwriting who has only seen for a few minutes papers acknowledged by defendant to be in his handwriting.—United States v. Johnson, Case No. 15,484.

The signatures of officers of a bank may be proved by persons who are conversant with the bank bills, though they have never seen such officers write.—United States v. Holtsclaw, Case No. 15,384.

Standard specimens of defendant's handwriting being in evidence, an expert may point out features therein identical with those displayed in the writing in question.—United States v. Chamberlain, Case No. 14,778.

The knowledge of an expert in handwriting cannot be tested by placing before him irrelevant papers for the mere purpose of contradicting his testimony as to the handwriting thereon.—United States v. Chamberlain, Case No. 14,778.

The jury may compare the handwriting of documents properly in evidence, and proved to have been written by defendant, with the handwriting of the papers in dispute, to prove their authorship.—United States v. Chamberlain, Case No. 14,778.

§ 79. Effect of opinion evidence.

Expert testimony is to be considered like any other testimony.—Carter v. Baker, Case No. 2,472.

Mere opinions of physicians that ill health subsequent to an injury was caused by it are to be received with caution.—Nichols v. Brunswick, Case No. 10,238.

Where the testimony in a case is mere matter of opinion, the jury cannot decide according to the number of witnesses alone, but must consider their intelligence, and the manner in which they testify.—Cochrane v. Swartout, Case No. 2,928.

The jury are not bound by the opinions of experts, but may follow their own judgment.—Whipple v. Baldwin Mfg. Co., Case No. 17,514.

The ability of the expert, his knowledge of the art, his impartiality, and his fairness of expression, as well as the reasons assigned, are to be taken into view in considering his opinion.—Johnson v. Root, Case No. 7,411.

X. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

§ 80. Evidence of deceased witness.

Evidence of deceased witness' testimony at former trial must be of his very words.—Bennett v. Adams, Case No. 1,316; United States v. Wood, Id. 16,756. CONTRA, see United States v. White, Case No. 16,679.

What a witness since deceased swore to at a former trial may be proved by a person present thereat.—United States v. Wood, Case No. 16,756.

§ 81. Deposition.

No one can take the benefit of depositions who would not have been prejudiced by them had they been otherwise.—Boudereau v. Montgomery, Case No. 1,694.

The deposition of a party in another cause is admissible to contradict his oral evidence, or as an admission.—Lastrapes v. Blanc, Case No. 8,100.

Depositions taken in another suit for freedom of a slave, by one of the same family, are inadmissible, as hearsay, in relation to the common ancestor.—Humphries v. Tench, Case No. 6,873.

In a suit for collision by the master of a vessel in behalf of the cargo owners, libelant cannot read in evidence a deposition taken in behalf of the owners of the vessel in a suit by them for the same collision.—The John H. Starin, Case No. 7,351.

§ 82. Admissions upon demurrer in other proceeding.

A demurrer whereby a certain fact is considered in law as admitted is not evidence of the fact in another cause between the same parties.—Auld v. Hepburn, Cases Nos. 650, 651.

§ 83. Between what parties evidence admissible.

Testimony of a witness taken in a former suit, for the same cause of action between the same parties, discontinued, *held* not admissible.—Brewer v. Caldwell, Case No. 1,848.

The record of a trial and verdict against plaintiff in a suit by him against another cannot be given in evidence by another defendant.—Hurst v. McNeil, Case No. 6,936.

The record in a suit between the borrower and the lender for the loss of securities deposited as collateral is not evidence to prove the liability for negligence of the agent of the lender from whom they were stolen.—Second Nat. Bank v. Ocean Nat. Bank, Case No. 12,602.

The record in other suits between defendant and other plaintiffs cannot be read in evidence by plaintiff.—Bank of Alexandria v. Mandeville, Case No. 851.

XI. WEIGHT AND SUFFICIENCY.

See, also, ante, §§ 26, 38, 79.

§ 84. Negative and positive testimony.

Positive testimony is of greater weight than negative testimony.—Abbe v. Rood, Case No. 6; Colt v. Same, Id. 3,031; Cornell v. Hyatt, Id. 3,237; Risley v. Indianapolis, B. & W. Ry. Co., Id. 11,859.

But such evidence is of greater weight only when it can be reconciled with the negative without violence or restraint.—Cornell v. Hyatt, Case No. 3,237.

The rule as to comparative weight of positive and negative testimony does not apply where witnesses testify that a certain fact was notorious in a certain vicinity, while others residing there testify that they had no knowledge of it.—Liggett v. Marshall, Case No. 8,342.

Circumstantial evidence tending to raise doubts as to the time of invention is overcome by positive testimony fixing the time definitely.—Cundell v. Parkhurst, Case No. 3,477.

§ 85. Uncontroverted evidence.

All doubts are resolved against a party who stands by and makes no denial when testimony of a damaging nature is given.—United States v. Chaffee, Case No. 14,774.

A claimant in admiralty who is present in court, and does not deny facts within his knowledge which are sworn to by the witnesses, confesses their truth.—The Silver Moon, Case No. 12,856.

§ 86. Documentary and oral evidence.

The testimony of the master of a foreign vessel that he discharged a seaman, will not prevail in a suit for wages against his official report that the seaman deserted.—The Infanta, Case No. 7,030.

The delivery books of a cargo showing the order in which the goods were unladen is entitled to greater weight than the testimony of the crew.—Llado v. The Tritone, Case No. 8,427.

Testimony of persons who have witnessed dawn and sunset at the place and season involved in the issue, together with that of eyewitnesses to the facts in dispute, outweighs the received opinions of geographers and navigators as to the time of such phenomena and the duration of twilight.—Fletcher v. The Cubana, Case No. 4,863.

The certificate of a public officer, of acts done in the execution of his duty, will not be impeached by the evidence of a single witness.—Brown v. Galloway, Case No. 2,006.

§ 87. Preponderance of evidence.

The greater number of witnesses should prevail where there is no method of testing the facts except their statement, and other things are equal.—Crawford v. The Buffalo, Case No. 3,365a; The Napoleon, Id. 10,015.

Where, in a dispute as to wages of seamen, the master fails to call available witnesses to support his testimony, the question will be determined by the greater number of witnesses.—The Dolphin, Case No. 3,972.

A witness supported by his previous deposition, though not on file, will be believed, rather than one whose previous deposition does not support his testimony.—Hall v. The Buffalo, Case No. 5,927.

§ 88. Testimony of interested persons.

Admissions, such as might be considered the natural effusions of mortified pride or vanity, though clear and distinct against a party's interest, are entitled to but little weight as evidence against him.—Nachtrieb v. The Harmony Settlement, Case No. 10,003.

The testimony of the clerk of respondent will overcome that of libelant testifying for himself.—Leaning v. Standish, Case No. 8,161.

The testimony of the libelants in admiralty, the one for the other, ought to be narrowly scrutinized and received with caution.—Graham v. Hoskins, Case No. 5,669.

Testimony of a party relative to his own conduct and knowledge is the best evidence, and the withholding of it awakens suspicion in regard to evidence less explicit and satisfactory.—The Silver Moon, Case No. 12,856.

§ 89. Means of knowledge of witness.

Where all the witnesses are equally trustworthy the court is governed more by their means of knowledge than the number.—Taylor v. Harwood, Case No. 13,794.

A direct conflict between equally credible witnesses must be resolved in favor of the one having best opportunity to know the facts.—Abbe v. Rood, Case No. 6; Ayer v. The Glaucus, Id. 683.

The testimony of the crew of a vessel as to their own health will control as against that of persons experienced in the trade in question as to its effect upon seamen.—The Gentleman, Case No. 5,323.

§ 90. Conduct of witness.

The manner and demeanor of witnesses in giving testimony will be considered where they

conflict in their statements.—Dickenson v. The Gore, Case No. 3,893.

§ 91. Contradictory evidence.
To determine the truth from contradictory statements, the court will consider which statement is the more probable, aided by such corroborative evidence as there may be.—Jordan v. Eaton, Case No. 7,520.

In the case of contradictory oaths of a party, the one will be taken as true which bears most strongly against himself.—Farrell v. Campbell, Case No. 4,681.

EXAMINATION.

In bankruptcy, see "Bankruptcy," §§ 316–336.
Of person accused of crime, see "Criminal Law," § 38.
Of witnesses in general, see "Witnesses," §§ 59–69.

EXCEPTIONS.

In admiralty, see "Admiralty," § 84.
In deeds, see "Deeds," § 12.
To jurisdiction, see "Courts," § 62.
To pleadings, see "Equity," § 75.
To report of commissioner in admiralty, see "Admiralty," § 104.
—— of master in chancery, see "Equity," §§ 115–117.
—— of referee, see "Reference," § 7.

EXCEPTIONS, BILL OF.

§ 1, What constitutes. § 2, Form. § 3, Contents. § 4, Seal. § 5, Allowance and signing in general. § 6, Time of allowance, signing and filing.

Necessity for purposes of review, see "Appeal and Error," §§ 9, 20.
On motion for new trial, see "New Trial," § 20.
Taking exceptions at trial, see "Trial," § 20.

§ 1. What constitutes.
A statement signed by the judge as to the facts and rulings is not a bill of exceptions, unless it appears that the party actually excepted and persisted therein.—United States v. Jarvis, Case No. 15,469.

§ 2. Form.
The proper form for a bill of exceptions is that in use under Stat. Westm. II., and not of a case saved by one judge for the whole court.—United States v. Jarvis, Case No. 15,469.

§ 3. Contents.
Only so much of the evidence as may be necessary to present the legal questions raised should be embodied in the bill of exceptions.—Locke v. United States, Case No. 8,442.

§ 4. Seal.
The seal to a statement verifying all the papers sent up may be sufficient, though not in the usual place for a bill of exceptions.—United States v. Jarvis, Case No. 15,469.

§ 5. Allowance and signing in general.
Motion for allowance of bill of exceptions in a patent case will be granted by the circuit court, except where important and doubtful points arise on construction of the patent law.—Allen v. Blunt, Case No. 217.

The court will not sign a bill of exceptions purporting to contain all the evidence, when the parties do not agree that this is so, and the judge is not satisfied of it.—Lyles v. Alexandria, Case No. 8,624.

§ 6. Time for allowance, signing, and filing.
Bill of exceptions not allowed after lapse of 2½ years, where writ of error was pending in the supreme court.—Herbert v. Butler, Case No. 6,397.

Order for leave to make a bill of exceptions was granted two years after the trial, where plaintiff had made a case by direction of the trial judge.—Foote v. Silsby, Case No. 4,917.

The court will not seal a bill of exceptions presented two years after the trial, unless satisfied that there was error in the instructions given to the jury.—Greenway v. Gaither, Case No. 5,788.

The rule stated as to when a bill of exceptions may be signed and filed, and as to the circumstances under which a judgment will be vacated for the purpose of allowing a bill of exceptions which was not signed at the proper term to be subsequently signed and filed.—Eagle Mfg. Co. v. Draper, Case No. 4,234.

Exceptions to be incorporated in a bill should be so taken and notified at the trial. If this is done, the court may allow them to be subsequently reduced to form and filed nunc pro tunc.—Nicoll v. American Ins. Co., Case No. 10,259.

EXCHANGE OF PROPERTY.

By bankrupt, see "Bankruptcy," §§ 69, 231.

§ 1. Construction of contract.
Construction of contract for the exchange of barges at such time as it can be made "without injury or loss to either party."—Scott v. The Dick Keyes, Case No. 12,528.

EXCISE.

Duties, see "Internal Revenue."
Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXCUSABLE HOMICIDE.

See "Homicide," § 4.

EXECUTION.

§ 1, Property subject to execution. § 2, Time of issuance and performance of conditions preliminary thereto. § 3, Requisites of writ—Name of defendant. § 4, —— Execution against joint defendants. § 5, —— Collateral attack. § 6, Alias and pluries writs. § 7, Lien and priorities. § 8, Levy. § 9, Forthcoming bond. § 10, Stay of execution. § 11, Quashing or vacating writ. § 12, Injunction. § 13, Claims by third parties. § 14, Sale, manner and validity. § 15, Vacating or setting aside sale. § 16, Resale. § 17, Title and rights of purchasers or tenant by elegit. § 18, Redemption. § 19, Conveyance to purchaser. § 20, Proceeds. § 21, Return. § 22, Payment and discharge—Set-off of executions. § 23, Supplementary proceedings. § 24, Execution against the person—In general. § 25, —— Discharge of prisoner. § 26, —— Bonds. § 27, Wrongful execution.

See, also, "Attachments"; "Garnishment"; "Judicial Sales."
Exemptions, see "Exemptions"; "Homestead."
Issue of, see "Justices of the Peace," § 11.
Liability of officer, see "Sheriffs and Constables," § 3.
Suffering or procuring property to be taken on execution, see "Bankruptcy," §§ 243–245.

In actions by or against particular classes of parties.

See "Banks and Banking," § 14; "Corporations," § 59; "Executors and Administrators," § 53; "Partnership," § 39.

In particular actions or proceedings.

In admiralty, see "Admiralty," §§ 108–110, 120.
In equity, see "Equity," § 126.
On appeal, see "Admiralty," § 120.

§ 1. Property subject to execution.

See, also, "Bankruptcy," § 535.

An equity is not subject to execution.—Lenox v. Notrebe. Case No. 8,246c.

A mere equitable interest in land is not subject to attachment by way of execution in Maryland.—Sawyer v. Morte, Case No. 12,401.

The equity of redemption is not subject to sale on execution.—Campbell v. McManus, Case No. 2,364; Hill v. Smith, Id. 6,499; King v. Tuscumbia, C. & D. R. Co., Id. 7,808; Piatt v. Oliver, Id. 11,115; Van Ness v. Hyatt, Id. 16,867. But see Chickering v. Hatch, Case No. 2,672; Coggswell v. Warren, Id. 2,958; Russell v. Topping, Id. 12,163; Wilkins v. Wright, Id. 17,666.

Money in the hands of defendant may be seized on execution and credited as a payment. —Reno v. Wilson, Case No. 11,700a.

Money in the hands of a sheriff cannot be levied on nor applied to an execution against the plaintiff.—Reno v. Wilson, Case No. 11,700a.

An officer leaving property levied on in the hands of the defendant subjects it to be seized upon by subsequent creditors of the defendant. —Fields v. Crawford, Case No. 18,296.

The sheriff cannot levy a fi. fa. upon money in his hands made upon another fi. fa.—Fendall v. Turner, Case No. 4,727.

The property of a seminary of learning which is under the control of state officers, and derived all its property from the public, cannot be taken in execution on a judgment recovered against it. — Featherman v. Louisiana State Seminary, Case No. 4,713.

Goods in a bonded warehouse under the revenue laws are not subject to levy under an execution against the owner.—In re Johnston, Case No. 7,424.

Land held under a special warrant in Pennsylvania may be levied upon under a fi. fa. and sold under a vend. ex.; but land held under an indescriptive warrant cannot be so levied upon. —Lewis v. Meredith, Case No. 8,328.

§ 2. Time of issuance and performance of conditions preliminary thereto.

An execution issued before the expiration of 10 days from the judgment will be set aside on motion.—Bobyshall v. Oppenheimer, Case No. 1,591.

Execution is not void because issued prematurely. If issued pending motion for new trial, the irregularity is cured on denial of the motion. —Dawson v. Daniel, Case No. 3,669.

Under an agreement for judgment for the amount due on a promissory note, plaintiff must settle the amount due on notice to defendant before issuing execution.—Hancock v. Hillegas, Case No. 6,010.

The fact that plaintiff failed to return certain securities taken for the debt will not prevent his proceeding with execution where the condition on which they were given was not performed by defendant.—Bleecker v. Bond, Case No. 1,535.

When the judgment is for a penalty to be released on the payment of a smaller sum, that sum must be ascertained before the execution can be issued.—Fitzhugh v. Blake, Case No. 4,840.

Exemplification of records of Maryland and Virginia for purposes of obtaining executions under Act Feb. 27, 1801, § 13.—Parrot v. Habersham, Case No. 10,771.

No actual, formal entry of judgment, on any docket or other paper, need be made by either court or prothonotary to justify the issue of final process, as on a judgment.—Cromwell v. Bank of Pittsburg, Case No. 3,409.

Under the California practice act, an execution may be issued and executed as soon as the judgment is entered, and before the judgment roll is actually made up.—Galpin v. Page, Case No. 5,205.

§ 3. Requisites of writ—Name of defendant.

Court will not order it to be issued in other than the name appearing in the judgment, though through mistake of the clerk there is an obvious misnomer.—Bank of United States v. McKenney, Case No. 926.

§ 4. —— Execution against joint defendants.

An execution in the names of two plaintiffs after one is dead is defective.—Ex parte Kennedy, Case No. 7,698; Lane v. Beltzhoover, Id. 8,047; Devlin v. Gibbs, Id. 3,842.

Such execution is voidable, not void, and may be amended. — Lane v. Beltzhoover, Case No. 8,047; Devlin v. Gibbs, Id. 3,842. But see Ex parte Kennedy, Case No. 7,698.

§ 5. —— Collateral attack.

The signing of the vend. ex. by the deputy clerk, in his own name, *held* a mere irregularity, of which advantage could not be taken in a collateral proceeding. — Griswold v. Connolly, Case No. 5,833.

§ 6. Alias and pluries writs.

An alias execution may issue where personal property levied on is not sufficient, on sale, to satisfy the judgment.—Corning v. Burdick, Case No. 3,246.

The clerk has no authority to issue an alias fi. fa. under the same order on which the first was issued.—Smith v. Bank of Columbia, Case No. 13,011.

An alias execution cannot be issued until the return of the first execution, except on proof that it is lost or destroyed.—Corning v. Burdick, Case No. 3,246.

A judgment assigned to one of the debtors after execution has been returned unsatisfied will not support a second execution against the co-debtor's property.—French v. Edwards, Case No. 5,098.

Plaintiff may take out a new execution after the expiration of a year and a day, where he has countermanded the original execution at defendant's request, or has been delayed by injunction.—Muncaster v. Mason, Case No. 9,920.

An alias cap. ad resp. must be tested at the return of the original writ, and made returnable at the next ensuing term.—United States v. Parker, Case No. 15,992.

The judgment creditor may have several writs of the same species running at the same time, or writs of different species issued in succession. —Dobbin v. Allegheny, Case No. 3,941.

An alias fi. fa. or a new levy is not necessary where the first levy and inquisition are set aside by the court.—Thompson v. Phillips, Case No. 13,974.

§ 7. Lien and priorities.

See, also, "Bankruptcy," §§ 265-270.

An execution is a lien on the debtor's property from the time it is delivered to the sheriff to be executed.—Bartlett v. Russell, Case No. 1,080; Bayard v. Bayard, Id. 1,129.

The writs of execution from United States courts, in states divided into more than one district, run all over the state.—Prevost v. Gorrell, Cases Nos. 11,400, 11,402.

The execution first delivered to the marshal must be first served.—Cunningham v. Offutt, Case No. 3,484.

The writ first executed will take personal property without regard to their dates or the

time of delivery to the officers, and the lien given by such delivery binds the goods against a voluntary transfer.—In re Tills, Case No. 14,052.

An execution delivered to the marshal will supersede one delivered to a constable subsequently, but first levied.—Riddle v. Marshal of District of Columbia, Case No. 11,808.

A levy by a sheriff on personal property under a state judgment gives a prior lien over a subsequent levy made on the same property by the marshal.—Earl v. Raymond, Case No. 4,243.

As between two executions,—one in the hands of a constable, and the other in the hands of a sheriff,—the one first levied has the prior right.—In re Hughes, Case No. 6,843.

A second execution levied during suspension by order of the creditor of the first execution takes precedence.—Berry v. Smith, Case No. 1.359.

A fieri facias, received by the marshal before an attachment for rent not due, is entitled to priority, and must be first satisfied.—Stieber v. Hoye, Case No. 13,441.

A stay of execution does not disturb the lien thereof.—Love v. Love, Case No. 8,549.

An officer of another state forfeits any lien he may have on property levied on, by allowing it to be taken out of the jurisdiction of the state.—Fields v. Crawford, Case No. 18.296.

The lien of a fi. fa. ceases where it is returned without being levied upon the goods, and is not revived by the issuing of a subsequent fi. fa.—Cunningham v. Offutt, Case No. 3,484; Maul v. Scott, Id. 9,306.

§ 8. Levy.

A sheriff who has made a valid levy on property subsequently wrongfully removed by another may take forcible possession of it, wherever he finds it.—Parrish v. Danford, Case No. 10,770.

The plaintiff has a right to enter the defendant's house with the constable, who has a fi. fa., to show the defendant's property, upon which to levy the execution.—Harrington v. McDuel, Case No. 6,108; United States v. Baker, Id. 14,502.

Notice of an assignment of chattels to a judgment creditor will not prevent a levy where possession has never been taken.—Meeker v. Wilson, Case No. 9,392.

A levy on a stock of goods seen through the transom, over the door, of the store, into which the sheriff was unable to gain an entrance, *held* valid.—MacDonald v. Moore, Case No. 8,763.

Levy by sheriff, by a description of the debtors' lands indorsed on the writ, *held* sufficient.—Armstrong v. Rickey, Case No. 546.

An attachment of all the right, title, and interest of the defendant in and to any lands in the county binds his right of redemption of mortgaged land, and not the fee, and, if the execution be extended on the land, the title dates only from the seizure on the execution.—Coggswell v. Warren, Case No. 2,958.

An execution is not levied so as to give a lien against purchasers or creditors if the property is permitted to remain with the debtor.—Barnes v. Billington, Case No. 1,015.

An execution coming to the hands of an officer in possession of the debtor's property under former executions, is not levied, ipso facto, by mere operation of law.—Scriba v. Deane, Case No. 12,559.

In Georgia a writ of fi. fa. for taxes is subject to the same rules as to its mode of execution as writs issued on judgments in favor of private parties.—Georgia v. Atlantic & G. R. Co., Case No. 5,351.

To make levy effectual, property seized should be specially designated in return or by reference to a schedule accompanying it.—Barnes v. Billington, Case No. 1,015.

A levy on land attached takes effect from date of the attachment, when the record shows that it is the same land, though the officer's return does not so state.—Mattocks v. Farrington, Case No. 9,298.

A levy on personal property, shown by the return to be sufficient to pay the debt, discharges defendant.—Campbell v. Pope, Case No. 2,365a.

A writ of fi. fa. duly levied is a discharge of the debt, unless, by actual sale of the property, the value should appear to be insufficient to discharge the debt. Until then no new execution can issue.—Smith v. Bank of Columbia, Case No. 13,011.

The effect of a seizure is to change the property in the goods, and vest it in the sheriff.—Barnes v. Billington, Case No. 1,015.

Levy by sheriff valid in state courts will be held valid in federal court in bankruptcy.—Armstrong v. Rickey, Case No. 546.

The withdrawal of a watchman by the levying officer is no abandonment of the levy.—Dawson v. Daniel, Case No. 3,669.

A fi. fa. issued by order of the president of the Bank of Columbia, under section 14 of its charter, bound the lands and goods of the debtor from the time of its delivery to the marshal, if it bound them at all.—Smith v. Bank of Columbia, Case No. 13,011.

A vague levy on land may be rendered certain by an appraisement in which it is particularly described.—Sumner v. Moore, Case No. 13,610.

A plaintiff has no right to countermand a fi. fa. after it has been executed.—Smith v. Bank of Columbia, Case No. 13,011.

Levy may be made for whole amount of a judgment which is entered for a larger sum than the real debt, to be released on payment of the real debt and interest.—Allen v. Croghan, Case No. 220.

A levy should have such certainty as to show to a subsequent purchaser on what the levy was made. It cannot be made certain as against other creditors by parol evidence.—Gault v. Woodbridge, Case No. 5,275.

An execution cannot be levied on an undivided part of a mill and its appurtenances where the debtor owns the entirety, although a mill privilege is incapable of severance.—Gordon v. Lewis, Case No. 5,612.

A levy on one-half of a lot, without designating which half, or of 100 acres in a section, is too indefinite to convey the title.—Gault v. Woodbridge, Case No. 5,275.

Under Act Mass. March 17, 1784, it is not necessary that the levy should be recorded in the registry of deeds within the time prescribed by the statute, as between the parties to the execution, nor that the certificate of appraisement should be made and signed by the appraisers.—United States v. Slade, Case No. 16,312.

A defective levy being set aside on motion makes good a junior levy.—Gault v. Woodbridge, Case No. 5,275.

§ 9. Forthcoming bond.

Recitals in forthcoming bond.—Ambler v. McMechen, Case No. 273.

A forthcoming bond, given by mistake for less than the judgment, may, on plaintiff's motion, be quashed on paying costs of the motion.—Stevens v. Lloyd, Case No. 13,403.

A forthcoming bond, made payable to the creditor on a levy of a fi. fa., after his death, will support a judgment on motion by the administrator.—Entwisle v. Bussard, Case No. 4,503.

In an action on a forthcoming bond, a mistake in calculating marshal's fees may be cured by a release, and judgment rendered for true sum.—Ambler v. McMechen, Case No. 273.

§ 10. Stay of execution.

See, also, "Ejectment," § 18.

Where proceedings on execution from a state court are stayed under Code Ga. § 3669, the property is subject to execution from the federal court, or to possession by its receiver.—Georgia v. Atlantic & G. R. Co., Case No. 5,351.

Execution will be enforced where terms on which it was suspended under consent decree not complied with.—Anderson v. Jacksonville, P. & M..R. Co., Case No. 358.

A motion for new trial, or in arrest of judgment, is a waiver of a stay agreed upon by the parties.—Brent v. Coyle, Case No. 1,838.

A rule to show cause why execution should not be stayed on a ground that defendant is entitled to further credit will not be granted except upon affidavit stating the precise credits and their nature.—United States v. Wells, Case No. 16,664.

§ 11. Quashing or vacating writ.

The court will quash an execution upon a supersedeas judgment, and also the supersedeas judgment itself, if it does not truly recite the original judgment.—McSherry v. Queen, Case No. 8,926.

An execution issued on a judgment which does not authorize it may be quashed on motion, and the money made thereon ordered to be refunded, except where there is only a clerical mistake, in which case the execution will be corrected.—Murphy v. Lewis, Case No. 9,950a.

If execution issue before the end of the term in which the judgment was rendered, it may be quashed on motion, and the judgment rescinded.—Sharpless v. Robinson, Case No. 12,713.

An execution upon an exemplification from Maryland against a person not resident nor having property within the District of Columbia will be quashed on motion.—Sherrard v. Ponsonby, Case No. 12,772.

A fi. fa. issued after the death of defendant, but bearing teste before his death, will not be quashed.—Kane v. Love, Case No. 7,608.

A defective forthcoming bond will, at plaintiff's request, be quashed, as well as the execution upon which it was founded.—Sutton v. Mandeville, Case No. 13,649.

An execution cannot be quashed at one term when not returnable until the next term.—Linthecum v. Jones, Case No. 8,376.

Where a decree is satisfied, the execution thereon will be arrested on motion, without a new bill.—Molyneaux v. Marsh, Case No. 9,703.

§ 12. Injunction.

See, also, "Bankruptcy," § 285.

A bill will not lie to restrain an execution issued on a judgment at law, on grounds which might have been urged as a defense at law.—New Orleans v. Morris, Case No. 10,182.

A court of equity will enjoin the levy of an execution against one partner, on property of the firm, in which he has no interest which can pass by a sale, though the bill does not pray for a dissolution.—Cropper v. Coburn, Case No. 3,416.

A sale of property under execution will not be enjoined where it is averred that no legal injury will result to the execution debtor from such sale.—Chafee v. Coggshall, Case No. 2,571a.

A sale of the property of A. on an execution against B. will be restrained, notwithstanding the owner has a remedy by trespass against the sheriff, or by action on an indemnity bond given.—Daly v. Sheriff, Case No. 3,553.

When the personal property of an institution of learning in Louisiana is levied on, it is not necessary to file a bill in equity to restrain the sale. It may be done by intervention and third opposition.—Featherman v. Louisiana State Seminary, Case No. 4,713.

An injunction might also be granted against levying the execution on articles improperly attached, when not good against the execution itself.—Sawyer v. Gill, Case No. 12,399.

§ 13. Claims by third parties.

Parties claiming a superior lien on property levied upon by a marshal may proceed by intervention, and ask judgment against the debtor.—Bank v. Labitut, Case No. 842.

A person whose property is levied upon by a United States marshal, under execution against another, cannot resort to a local law which provides for equitable relief, but must file his bill in equity.—Hall v. Yahoola River Min. Co., Case No. 5,955.

§ 14. Sale, manner and validity.

See, also, "Bankruptcy," § 283.

Act Ark. Dec. 23, 1840, to regulate the sale of property on execution, and known as the "Valuation Law," is constitutional, and its provisions must be followed in executing the final process of the district court in the state.—United States v. Conway, Case No. 14,849.

In Missouri the power to sell continues after the return date as to land duly levied upon.—Webster v. Woolbridge, Case No. 17,340.

In Pennsylvania the death of either of the parties after a fi. fa. issued does not prevent the vend. ex. from issuing immediately upon the return of the fi. fa. A sci. fa. is not necessary.—Bleecker v. Bond, Case No. 1,535.

The death of defendant after the levy does not affect the power of the sheriff to sell; otherwise in the case of a death before levy.—Sumner v. Moore, Case No. 13,610.

Land must be sold on execution under the law in force at the time the contract was entered into.—Rue v. Decker, Case No. 12,112.

Personal notice of the time and place of sale of land must be given by the sheriff, under Act Pa. 1705, c. 153, § 4.—Hurst v. Rodney, Case No. 6,938.

A sale which is void for want of notice to the judgment debtor is not protected by the prescription of five years provided for by Rev. Code La. § 2809.—Kimball v. Taylor, Case No. 7,775.

Seizure and sale by a sheriff of property in New Orleans belonging to a judgment debtor, who had been expelled by the United States military authorities, and carried within the Confederate lines, notice being served upon a curator ad hoc appointed by the court, *held* void under the Louisiana Code.—Kimball v. Taylor, Case No. 7,775.

A railroad cannot be cut up into parcels and sold piecemeal on execution.—Georgia v. Atlantic & G. R. Co., Case No. 5,351.

A sale under an execution issued upon a judgment in an action in which the land sold had not been attached, and where there was no service upon the defendant except by publication, is void.—Morton v. Root, Case No. 9,866; Same v. Smith, Id. 9,867.

A sale of lands under an execution issued upon a judgment which has been fully paid is void.—Lee v. Rogers, Case No. 8,201.

A levy upon land, which is not sold for want of bidders, does not render void a subsequent sale of other land on another execution on the

same judgment.—Morton v. Smith, Case No. 9,867.

§ 15. Vacating or setting aside sale.

A person having title to land will not be prejudiced by a sale on process in a suit in which he was not a party, and he cannot move to set aside the sale.—Glassell's Adm'r v. Wilson's Adm'r, Case No. 5,477.

An agreement to prevent a sacrifice of property, under which it is bid off for its full value, is no ground of setting aside the sale.—Thames v. Miller, Case No. 13,860.

Inadequacy of consideration is no objection to a sale under an execution, if legally and fairly made.—Cooper v. Galbraith, Case No. 3,193.

A sale for a grossly inadequate consideration will be set aside where the attorney prepared the writ for the clerk, taxed the costs, prepared the advertisement, directed a large quantity of land to be levied on, and himself became the purchaser.—Surget v. Byers, Case No. 13,629.

A sale made under an erroneous description of the premises will be set aside.—McPherson v. Foster, Case No. 8,921.

A marshal's sale on execution of land in which defendant had no interest will be set aside on motion of the purchaser, who was deceived or misinformed, where the sale has not been completed.—Rocksell v. Allen, Case No. 11,983.

A sale by a marshal after his removal from office under a levy made before such removal will be set aside, though the marshal had no notice of his removal. — Overton v. Gorham, Case No. 10,626.

A levy and sale of lands under a pluries execution, while a prior levy under the same judgment is undisposed of, instead of issuing a venditioni exponas, is a mere irregularity, which can only be taken advantage of in apt time.—Kerr v. South Park Com'rs, Case No. 7,733.

§ 16. Resale.

Where the purchaser at the sale refuses to comply with its terms, the marshal should again offer the property for sale if he has time to do so, and, if not, by a proper return, enable plaintiff to take out an alias vend. ex.—Wortman v. Conyngham, Case No. 18,056.

§ 17. Title and rights of purchasers, or tenant by elegit.

A purchaser at a sale under judgment and execution takes only the right of the debtor at the time of the judgment. — Georgetown v. Smith, Case No. 5,347.

A sale on execution of a partner's interest in the firm passes only the debtor's interest in the chattels actually seized on the execution.—Moore v. Rosenberger, Case No. 9,774.

In Pennsylvania, a sale by a sheriff under a judgment in the state court passes a title to the purchaser discharged from a prior judgment in the federal court, either against defendant, as whose property it was sold, or against any persons from whom it was conveyed to defendant.—Thompson v. Phillips, Case No. 13,974.

The interest of persons to whom land was conveyed as trustees of an unincorporated association will pass, on execution sale, under a judgment for a debt of the association, recovered in an action against all the members, including such trustees.—French v. Edwards, Case No. 5,098.

The title under a sheriff's deed, although such deed does not convey a title until recorded, relates back to the time when the deed was made.—Wallace v. Lawrence, Case No. 17,101.

Execution issued on a dormant judgment is irregular, but a title acquired under a sale thereon is good.—Sumner v. Moore, Case No. 13,610.

The title of the purchaser at a sheriff's sale cannot be affected by irregularities in the proceedings, unless they are such as to render the proceedings absolutely void.—Sumner v. Moore, Case No. 13,610.

After six years' possession under a sheriff's deed made in good faith, and for a valuable consideration, objections to the process and its execution are not available. (Act Pa. March 26, 1785.).—Morrell v. Craefe, Case No. 9,819.

A purchaser at execution sale is entitled to show that a prior deed by the debtor was fraudulent, as against the execution creditor.—Middleton v. Sinclair, Case No. 9,534.

The title acquired on a sheriff's sale is conclusive in ejectment against the defendant in execution and those claiming under him.—Cooper v. Galbraith, Case No. 3,193.

Execution of the writ and the rights of the tenant by elegit secured thereunder.—Ronald v. Barkley, Case No. 12,031.

§ 18. Redemption.

Junior judgment creditor will, in equity, be allowed to redeem, even after the statutory period of redemption has expired.—Howard v. Milwaukee & St. P. Ry. Co., Case No. 6,761.

Redemption is complete on acceptance by sheriff of draft for amount, though it is not collected until after expiration of time.—Buford v. Henzier, Case No. 2,114.

A release to a purchaser at a marshal's sale by the judgment debtor, who holds the estate both by mortgage and by a distinct conveyance, conveys both titles.—Dexter v. Harris, Case No. 3,862.

§ 19. Conveyance to purchaser.

The deed of the auditors (in Ohio) may be made to the purchaser at the sale, or to his order.—Bank of United States v. Voorhees, Case No. 939.

The acknowledgment of a sheriff's or marshal's deed *held* a judicial act, which would cure all defects in process or its execution which the court had power to remedy by their order.—Thompson v. Phillips, Case No. 13,974.

Where a sheriff's deed is certain, it cannot be avoided collaterally by a defect in the levy.—Sumner v. Moore, Case No. 13,610.

§ 20. Proceeds.

Where land is sold under execution upon a judgment of the federal circuit court, such court will not, upon a motion to that effect, appropriate the proceeds to an older judgment of a state court.—Whitely v. Riddick, Case No. 17,567.

The court will not interfere, in a summary way, to distribute money, the proceeds of an execution, or decide on the rights of those who claim it, unless the money be paid into court.—Wortman v. Conyngham, Case No. 18,056.

After the marshal is commanded by the writ to bring the proceeds of a sale into court, he may pay it to the plaintiff on the execution, on his responsibility, for the right of the plaintiff to receive it.—Wortman v. Conyngham, Case No. 18,056.

A marshal will not be required to pay into court the proceeds of a sale of property claimed by a third person pending suit against him therefor, in the absence of collusion or danger of loss.—Day v. Emerson, Case No. 3,677.

In the case of judgment liens arising at different times, *held*, that the proceeds of the property were first chargeable with all the costs incurred by the judgment creditors.—Scriba v. Deane, Case No. 12,559.

Where a judgment is assigned as security for a less amount than its face, the debts will be

paid out of the first proceeds.—Varnum v. Milford, Case No. 16,891.

A person purchasing property on judicial sale under a judgment assigned as security will be compelled to pay the money to the assignee.—Varnum v. Milford, Case No. 16,891.

The judgment creditor in the federal court is entitled to the proceeds of a sale by a marshal under his execution, though the judgment, execution, and levy were subsequent to a judgment, execution, and levy of process from the state court.—In re Jordan, Case No. 7,513.

Motion allowed to take money out of court levied to satisfy a judgment, to pay a prior judgment.—Azcarati v. Fitzsimmons, Case No. 690.

One having the legal title to land, half of which in equity belongs to another, cannot have a debt against the latter satisfied out of the land in preference of other creditors.—Moore v. Searcy, Case No. 9,774a.

§ 21. Return.

See, also, "Creditors' Suit," § 6.

Marshal is not bound to hold execution for full sixty days.—Bassett v. Orr, Case No. 1,095.

Sufficiency of return to show no property on which to levy.—Goshorn v. Alexander, Case No. 5,630.

The return to the execution nulla bona need not state that the officer made search for property.—Suydam v. Beals, Case No. 13,653.

The return of the officer stating that the appraisers who acted in making a levy on real estate were disinterested is conclusive. — Mattocks v. Farrington, Case No. 9,298.

An extent under Act Mass. March 17, 1784, upon real estate, is not good unless it appear by the return that all the appraisers are sworn, nor unless all the appraisers concur in the appraisement.—United States v. Slade, Case No. 16,312.

Under the Maine statutes, the return of the officer that the land levied on cannot be divided without damage is conclusive on parties and privies.—Mattocks v. Farrington, Case No. 9,298.

If an officer's return can be fairly construed so as to be sufficient in law, it is the duty of the court so to construe it.—Coggswell v. Warren, Case No. 2,958.

The marshal makes his return to process at his peril. The court will not dictate its form.—Wortman v. Conyngham, Case No. 18,056.

The marshal may amend his return after the return day, according to the truth of the case, by the data in his sales book.—Linthicum v. Remington, Case No. 8,377.

Sheriff's return to an execution cannot be impeached collaterally. — Armstrong v. Rickey, Case No. 546.

The return of the marshal to a writ cannot be traversed in an action between the parties to the suit in which the writ issued.—Wilson v. Hurst, Case No. 17,809.

The court will not, upon motion, quash the return of a fi. fa. levied upon an equity of redemption.—Warfield v. Wirt, Case No. 17,174.

§ 22. Payment and discharge—Set-off of executions.

In the case of separate reports on a reference of all matters of difference between the parties on which executions were issued, *held*, that an assignee of one of the parties before issue of the execution took subject to the right of set-off of one execution against the other.—Wood v. Carr, Case No. 17,940.

§ 23. Supplementary proceedings.

A suit in rem for forfeiture of property by reason of violation of the internal revenue laws is a "common-law cause," within the meaning of Rev. St. § 916, and, after the return of execution against the stipulators unsatisfied, supplementary proceedings, under the New York law, are properly taken.—In re Quantity of Manufactured Tobacco, Case No. 11,499.

The circuit court for the Southern district of Ohio has adopted as a rule of practice the proceeding in aid of execution provided for by the Code of Ohio.—Gregory v. Hewson, Case No. 5,801.

§ 24. Execution against the person — In general.

What constitutes an imprisonment for debt under Act June 17, 1874.—Ex parte Dexter, Case No. 3,854.

Construction of Massachusetts and federal statutes relating to imprisonment for debt.—Campbell v. Hadley, Case No. 2,358.

A claim for damages for an injury to the person with force is not a claim for a debt, within the meaning of the statute and rules relating to imprisonment for debt.—Hanson v. Fowle, Case No. 6,041.

Const. Or. art. 1, § 19, prohibiting "imprisonment for debt except in cases of fraud," does not apply to an action for a tort or penalty, but only to cases of debt arising upon contract, express or implied.—United States v. Walsh, Case No. 16,635.

Act 1828, c. 68, adopts the state laws, then existing, on the subject of jail liberties; and Act 1800, c. 4, is no longer in force.—United States v. Knight, Case No. 15,539.

Act Feb. 28, 1839, which adopts the laws of a state in regard to imprisonment of debtors, applies to pending cases.—Gray v. Munroe, Case No. 5,724. CONTRA, see Wilber v. Ingersoll, Case No. 17,632.

Immunity from imprisonment for debt, granted under the state insolvent law, will apply in the case of executions issued out of the federal courts on prior judgments.—Moan v. Wilmarth, Case No. 9,686.

Act Jan. 14, 1841, does not adopt subsequent state laws imposing restrictions and conditions on imprisonment for debt. — In re Freeman, Case No. 5,083; United States v. Walsh, Id. 16,635. CONTRA, see Moan v. Wilmarth, Case No. 9,686.

Imprisonment for debt being abolished in Louisiana, *held*, that the federal courts therein have no jurisdiction of a suit for the enforcement of a highly penal statute in regard to fraudulent debtors. Act 1841.—Curtis v. Feste, Case No. 3,502.

Since the adoption of the rules of 1845, parties are liable to arrest and imprisonment on process issuing out of the United States courts, irrespective of subsequent legislation in the several states abolishing imprisonment on like process.—Gaines v. Travis, Case No. 5,180.

Act March 2, 1867, adopts the modifications, conditions, and restrictions upon imprisonment for debt then existing by the laws of the several states, and the course of proceedings which may thereafter be adopted therein.—United States v. Tetlow, Case No. 16,456.

Whether, under a judgment for the value of goods illegally imported, the debtor is liable to arrest on execution, depends on the local law. Rev. St. § 990.—United States v. Moller, Case No. 15,793.

Imprisonment for debt, having been abolished in the state (New York), it cannot be used to enforce a final decree in the federal court. Rev. St. § 990.—The Blanche Page, Case No. 1,524.

Act Mass. May 21, 1855, to abolish imprisonment for debt and to punish fraudulent debt-

ors, does not abolish imprisonment for debt, and is not adopted by any act of congress so as to affect process out of that court.—In re Freeman, Case No. 5,083.

§ 25. —— Discharge of prisoner.

A prisoner in execution for a debt due the United States is entitled to be released on prison-bounds bonds.—United States v. Anderson, Case No. 14,450.

Debtors of the United States are not entitled to the benefit of the prison bounds in the District of Columbia.—United States v. Gorman, Case No. 15,236.

Forty-eight hours is ordinarily a reasonable time to give a debtor arrested on execution to procure bond before committing him to prison.—United States v. Hudson, Case No. 15,412.

The aldermen of Alexandria have no power to discharge, under the Virginia laws, a debtor committed on process from a United States court.—Knox v. Summers, Case No. 7,914.

After surrender to the custody of the jailer, the debtor cannot complete the disclosure theretofore begun, and further proceedings by the justices are without jurisdiction.—Burnham v. Adams, Case No. 2,173.

Right of imprisoned debtor in Massachusetts to take the poor debtor's oath.—Case of Snow, Case No. 13,143.

The remedy given by the act of 1798, authorizing the secretary of the treasury to discharge imprisoned debtors, does not prevent a remedy under the act of 1867.—United States v. Tetlow, Case No. 16,456.

The court will not, on motion, discharge a prisoner for debt, who has the benefit of the bounds, because the creditor refuses to pay the daily allowance.—Ex parte Wilson, Case No. 17,779.

Selection of justice of peace by officer, at request of debtor, must be considered the act of the debtor.—Buckley v. Page, Case No. 2,094.

Where the justices have jurisdiction, their certificate is conclusive as to regularity of preliminary proceedings.—Buckley v. Page, Case No. 2,094.

Persons confined for torts and trespasses are not within the provisions of the act of congress, or that of South Carolina, for the relief of insolvent debtors.—Martins v. Ballard, Case No. 9,176.

The Rhode Island statutes giving the liberty of the limits to prisoners, on giving bonds not to escape, etc., have not altered the common law.—Steere v. Field, Case No. 13,350.

After a prisoner has been released upon a limit bond, the sheriff can confine him again only on the bail's becoming insufficient. He cannot accept a surrender.—United States v. Noah, Case No. 15,894.

A debtor of the United States, discharged, by order of the president, under Act March 3, 1817, cannot be arrested again on a new ca. sa. by the marshal for his fees, irrespective of an agreement to that effect.—United States v. Smith, Case No. 16,327.

After judgment rendered on a prison-bounds bond, defendant may be taken in custody on the original ca. sa., after the expiration of a year from the date of the bond.—Owen v. Glover, Case No. 10,629.

§ 26. —— Bonds.

A statutory bond for the liberties of the prison, executed by the debtor under duress, is void both as against him and his sureties.—Hawes v. Marchant, Case No. 6,240.

But if the debtor, with the knowledge and consent of one of his sureties, claims and exercises the right of being on the liberties by virtue of such a bond, they are estopped to allege its invalidity.—Hawes v. Marchant, Case No. 6,240.

A prison-bounds bond may be assigned by a deputy marshal.—Scott v. Wise, Case No. 12,548.

The obligors on a bond for the jail limits are not discharged from liability for an escape by the subsequent assent of the plaintiff to the escape.—Slocum v. Hathaway, Case No. 12,952.

It is no defense to a surety on a prison-bounds bond that the principal was insolvent when the bond was given.—Smoot v. Lee, Case No. 13,133.

The escape of a prisoner while he is in a state of insanity, is no breach of the condition of a bond for jail limits.—Hazard v. Hazard, Case No. 6,278.

Right of action upon a prison-bounds bond, for an escape after the debtor had been ordered into close custody on being found guilty of fraud on an application for a discharge under the insolvent act.—Keirll v. McIntire, Case No. 7,651.

A valid promise not to arrest a debtor on the first execution does not, at law, avoid a bond given by the debtor for the prison liberties, when arrested in violation of such promise, which is collateral merely.—Hawes v. Marchant, Case No. 6,240.

§ 27. Wrongful execution.

The officer cannot justify under an execution without producing it.—United States v. Baker, Case No. 14,502.

The person executing a bond of indemnity to the sheriff is a trespasser if the act of the sheriff be illegal.—Parrish v. Danford, Case No. 10,770.

An execution, after the expiration of the time within which it is made returnable, is of no force, and an arrest under it is a trespass.—Stoyel v. Lawrence, Case No. 13,517.

EXECUTIVE DEPARTMENTS.

Construction of statutes, see "Courts," § 76.
Powers, see "Constitutional Law," § 2; "Courts," §§ 2, 76; "Extradition," §§ 3, 16; "United States," § 5.

EXECUTORS AND ADMINISTRATORS.

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XI. FOREIGN AND ANCILLARY ADMINISTRATION.

§ 70, Foreign appointment. § 71, Ancillary appointment. § 72, Collection and disposition of assets. § 73, Actions by foreign executors or administrators. § 74, Actions against foreign administrators or executors.

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I. ADMINISTRATION IN GENERAL.

§ 1. Power to control administration.
A prefect under the Mexican government in California had no jurisdiction over the estates of deceased persons, or authority to appoint an administrator.—Hardy v. Harbin, Case No. 6,060.

§ 2. Fact of death.
A probate court has no jurisdiction to make an appointment of an administrator of the goods of a person who at the time is alive.—United States v. Payne, Case No. 16,014.

Where an administrator is appointed of a person who at the time is alive, money paid to him in that capacity may be recovered back, where it has not been paid over.—United States v. Payne, Case No. 16,014.

§ 3. What law governs.
The statute of California for the settlement of the estates of deceased persons has no application to the estates of persons who died previous to the organization of the state government.—Hardy v. Harbin, Case No. 6,060.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 4. Renunciation by executor.
Notwithstanding the renunciation of an executor, under Act Md. 1798, c. 101, subc. 3, § 7, he can come into court and take the responsibility by complying with the law at any time before letters of administration have been granted to another.—In re Benton's Will, Case No. 18,234.

An executor could renounce his right as executor after acting as such, and be relieved from his responsibility.—Easby v. Easby, Case No. 18,293.

§ 5. Bond.
The orphans' court of Alexandria county, D. C., cannot, in any case, grant letters testamentary without security, unless the testator's visible personal estate is sufficient to pay all the debts.—Ex parte Lee, Case No. 8,176.

The administrator should give a bond sufficiently large to cover the amount which is in equity due the representatives from the government, where there is a bill in congress for an appropriation.—Richardson v. Cameron, Case No. 11,780a.

Where it appears that a large sum of money is likely to come into the administrator's hands, he may be ordered to give additional bonds, failing which he may be removed.—Taylor v. Sherburne, Case No. 13,805.

§ 6. Effect of appointment.
A person receiving letters testamentary on a will duly proved is authorized to perform every act proper for an executor, notwithstanding the pendency of a question relative to the validity of the will.—Bradford v. Boudinot, Case No. 1,765.

Where a person presenting a claim for the wages of another has letters of administration granted by the proper authority upon his estate, the court must take the fact to be that the latter is dead.—Ketland v. Lebering, Case No. 7,744.

§ 7. Revocation of letters.
Letters testamentary granted without security agreeable to the will may be revoked upon petition of creditors.—Laird v. Dick, Case No. 7,990.

A creditor appointed administrator on his petition will not be removed on the petition of the next of kin, without cause.—Rogers v. May, Case No. 12,015b.

§ 8. Administrator de bonis non.
The administrator d. b. n., and not the distributees of the estate, is the personal representative of the deceased.—Smith v. Billing, Case No. 13,014.

III. ASSETS.

§ 9. What are assets.
Nothing is assets in the hands of an administrator, applicable to the payment of a demand against the estate, within Civ. Code Or. § 1103, but money.—United States v. Eggleston, Case No. 15,027.

In Connecticut, real and personal estate are alike a fund for the payment of debts, and both are assets in the hands of the administrator.—Davis v. Weed, Case No. 3,658.

In California, real estate is assets in the administrator's hands, to be administered like personalty.—Meeks v. Vassault, Case No. 9,393.

Stock held by a trustee is not assets in the hands of his administrator.—United States v. Cutts, Case No. 14,912.

Administrator de bonis non cannot be charged as such with property fraudulently conveyed to him by deceased.—Backhouse v. Jett, Case No. 710.

The administrator of decedent's domicile is entitled to receive from the administrator appointed in another state the balance of assets remaining after paying debts therein.—Swatzel v. Arnold, Case No. 13,682.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

§ 10. Representation of decedent in general.
An executor, as such, has a right to enter goods of his testator at the customhouse, and to give bonds for duties which will bind the estate.—United States v. Aborn, Case No. 14,418.

§ 11. Collection of assets.
Money received by defendant, for the estate of intestate, in the first administrator's lifetime, may be recovered as assets in an action by a subsequent administrator.—Blydenburgh v. Lowry, Case No. 1,582.

An executor under a domestic will is not liable for legacies which came to the hand of another as executor and guardian under a will made abroad.—Gaines v. Spann, Case No. 5,178.

A payment to a foreign administrator, is no defense to a suit by an administrator of the state of debtor's domicile.—Anonymous, Case No. 431.

In California, the exclusive right to recover real estate is in the administrator until distribution, and, if his right becomes barred by neglect, the right of the heir, though a minor, is also barred.—Meeks v. Vassault, Case No. 9,393.

See, also, post, § 72.

§ 12. Compromise and release of claim.
An administrator of a deceased partner may settle with the survivor on such terms as, in the exercise of good faith and reasonable diligence, he may choose to accept.—Hoyt v. Sprague, Case No. 6,810.

§ 13. Recovery of assets by administrator de bonis non.
An administrator de bonis non, who is also executor of the surviving administrator, is personally liable where he fails for a long period of time to call to an account the agents of the former administrators.—Lidderdale v. Robinson, Case No. 8,337.

Administrator de bonis non is liable as such to banker for money credited by mistake to the intestate, and paid to the original administrator.—Baring v. Putnam, Case No. 984.

See, also, post, § 42.

§ 14. Partnership.
Administrator is not bound to pay over money to creditor of deceased partner of his intestate, and cannot set up such payment in defense of action by representatives.—Barnes v. Ryder, Case No. 1,020.

§ 15. Delegation of powers.
An administrator who employs an agent to look after the estate of the intestate is personally responsible to the creditors for his acts.—Green v. Hanberry, Case No. 5,759.

§ 16. Contracts.
A contract by a person, as administratrix and as guardian of infant heirs, with an agent, to redeem lands from tax sales, and to perfect titles in consideration of a conveyance of a moiety, will be *held* personally binding upon the administratrix as to her share, and upon the infants to the extent of a liberal remuneration for services performed.—Teakle v. Bailey, Case No. 13,811.

§ 17. Conversion or loss of assets.
An executor invested a legacy in bank stock and when called upon for its amount sold the stock and paid over the proceeds. *Held*, that the executor was not liable for conversion in selling the stock.—Norman v. Storer, Case No. 10,301.

A deposit, by an executor, of money belonging to the estate in the Confederate states depository, *held* a direct contribution to the government, rendering the executor personally liable on the settlement of the estate.—Lockhart v. Horn, Case No. 8,445.

An executor is not responsible for the loss of the funds received by him for dividends in Confederate money or notes, which, at the time, he was obliged to accept.—McKenzie v. Anderson, Case No. 8,855.

§ 18. Co-administrators.
One administrator may release or dispose of the estate without the other.—Boudereau v. Montgomery, Case No. 1,694.

§ 19. Real property—Title and possession.
A court of probate cannot authorize an administrator to take possession of any property of which the title or right of possession is not in the estate of the intestate.—Crescent City Ice Co. v. Stafford, Case No. 3,387.

Where an executor takes possession as such under the authority of the probate court, the fact that he is also universal legatee does not change the character of his possession, so as to make him hold in the latter capacity, and thereby render him the personal debtor of the legatees and creditors.—Labitut v. Prewett, Case No. 7,962.

§ 20. —— Improvements.
An executor who built a bulkhead on the water front of the estate *held* liable for damage resulting from the sinking of a vessel by its faulty construction, and also for additional damage occurring while the vessel was being raised with due care by her owner.—Mason v. Rhinelander, Case No. 9,251.

§ 21. —— Authority to sell.
An administrator has no authority to sell an estate held by his intestate in trust for other persons as assets to pay the debts of the intestate.—Robison v. Codman, Case No. 11,970.

A sale directed to be made by the executor may be made by the administrator with the will annexed, where the executor fails to qualify. Code Miss. 1871, § 1194.—Peters v. Bowman, Cases Nos. 11,028, 11,029.

An executor, empowered by will to sell real estate in the best mode in his judgment, for the interest of the estate, cannot delegate such power.—Pearson v. Jamison, Case No. 10,879.

An executor in a will not named as trustee therein with others to whom land is devised in trust has no power to convey the land.—Beard v. Rowan, Case No. 1,181.

Under a direction to executors, in case the rents are not sufficient to pay the allowance to minor children to adopt some mode of raising the deficiency out of the other parts of the estate, not devised to the widow, *held*, that the executors had power to sell the reversion of the lands.—Roberdeau v. Roberdeau, Case No. 11,888.

A lease by a life tenant for a certain number of years, unexpired, *held* no impediment to the exercise of a power of sale under the will.—Waldron v. Chasteney, Case No. 17,058.

See, also, post, §§ 37–39.

§ 22. —— Validity of sale.

A contract made by an executrix with a relative and another to hold land until they could purchase it for a price less than its true value at the time of its actual sale is against public policy, and voidable.—Tufts v. Tufts, Case No. 14,233.

Under a direction to the executor to sell lands, and to pay over the proceeds after payment of debts, expenses, etc., to trustees for a charitable use, he may make a valid sale, though the devise is invalid under the laws of the state.—Peters v. Bowman, Case No. 11,029.

§ 23. —— Purchase by executor or administrator.

The general administrator upon an estate may be a purchaser at a sale by a person appointed by the legislature to sell intestate's estate in payment of his debts.—Dexter v. Harris, Case No. 3,862.

A sale by an administrator, at which he purchases, may be set aside at the discretion of the persons interested, though there be no fraud.—Price v. Morris, Case No. 11,414.

An administrator purchasing at an execution sale, under a judgment obtained on a note given for a part of the purchase price on a sale of decedent's lands, does not hold the land in a fiduciary capacity.—Shakeley v. Taylor, Case No. 12,698.

§ 24. —— Covenant in conveyance.

A covenant by an executor in a conveyance of land of his testator in his capacity as executor, and not otherwise, is not binding upon him in his individual capacity, although it may not be binding on the estate.—Thayer v. Wendell, Case No. 13,873.

§ 25. —— Rights of purchasers.

Where a charge on realty is general, the purchaser is not bound to see to the application of the purchase-money, unless he have notice of the debt.—Garnett v. Macon, Case No. 5,245.

An executor having no specific power given by will cannot assign a military warrant or a certificate on which a warrant was obtained, and where such assignment appears on the face of the warrant, and is copied into the patent, the assignee or the patentee takes with notice.—Ware v. Brush, Case No. 17,171.

§ 26. —— Setting aside sale.

Setting aside an administrator's sale as fraudulent, and charging him with the appraised value of the goods, does not vest title in him in his own right.—Smith v. Billing, Case No. 13,014.

§ 27. Personal property.

Where an executor, who is also a devisee or residuary legatee, enters generally into the possession of the property, he does it as executor, and not as devisee.—Hanson v. Cox, Case No. 6,040.

An administrator cannot acquire the title to the property of the deceased by paying his debts. The property must be sold and accounted for by him.—Wilson v. Taylor, Case No. 17,840a.

A sale of a final settlement certificate by the administrator for the highest market price, though below its nominal value, is valid.—Strodes v. Patton, Case No. 13,538.

Prior to the act of 1843 an executor in Maryland was authorized to sell or raise money on the property of the deceased in the regular course of his duty, and parties dealing with him were not bound to inquire into his object.—Lowry v. Commercial & Farmers' Bank, Case No. 8,581.

One dealing with an executor is chargeable with all the knowledge which he would have acquired by reading the will on the public records.—Lowry v. Commercial & Farmers' Bank, Case No. 8,581.

One dealing with an executor, with reasonable grounds to believe that he intends to misapply the money, is liable to the party injured by the transaction.—Lowry v. Commercial & Farmers' Bank, Case No. 8,581.

A proposition by one executor alone to transfer stock long after the death of the testator without first obtaining an order of court should satisfy a man of common business experience of an abuse of trust.—Lowry v. Commercial & Farmers' Bank, Case No. 8,581.

If the executor sells a chattel specifically devised, to a person who knows there are no debts, the purchaser takes the property subject to the bequest.—Garnett v. Macon, Case No. 5,245.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

§ 28. Liabilities of estate.

The executor may pay a debt barred by statute.—Fairfax v. Fairfax, Case No. 4,613.

§ 29. Presentation and allowance.

A claim accruing after the time limited for presentation is not barred, in Connecticut, if presented within one year after it accrued.—Davis v. Weed, Case No. 3,658.

A contingent claim which has not accrued prior to the close of the administration of an estate is not barred by the Illinois statutory two-years limitation of time to exhibit claims against a decedent's estate.—Payson v. Hadduck, Case No. 10,862.

Act N. C. 1715, c. 48, § 9, limiting time for filing claims against decedents' estates, *held* suspended by Act 1777, c. 2, § 101, disabling British subjects from suing in state courts, until enforcement of treaty of peace by Act 1787.—Ogden v. Witherspoon, Case No. 10,461.

§ 30. Disputed claims.

The executor or administrator may submit an account of his testator or intestate to arbitration, and his acceptance of the award is binding on all concerned.—Strodes v. Patton, Case No. 13,538.

A claim by the executor as a creditor of the estate cannot be controverted by other creditors before the orphans' court.—Nicholls v. Hodge, Case No. 10,231.

The auditor's report as to the amount due from an intestate is prima facie correct, and admissible in evidence.—Bank of United States v. Williams, Case No. 942.

§ 31. Priorities and payment.

An administrator has a right at law to give a preference to a creditor by confessing a judgment, and a court of equity will not interfere

by injunction.—Wilson v. Wilson, Case No. 17,848.

An orphans' court cannot annex conditions to the payment of the dividend on a judgment recovered against the intestate.—Chesapeake & O. Canal Co. v. Johnson, Case No. 2,648.

Where an executor commits a devastavit, the debts due from the estate of which he was executor take precedence of the claims against his own estate after his decease.—Coates v. Muse, Case No. 2,917.

The priority of debts must be determined by the law of the country from which the representative derives his power to act.—Union Bank of Georgetown v. Smith, Case No. 14,362.

Act Md. 1798, c. 101, giving preferences to judgment creditors does not embrace foreign judgments.—Norton v. Stevens, Case No. 10,353a.

A judgment of a justice of the peace, unlike a judgment of a court of record, is not entitled to priority in payment.—Bettinger v. Ridgway, Case No. 1,369.

The administrator of the surety in a collector's bond, who pays away the assets on the intestate's debts before notice of the government's claim, is not guilty of a devastavit.—United States v. Ricketts, Case No. 16,159.

Executor and trustee paying money to remainder-man through his counsel is chargeable with his knowledge as to bankruptcy proceedings against remainder-man.—Beecher v. Gillespie, Case No. 1,224.

In case of payments made by an administrator of an insolvent estate, all such payments must be deemed to be made on general account, and pro rata towards the extinguishments of all debts due to the creditor.—United States v. Wardwell, Case No. 16,640.

VI. DISTRIBUTION OF ESTATE.

See, also, post, § 72.

§ 32. Requiring security.

Failure to take from distributees the statutory bond for the payment of any debts subsequently shown *held* not to render administrator liable for devastavit.—Davis v. Van Sands, Case No. 3,655.

The Virginia statute, providing that an administrator shall not be compelled to make distribution until security is given for the refund of any part necessary to meet debts subsequently discovered (1 Rev. Code 1819, c. 105, § 58), extends to executors, though they are not named therein.—Kirkpatrick v. Gibson, Case No. 7,848.

The amount of the security which the executor or administrator is authorized to take under this statute, is within the sound discretion of the court, and need not cover the whole amount distributed.—Kirkpatrick v. Gibson, Case No. 7,848.

§ 33. Mode of payment.

Where a legatee takes from the executors a bond and mortgage from a purchaser of the estate for a greater amount than his legacy, agreeing to pay back the excess, he is liable for such excess, though the obligor became insolvent, and a sale of the mortgaged property did not produce the amount of the legacy.—Washington v. Washington, Case No. 17,236.

§ 34. Over payment.

The executors are personally liable for an overpayment to legatees.—Moffit v. Varden, Case No. 9,689.

The administrator is liable to a creditor of the intestate for the amount of an overpayment to the distributee on a final distribution.—Falls Bridge Turnpike Co. v. Adams, Case No. 4,630.

§ 35. Enforcing payment after distribution.

An order of the probate court of settlement and distribution of the estate does not bar a claim subsequently accruing.—Davis v. Weed, Case No. 3,658.

The validity of a claim accruing after distribution of the estate, contested by the administrator, must be determined by a suit thereon against the administrator before a court of common-law or of equity jurisdiction.—Davis v. Weed, Case No. 3,658.

§ 36. Administrator as guardian of distributee.

An administrator who, after a decree ascertaining the distributive shares, takes guardianship of a minor distributee, will hold his share as guardian, and not as administrator.—Taylor v. Deblois, Case No. 13,790.

An administrator, who is also guardian for legatees and distributees, who receives assets from a foreign administrator, will be deemed to have received them as administrator, and to have retained them as such, where he fails to inventory or account for them, or procure any settlement in the probate court.—Pratt v. Northam, Case No. 11,376.

VII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

§ 37. When authorized.

Sales of lands by executors to pay debts under the Illinois statutes.—Dubois v. McLean, Case No. 4,107.

As to the validity of an executor's sale of land in Ohio.—Piatt v. McCullough, Case No. 11,113.

A probate court in Oregon *held* to have no power to authorize generally an administrator to convey lands in performance of his intestate's obligations, but only to convey specific premises upon the petition of the person claiming to be entitled thereto.—Wythe v. Palmer, Case No. 18,120.

Liability of lands of decedents in Pennsylvania for debts, and practice and proceedings to sell such lands for payment.—Wilson v. Watson, Case No. 17,847.

§ 38. Application and order.

An application may be made by an executor or administrator to the court of common pleas in Ohio, by attorney, for the sale of real estate.—Piatt v. McCullough, Case No. 11,113.

Where proceedings for the sale of real estate have been carried on by an attorney, the sanction of the executor or administrator will be presumed, unless the contrary appear.—Piatt v. McCullough, Case No. 11,113.

A sale by an administrator, without giving the proper bond, is void.—Bright v. Boyd, Case No. 1,875.

§ 39. Sale.

Sale of realty by administrator on notice of petition to sell to pay debts, served upon the widow and heir, *held* valid, though a purchaser of the land was not notified.—Dolton v. Nelson, Case No. 3,976.

A sale by an administrator, unsupported by a judicial record of the proceedings in which he was given authority, *held* void.—Seaverns v. Gerke, Case No. 12,595.

A judgment for the purchase price of lands, sold by commissioners at a public sale, by the acre, as directed by a decree of the court, will be enjoined to the extent of any deficiency, though the commissioners declared that the purchaser must buy at his own risk, both as to

quantity and title.—Strodes v. Patton, Case No. 13,538.

Proceedings for the sale of realty to pay debts to which nonresident heirs were made parties by publication under order of the court, as provided by statute, cannot be collaterally attacked.—Forsythe v. Ballance, Case No. 4,951.

An interest in lands acquired at an administrator's sale before the title is passed is assignable, and such assignment need not be registered under the laws of North Carolina to be valid against creditors.—In re Reynolds, Case No. 11,724.

A sale of lands in Ohio by an administrator, to pay debts, under order of the proper court, will not be set aside, as against innocent purchasers, after 30 years, merely because the heirs and devisees were infants.—Newsom v. Wells, Case No. 10,187.

A purchaser under a power given by will to the executor to sell real estate for payment of debts is not bound to see that the purchase money is properly distributed among testator's creditors.—Greenway v. Roberts, Case No. 5,790.

Under Act Md. 1798, an order of the orphans' court for the sale of stock by an executor would protect the purchaser.—Lowry v. Commercial & Farmers' Bank, Case No. 8,581.

Administrator's sale of realty cannot be avoided for irregularity by a stranger to decedent's title.—Burnham v. Hewey, Case No. 2,175.

A stranger cannot object to the irregularity of proceedings for the sale of realty to pay debts, where the heirs make no objection.—Forsythe v. Ballance, Case No. 4,951.

A deed executed by administrators under an order of the orphans' court cannot be read in evidence without producing the order of the court.—Hartshorn v. Wright, Case No. 6,169.

VIII. INSOLVENT ESTATES.

§ 40. Distribution and settlement.

An action in behalf of creditors will lie against an administrator of an insolvent estate for payment, where new assets come into his hands after decree of distribution, though the statute of limitation precludes an original suit.—Dexter v. Arnold, Case No. 3,855.

IX. ACTIONS.

See, also, post, §§ 73, 74.

§ 41. Jurisdiction.

Executors and administrators may be sued in their representative capacity in the federal courts, and judgments against them may be enforced by execution against the property of the estate unadministered.—United States v. Drennen, Case No. 14,992.

Jurisdiction of action as dependent upon citizenship or residence, see "Courts," §§ 47, 48.

§ 42. By executors or administrators.

An administrator de bonis non cannot support an action in his own name for goods of his intestate sold by the previous administrator.—Calder v. Pyfer, Case No. 2,299.

Under the Maryland statutes, the husband is administrator of his deceased wife, and may sue for her separate estate not disposed of by deed or will.—Marshall v. Dorsett, Case No. 9,128.

An executor, who was also trustee under a deed of trust from the grantor, *held* entitled to recover, as executor, money paid out under a decree declaring the trust deed void as to a certain creditor.—Lynn v. Yeaton, Case No. 8,642.

See, also, ante, § 13.

§ 43. Against executors or administrators.

Advances made for a person after his death cannot be recovered in assumpsit against his executor.—Hourquebie v. Girard, Case No. 6,732.

A bond creditor need not pursue personal assets of his debtor in the hands of persons other than his personal representative, if such pursuit threatens to be tedious, intricate, and unproductive.—Murdock v. Hunter. Case No. 9,941.

An action at law on a judgment obtained on a joint and several bond in a joint suit against all the obligors will not lie against the administrator of a deceased obligor.—United States v. Cushman, Case No. 14,907.

In Indiana the representatives of a deceased joint obligor may be sued, as on a joint and several obligation.—Curtis v. Bowrie, Case No. 3,498.

A judgment against an administrator appointed in one state cannot be made the basis of an action against an administrator appointed in another state.—Dent v. Ashley, Case No. 3,809a.

An election to proceed against the administrator in his representative capacity will prevent the creditor subsequently proceeding upon individual liability.—Duffy v. Neale's Adm'r, Case No. 4,119.

A citizen of another state is not deprived of the right to sue the administrator in the federal court by a representation of insolvency.—Hunt v. Danforth, Case No. 6,887.

§ 44. Defenses by executors or administrators.

The plea of plene administravit is no defense to an action merely seeking to establish the existence of a debt against the estate, where the statute classifies the debts, and only makes the administrator liable to the extent of assets received.—Covington v. Burnes, Case No. 3,291.

Plea of never administrator will not obtain in the District of Columbia by one who obtained letters of administration in Fairfax county before the District was separated from it.—Courtney v. Hunter, Case No. 3,285.

An administrator made defendant after verdict against his intestate, and before judgment, may plead no assets or insolvency on sci. fa. against him.—Hatch v. Eustis, Case No. 6,207.

§ 45. Limitations.

Act Ga. March 16, 1869, barred suits on causes accruing prior to June 1, 1865, if not brought by January 1, 1870. *Held* that, in the case of an administrator, the time was extended one year. Code, § 2548.—Marsh v. Burroughs, Case No. 9,111.

The exemption by Code Ga. § 2548, of an administrator from suit for one year from his qualification, *held* not repealed by the limitation law of March 16, 1869.—Marsh v. Burroughs, Case No. 9,111.

A creditor may sue to recover his debt any time before distribution, though after the expiration of 12 months.—Hanson v. Cox, Case No. 6,040.

Administrators are bound to plead before the expiration of a year from the date of the letters of administration.—Buckley v. Beatty, Case No. 2,091.

An executor may be ruled to plead before the expiration of the year after letters granted.—Frazier v. Brackenridge, Case No. 5,071.

In actions against executors and administrators, the statute of limitations may be pleaded after office judgment. — Wilson v. Turberville, Case No. 17,842.

On a debt due by an executor to his testator, the statute ceases to run from the acceptance

of the trust by the executor.—Wilson v. Rose, Case No. 17,831.

Trusts devolving on an executor, and trust property in the hands of the deceased, kept separate, are not assets in the hands of executors and administrators, and the statute of limitations does not run against them.—Trecothick v. Austin, Case No. 14,164.

The statute does not run against nonresident devisees for land sold by the executor without authority.—Dunlap v. Pyle, Case No. 4,163.

The statute which bars a resident devisee in such case does not apply to a right which subsequently falls to him on the death of nonresident devisees, not barred by statute.—Dunlap v. Pyle, Case No. 4,163.

The statute does not begin to run against defendant legatees from the date of a final decree authorizing them to file petitions to propound their claims.—Bryan v. Alexander, Case No. 2,064.

In Massachusetts, the statute does not begin to run in favor of executors and administrators against persons who have a right to appeal from the decree granting administration until the right of appeal is lost, or the decree becomes absolute.—Trecothick v. Austin, Case No. 14,164.

Construction of 1 Rev. Code N. C. c. 65, in relation to the limitation of actions against executors and administrators.—Bond v. Allen, Case No. 1,619.

The statute of limitations of Rhode Island, of suits brought against executors and administrators, is a good bar in equity as well as at law.—Pratt v. Northam, Case No. 11,376.

The limitation, in Rhode Island, to three years, of suits against executors and administrators, in the case of a suit brought to recover for the default of the original executor after his death, begins to run from the time the last administration is taken out.—Pratt v. Northam, Case No. 11,376.

Under the probate act of California, § 190, suit to recover lands sold by an administrator by order of the probate court is barred in three years from the sale.—Meeks v. Vassault, Case No. 9,393.

A bill in equity filed by legatees against the executor and other legatees to compel the settlement and distribution of the estate suspends the running of the statute.—Lockhart v. Horn, Case No. 8,446.

See, also, "Limitation of Actions," § 12.

§ 46. Parties.

An attorney in fact of an executor or administrator cannot maintain suit in his own name for the benefit of the estate.—Neely v. Robinson, Case No. 10,082a.

All the executors need not join in an action on a sealed note given to one.—Foote v. Noland, Case No. 4,915.

An executor may bring a bill to enjoin a sale of property of the estate, under a personal judgment against himself, without joining legatees or others interested in the estate.—Labitut v. Prewett, Case No. 7,962.

If a suit is brought originally against an administrator, and he die pendente lite, the administrator de bonis non may be compelled to appear to defend the suit.—Owen v. Blanchard, Case No. 10,628.

Where a debt is due to two persons, and a settlement with the executor of one made after the death of both, and notes given to him for the balance, he may sue in his own name, as the doctrine of survivorship does not apply.—Catlin v. Underhill, Case No. 2,524.

An objection to the competency of an administrator as a party claimant must be taken on his appearance.—The Boston, Case No. 1,669.

§ 47. Intervening in actions by others.

An administrator appointed in another state may intervene in behalf of his intestate.—The Boston, Case No. 1,669.

Right to intervene in admiralty, see "Admiralty," § 64.

§ 48. Pleading.

The administrator of a defendant who died after office judgment and writ of inquiry awarded cannot plead plene administravit, nor any other plea which the original defendant could not have pleaded.—Janney v. Mandeville, Case No. 7,213.

A general plea of plene administravit may be good where all the property has been exhausted in the regular course of administration; but, if exhausted in paying debts without notice of a debt having a legal priority, such fact should be specially pleaded.—United States v. Hoar, Case No. 15,373.

In a suit against the administratrix of a surety in a revenue bond, brought 13 years after the breach, a plea of want of assets, and fully administered before notice of the bond, *held* good.—United States v. Primrose, Case No. 16,091.

Declaration on promise by one as administrator must aver assets to charge him personally de bonis propriis.—Adams v. Whiting, Case No. 69.

Declaration by executor need not state by whom the letters testamentary were granted.—Cawood v. Nichols, Case No. 2,531.

In a declaration by an administrator upon a bond to his intestate he must aver himself to be administrator, and make profert of his letters of administration.—Fugate v. Bronaugh, Case No. 5,146.

Where it is apparent from the whole declaration that defendants are charged in their representative character, it is good on general demurrer, though it also allege a promise by the administrator.—Curtis v. Bowrie, Case No. 3,498.

Counts charging defendants as executors, upon the testator's promise and upon their own promise as executors, in consideration of assets, may be joined.—Dixon v. Ramsay, Case No. 3,932.

The executor, upon plene administravit, is not to be charged with lands devised to him to be sold, if necessary, to pay debts.—Curray v. McMunn, Case No. 3,489.

A plea by an administrator, to an action of debt, that the estate is insolvent, is not a good plea in bar.—Peyatte v. English, Case No. 11,054a.

In an action against an administrator, a plea of a release by a former administrator, without showing full payment, is bad. An administrator cannot release a debt except on full payment.—Maryland v. Todd, Case No. 9,220.

The plaintiff is bound to give oyer of his letters of administration whenever demanded, before the expiration of the rule to plead.—North v. Clark, Case No. 10,308.

Plaintiffs naming themselves administrators, but not making profert of their letters, are not bound to give oyer of them.—Mason v. Lawrason, Case No. 9,242.

An administrator may be permitted to amend by adding a plea where judgments have been obtained to the amount of the assets in his hands since he first pleaded.—Teasdale v. Jordan, Case No. 13,814.

After issue joined upon nul tiel record, and the cause is called for trial, defendant will not be permitted to plead that plaintiff was never administrator.—Duvall v. Wright, Case No. 4,212.

Joinder of counts, see "Action," § 3.

§ 49. Issues and proof.

Outstanding judgments cannot be given in evidence on plene administravit, but must be specially pleaded.—Hines v. Craig, Case No. 6,518.

Bills purchased and remitted to pay a foreign debt may be given in evidence as payments, on the issue of plene administravit, if purchased and remitted before the writ was served on defendant.—Fairfax v. Fairfax, Case No. 4,613.

In an action by an administrator upon the trial of an issue of non assumpsit, plaintiff need not produce his letters of administration.—Wise v. Getty, Case No. 17,909.

A defendant who pleads general issue in an action by executor appointed in another state on a cause of action arising in testator's lifetime cannot, on the trial, require plaintiff to produce letters testamentary.—Champlin v. Tilley, Case No. 2,586.

§ 50. Evidence.

The creditor has the burden of showing the amount of assets which came into the administrator's hands, even when he has neglected to return an inventory.—Hanson v. Cox, Case No. 6,040.

§ 51. Trial.

Under Act Md. 1798, c. 101, subc. 8, § 15, the court, and not the jury, is to ascertain whether the defendants paid away all the assets before notice of the plaintiff's claim.—Hellen v. Beatty, Case No. 6,336.

§ 52. Judgment.

The ascertainment of assets must precede a judgment against an executor or administrator for a debt of his decedent.—Bank of Washington v. Peltz, Case No. 952.

On the plea of "No assets," the practice in Pennsylvania is for the jury to find for the defendant, and for the plaintiff to pray judgment de terris, etc., and of the assets, quando, etc.—Wilson v. Hurst, Case No. 17,809.

Judgment may be rendered de bonis testatoris under the laws of Arkansas, and executions may be issued against the estate of the intestate, which may be sold to satisfy the same.—United States v. Drennen, Case No. 14,992.

A promise by an administrator to pay in consideration of assets will support a judgment de bonis testatoris.—Faxon v. Dyson's Adm'rs, Case No. 4,705.

An implied promise, in consideration of assets alone, is a promise as administrator.—Courtney v. Hunter, Case No. 3,285.

A judgment obtained by the administrator of an administratrix of her husband on notes taken by her personally in payment for property sold belonging to the estate will not be ordered to be entered up for the use of an administrator d. b. n. of the husband, unless it appear that the sureties of the administratrix are insolvent, and that the balance of her administration account is against her.—Magruder's Case, Case No. 8,962.

On a finding for plaintiff on the issue of plene administravit, he is entitled to judgment de bonis testatoris for the whole debt.—Fairfax v. Fairfax, Case No. 4,612.

Where an executor voluntarily appears in the action, judgment may be given for or against him with the same effect as if brought in by sci. fa.—Barker v. Ladd, Case No. 990.

§ 53. Execution and enforcement of judgment.

Executors against whom decree is rendered are presumed to be equally liable.—Coates v. Muse, Case No. 2,916.

"Judgments, when assets," rendered against administrators, *held* entitled to the same rank as between themselves which would belong to the particular instruments on which they were founded.—Lidderdale v. Robinson, Case No. 8,337.

A decree entered against two executors jointly will bind both equally, whether so expressed in a decree or not.—Coates v. Muse, Case No. 2,917.

But, on an application at a subsequent term to carry the decree into effect, it may be revived against each according to his liability as shown by the proofs.—Coates v. Muse, Case No. 2,917.

An execution de bonis propriis is the proper process against executor on a decree in equity for the balance of the administration account.—Catlett v. Fairfax, Case No. 2,516.

A scire facias will issue on a suggestion of a devastavit to subject the executor or administrator de bonis propriis.—Teasdale v. Branton, Case No. 13,813.

The pendency of a commission of insolvency is no bar to a sci. fa. against an administrator on a judgment had against him.—Hatch v. Eustis, Case No. 6,207.

Plea to sci. fa. against an administrator, suggesting waste, that defendant had fully administered the personalty, and had tendered lands more than sufficient to satisfy the execution, *held* demurrable.—Brattle v. Willard, Case No. 1,815.

A judgment against executors in Indiana does not authorize an execution against the lands of the deceased.—O'Brien v. Woody, Case No. 10,398.

§ 54. Costs.

A plea of set-off is not an action within the Arkansas administration laws, so as to deprive a party of costs.—Pate v. Gray, Case No. 10,794a.

Lawyer's fee not taxed in equity suit against executors and administrators (in Virginia).—Arell's Representatives v. Marsteller, Case No. 514.

Where plaintiffs, suing as executors, dismiss their bill because not competent to sue as such in the jurisdiction, a lawyer's fee will be taxed against them.—Patterson v. Ball, Case No. 10,823.

Charges properly allowed against a fund in the administrator's hands upon which a decree of the court had acted.—Ex parte Plitt, Case No. 11,228.

§ 55. Review.

An heir may sue out a writ of error to reverse a judgment rendered by the circuit court against the estate in favor of the executor.—Patterson v. Phillips, Case No. 10,829a.

X. ACCOUNTING AND SETTLEMENT.

§ 56. Duty to account—Property embraced.

An administrator is not liable to account, as such, for money which he received upon a sale, as mortgagee of the real estate of his intestate, although he sells with general warranty.—Dexter v. Arnold, Case No. 3,855.

Such sale does not bar the equity of redemption of the heirs.—Dexter v. Arnold, Case No. 3,855.

An executor or administrator who lawfully recovers or receives money or property in his representative character holds it as assets of the estate, and is liable in that character to the party entitled to it.—Duffy v. Neale's Adm'r, Case No. 4,119.

The administrator is also liable personally if the decedent was not liable in his lifetime, and the administrator's receipt discharged the debtor.—Duffy v. Neale's Adm'r, Case No. 4,119.

§ 57. Proceedings for accounting—Jurisdiction.

An American administrator is chargeable here, as such, for assets received from an administrator abroad.—Pratt v. Northam, Case No. 11,376.

A court of equity has jurisdiction to decree an account and distribution, according to the lex domicilii, of the estate of a deceased person domiciled abroad, which has been collected under an administration granted here.—Harvey v. Richards, Case No. 6,184.

But whether it will proceed to decree such account and distribution, or direct such assets to be remitted, to be distributed by a foreign tribunal, depends upon the circumstances of the case.—Harvey v. Richards, Case No. 6,184.

An administrator, having stated that he has property in his hands, may be called upon in equity to account for it to creditors anywhere.—Bryan v. McGee, Case No. 2,066.

An administrator appointed in one state, who has received assets of the estate in another state, cannot be compelled in the latter state to account therefor.—Vaughan v. Northrop, Case No. 16,899.

If assets in a foreign jurisdiction come into the possession of an administrator by a voluntary delivery to him, he may be required to account for them in the home jurisdiction.—Van Bokkelen v. Cook, Case No. 16,831.

§ 58. —— Notice.

Notice must be given to heirs where their interests are to be affected by a proceeding.—Patterson v. Phillips, Case No. 10,829a.

§ 59. Charges and credits—Profits.

The legatee is entitled to the profits made on an unlawful investment of the legacy by the executor in bank stock.—Norman v. Storer, Case No. 10,301.

§ 60. —— Interest.

An administrator is not liable to pay interest upon assets in his hands, unless under special circumstances.—Dexter v. Arnold, Case No. 3,855.

Interest on money in the hands of the administrator is not chargeable where the same is retained to determine the right of the claimant by suit.—Wade v. Wade, Case No. 17,030.

An administrator who mingles the assets with his own funds, upon which he draws indiscriminately for his own purposes, should be charged with interest thereon.—Union Bank v. Smith, Case No. 14,352.

An executor who makes personal use of funds of the estate is chargeable with the highest amount of legal interest.—McKenzie v. Anderson, Case No. 8,855.

Where an executor deposited money belonging to the estate in the Confederate States' depository, he is liable for interest, though he did not receive interest.—Lockhart v. Horn, Case No. 8,445.

Where an executor was directed to apply $500 to the manumitting of certain slaves, which he wrongfully failed to do for several years, *held*, that he was not chargeable with interest thereon for the benefit of the residuary legatees.—Stewart v. Barcroft, Case No. 13,422.

Executor *held* chargeable, on the balance found due, only from the date of the decree, where he acted in good faith, but misapprehended his duty.—Norman v. Storer, Case No. 10,301.

Mode of adjustment of accounts of executor and trustee in case of maladministration.—McKenzie v. Anderson, Case No. 8,855.

§ 61. —— Decrease of assets.

An executor may be allowed credit for the loss upon a sale of stock, though the sale was made without order of court.—Ex parte Jones, Case No. 7,443.

Where an executor might have collected the assets of the estate in good money before the civil war, but failed to do so, he should not be allowed to discharge the balance found due from him by payment in Confederate treasury notes.—Lockhart v. Horn, Case No. 8,445.

§ 62. —— Costs and counsel fees.

Whether an executor will incur the expense of a suit against a known insolvent debtor is a matter within his discretion.—Lupton v. Janney, Case No. 8,607.

§ 63. —— Disbursements for benefit of distributees.

The executor or administrator cannot be allowed for board and clothing of infant heirs.—Patterson v. Phillips, Case No. 10,829a.

§ 64. Compensation.

An executor *held* entitled to expenses in supporting in good faith the probate of a will subsequently declared invalid, and to commissions for managing the estate while in his hands.—Bradford v. Boudinot, Case No. 1,765.

Jurisdiction and procedure of orphans' court of Alexandria county in fixing compensation of executors.—Atkinson v. Robbins, Case No. 617.

An executor's compensation is, within the limits of 5 and 10 per cent. on the inventory, a matter lying within the discretion of the judge of the orphans' court.—Nicholls v. Hodge, Case No. 10,231.

§ 65. Hearing or reference and report.

In a suit against an administrator for an account, the commissioner to whom it is referred cannot admit an administration account settled in another jurisdiction without knowledge of plaintiff.—Backhouse v. Jett, Case No. 710.

The report of the commissioner made many years before on a reference of administrators' accounts, though not acted upon, *held* prima facie evidence on a reference of the accounts of the surviving administrator.—Lidderdale v. Robinson, Case No. 8,337.

The creditors of an insolvent estate are entitled to contest the settlement of the executor's account before the orphans' court, and to appeal from its decision.—Nicholls v. Hodge, Case No. 10,231.

A report is not binding as to the representatives of a coadministrator who were not before the court.—Green v. Hanberry, Case No. 5,759.

§ 66. Opening.

An account of an administrator, though settled by a judicial decree of a court of competent jurisdiction, may be opened for fraud.—Mallett v. Dexter, Case No. 8,988.

Mere lapse of time is not a bar to opening an executor's account, but long acquiescence in the settlement may make it against conscience to do so.—Lupton v. Janney, Case No. 8,607.

Accusations falsifying probate accounts for fraud must be specific, especially after parties implicated are dead.—Badger v. Badger, Case No. 718.

Allowance of notes given by administrator for valid claims for services during 15 years not set aside on bill by heirs, filed 19 years after settlement by administrator.—Gould v. Gould, Case No. 5,637.

§ 67. Review.

After an interlocutory decree charging executors with a certain sum as rents and profits, *held* too late on petition to decree a set-off of a debt alleged to be due by an alleged party in interest.—Gordon v. Lewis, Case No. 5,614.

§ 68. Costs.

Where a suit for an accounting was rendered necessary, the executor is chargeable with costs,

though complainant's demand was greatly reduced.—Norman v. Storer, Case No. 10,301.

§ 69. Operation and effect.

The settlement of an administrator's account in the probate court, procured by fraud, is not conclusive.—Pratt v. Northam, Case No. 11,376.

A bill will lie in equity against an administrator to recover assets which he has fraudulently withheld, notwithstanding a final settlement of his accounts by a probate court.—Van Bokkelen v. Cook, Case No. 16,831.

XI. FOREIGN AND ANCILLARY ADMINISTRATION.

§ 70. Foreign appointment.

Letters of administration have no operation in other states except by sanction of such states.—Wood v. Gold, Case No. 17,947.

§ 71. Ancillary appointment.

The state court will grant administration on property belonging or debts due to persons residing abroad, to enable them to be collected in the state.—Picquet v. Swan, Case No. 11,132.

Letters of administration with the will annexed, granted in the District of Columbia while there was an executor acting under letters testamentary granted in Maryland, are void.—Paul v. Kane, Case No. 10,843.

Auxiliary administration is not within the meaning of Revision Iowa 1860, § 2357, providing that administration shall not be "originally granted" after the lapse of five years from the death of decedent.—Dolton v. Nelson, Case No. 3,976.

§ 72. Collection and disposition of assets.

An administrator appointed in one state is not entitled to property, once vested in an administrator appointed by the court of decedent's domicile, transported to the former state for sale in its markets.—Crescent City Ice Co. v. Stafford, Case No. 3,387.

§ 73. Actions by foreign executors or administrators.

The administrator, to whom a patent has been granted for the invention of his intestate, is a trustee holding the legal title for the benefit of the heirs at law of the intestate, and he need not qualify in the state in which he is suing for infringement.—Goodyear v. Hullihen, Case No. 5,573.

A federal court in one state cannot regard letters testamentary or of administration granted in another state, and such letters give no authority to sue.—Brownson v. Wallace, Case No. 2,042.

The objection that plaintiffs are foreign executors may be taken at the hearing, where it does not appear on the face of the complaint.—Bartlett v. Rogers, Case No. 1,079.

The rule that a suit cannot be maintained in our courts by a foreign executor or administrator who has not taken out administration here only applies where such person sues in right of the deceased.—Trecothick v. Austin, Case No. 14,164.

If he sues in his own right, although the right be derived under a foreign will, no administration need be taken out here if it does not affect real estate passed by the will here.—Trecothick v. Austin, Case No. 14,164.

An administrator appointed in one state may sue in the courts of another before obtaining letters therein, and after he has obtained such letters may aver the fact by amendment.—Swatzel v. Arnold, Case No. 13,682.

Executors appointed in New York under probate of will there not authorized to maintain actions for collection of assets of estate of deceased in California.—Bartlett v. Rogers, Case No. 1,079.

Letters granted in New York upon a suggestion of assets found will enable the administrator to recover assets in the District of Columbia, under Act June 24, 1812, § 11.—Blydenburgh v. Lowry, Case No. 1,582.

An administrator acting under letters of administration granted in another state may institute a suit in Pennsylvania without taking out letters of administration there.—Glassell's Adm'r v Wilson's Adm'r, Case No. 5,477.

Executors or administrators appointed in other states may sue in Ohio.—Price v. Morris, Case No. 11,414.

A grant of letters duly certified is sufficient authority to sue in Ohio.—Price v. Morris, Case No. 11,414.

§ 74. Actions against foreign administrators or executors.

No action can be maintained against an executor or administrator, on a debt due from the estate, unless he has been duly qualified by a probate tribunal in the state or county where the suit is brought.—Caldwell v. Harding, Case No. 2,301.

An executor cannot be compelled to appear and answer in a state where he has not taken out letters testamentary, nor done any official act, though process is served upon him personally.—Security Ins. Co. v. Taylor, Case No. 12,607.

An executor or administrator appointed in one state cannot be sued in another for assets lawfully received by him in the former.—Mellus v. Thompson, Case No. 9,405.

XII. LIABILITIES ON ADMINISTRATION BONDS.

§ 75. Nature and extent in general.

Each administrator on a joint administration bond is a surety for the other, and is bound for the whole.—Gay v. Cornell, Case No. 5,280; Lidderdale v. Robinson, Id. 8,337.

§ 76. What constitutes breach.

The administration bond of an executor is liable if he fails to put in a claim against himself.—Wilson v. Rose, Case No. 17,831.

§ 77. Settlement and discharge of principal.

A receipt by one of four testamentary guardians to himself as executor discharges himself as executor.—Alston v. Munford, Case No. 267.

An executor indebted to the estate cannot, in an action upon the administration bond brought by creditors or legatees, discharge himself by showing payments to his co-executors.—United States v. Rose, Case No. 16,193.

Where an executor who was also a guardian charges himself as guardian with a specific legacy to his ward, both he and the sureties on his executor's bond are discharged from liability.—Alston v. Munford, Case No. 267.

The sureties in the administration bond are not liable for a distributee's share where the administrator, after a decree ascertaining the distributive shares, took guardianship of the distributee, as in such case he will hold the share as guardian, and not as administrator.—Taylor v. Deblois, Case No. 13,790.

The sureties of an administrator are liable in the same manner as their principal for assets received from a foreign administrator, where he is also guardian for legatees and distributees, until some act or admission showing that he retained them as guardian.—Pratt v. Northam, Case No. 11,376.

§ 78. Actions.

Right of action upon an administration bond by a creditor of the intestate in the District of

Columbia.—United States v. Shaw, Case No. 16,267.

In Washington county, D. C., there must be a return of non est, or of fi. fa., against the executor or administrator, before suit upon his bond. Act Md. 1720, c. 24.—United States v. Queen, Case No. 16,109.

An action will not lie against the sureties in an administration bond until a devastavit has been established in a suit against the administrator.—Young v. Mandeville, Case No. 18,161.

An action will not lie in Virginia against the sureties in an administration bond, until the plaintiff shall have proved his debt and a devastavit in an action against the administrator.—Gilpin v. Crandell, Case No. 5,449; Same v. Oxley, Id. 5,450.

An action cannot be maintained upon an administration bond of an executor for not giving in a claim against himself, until the claim has been established under Act Md. 1798, c. 101, § 20, cl. 8.—United States v. Rose, Case No. 16,194.

Where the executor has wasted the assets, and is insolvent, the government may claim payment of the duties from the sureties on the executor's bond, without in the first instance resorting to the sureties on the customhouse bond.—United States v. Aborn, Case No. 14,418.

A creditor cannot maintain an action against the administrator of his debtor on his administration bond, before return of non est on a capias ad respondendum, or a fi. fa. returned nulla bona, or other apparent insolvency.—United States v. Kenedy, Case No. 15,520.

A decree against an executor for legacies is no bar to an action on the executor's bond.—Bryan v. Alexander, Case No. 2,064.

A suit on an administration bond payable to the governor by name, must be in his name, and not by his style of office.—Arkansas v. Ball, Case No. 530.

A suit on an executor's bond is not barred in six years from the date of a decree merely ascertaining the amount due the legatee.—Bryan v. Alexander, Case No. 2,064.

In an action upon an administrator's bond to recover a distributive share of the estate, defendants may retain for necessaries furnished the distributee.—United States v. Ritter, Case No. 16,169.

XIII. EXECUTORS DE SON TORT.

§ 79. What acts constitute one executor de son tort.

The possession of property, under a disposition of it by deed in the lifetime of deceased, will not, in law, constitute the possessor executor de son tort.—Peters v. Breckenridge, Case No. 11,030.

§ 80. Liabilities.

Executor de son tort is liable for value of goods taken and used.—Baysand v. Lovering, Case No. 1,147.

EXEMPLARY DAMAGES.

See "Damages," § 8.

EXEMPLIFICATIONS.

As evidence, see "Evidence," §§ 47–50.

EXEMPTIONS.

See, also, "Homestead."
From service as juror, see "Jury," § 5.
—— of process, see "Process," § 6.
From taxation, see "Taxation," § 7.
Of property of bankrupt, see "Bankruptcy," §§ 515–536.

§ 1. Creation and effect.

Exemption laws passed after the commencement of a suit in the federal court will not apply to an execution therein.—Lawrence v. Wickware, Case No. 8,148.

State exemption laws apply to process issued from the federal courts.—Manufacturers' & Farmers' Bank v. Bayless, Case No. 9,050.

The federal courts in New York, under Rev. St. § 967, are not vested with discretionary power (Code Civ. Proc. N. Y. § 282) to order real property bound by the lien of a judgment to be exempted therefrom in certain cases during the pendency of an appeal from such judgment.—Myers v. Tyson, Case No. 9,995.

The effect of a chattel mortgage on the stock in trade upon the right to an exemption, and what property falls within the phrase "stock in trade," as used in the exemption statute, considered.—In re Jones, Case No. 7,445.

A merchant in Kansas is not entitled to the special exemption allowed a "mechanic, miner, or other person," of tools and instruments for the purpose of carrying on his trade or business. Comp. Laws Kan. 1862, p. 549, § 11.—In re Schwartz, Case No. 12,503.

A merchant tailor, in Kansas, who is a practical workman, and cuts and fits garments for customers, and superintends their manufacture, is entitled to the right of exemption of goods to the value of $400 as "stock in trade," which may be asserted against the proceeds of goods in the hands of the bankruptcy court where illegally refused by the assignee.—In re Jones, Case No. 7,445.

In Wisconsin exemptions will not be allowed from the stock in trade, or from articles simply bought for exchange, and which are not "used and kept for the purpose of carrying on the trade or business."—Ex parte Robinson, Case No. 11,933.

A merchant is entitled to an exemption of implements or stock in trade, given "any mechanic, miner, or other person."—In re Bjornstad, Case No. 1,453.

Under the Colorado law, a merchant is entitled to a horse as a "working animal," but not to a buggy.—In re Peabody, Case No. 10,866.

The business of mere buying and selling or directing or employing the labors of others is not a trade, occupation, or profession within Civ. Code Or. § 279, allowing exemptions.—In re Parker, Case No. 10,724.

The "business of a contractor" is not a "trade, occupation, or profession," within the meaning of Code Or. § 211, exempting certain tools and implements from execution.—In re Whetmore, Case No. 17,508.

A wagon and team are not exempt under Act 1867, § 14, and Civ. Code Or. § 279, unless they are necessary to a trade, occupation, or profession in which the bankrupt habitually earns his living.—In re Parker, Case No. 10,724.

EXHIBITS.

Annexed to pleading, see "Pleading," §§ 60–62.

EXPATRIATION.

See "Citizens," § 3.

EXPERT TESTIMONY.

In civil actions, see "Evidence," §§ 75–79; "Patents," §§ 200, 231.
In criminal prosecutions, see "Criminal Law," § 65.

EXPLOSIVES.

Criminal liability for explosion, see "Homicide," § 2.
Keeping of, see "Negligence," § 2.
Regulations as to carriage by water, see "Shipping," § 193.

EXPORTS.

Taxation of, see "Commerce," § 1.

EX POST FACTO LAWS.

Constitutional restrictions, see "Constitutional Law," § 10.
Retroactive operation of statutes, see "Statutes," § 35.

EXPRESS COMPANIES.

See "Carriers."

EXTORTION.

§ 1. Nature and elements of offense.

Extortion is the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due him, or more than is due, or before it is due.—United States v. Waitz, Case No. 16,631.

Laboring to exact fees from one party after having received them from another is not extortion.—United States v. Chenault, Case No. 14,791.

An officer is not guilty of extortion in collecting greater fees than those allowed by law, unless he did so with knowledge that he was violating the law.—United States v. Highleyman, Case No. 15,361.

A register of a land office cannot lawfully act as attorney for an applicant for a patent, and where, acting as such, he receives a gross sum as compensation for services in both capacities in excess of legal fees as register, he is guilty of extortion.—United States v. Waitz, Case No. 16,631.

EXTRADITION.

I. INTERNATIONAL.

§ 1, Nature of international extradition. § 2, Treaties and constitutional and statutory provisions. § 3, Executive authority and jurisdiction of courts. § 4, Application, complaint, and requisition. § 5, Demand. § 6, Warrant and mandate. § 7, Evidence. § 8, Procedure. § 9, What law governs. § 10, Crimes for which extradition may be demanded. § 11, Place of commission of crime. § 12, Persons subject to surrender. § 13, Review of commissioner's decision. § 14, Effect of extradition proceedings. § 15, Waiver of right to demand prisoner.

II. INTERSTATE.

§ 16, Executive authority. § 17, Crimes for which extradition may be demanded. § 18, Warrant and issuance thereof. § 19, Commitment for trial. § 20, Procedure and pleading.

Jurisdiction on habeas corpus proceedings, see "Courts," § 114.
Of fugitive apprentice, see "Apprentices," § 3.
—— slaves, see "Slaves," §§ 9–11.
Review of extradition proceedings, see "Habeas Corpus," § 15.

I. INTERNATIONAL.

§ 1. Nature of international extradition.

The right of a foreign government to demand the surrender of a fugitive from justice does not exist except as granted by statutory provisions or treaty stipulation.—In re De Giacomo, Case No. 3,747; Ex parte Dos Santos, Id. 4,016; United States v. Davis, Id. 14,932.

§ 2. Treaties and constitutional and statutory provisions.

The act of August 12, 1848, is not in conflict with the treaty with Great Britain of August 9, 1842, but is merely supplementary thereto.—In re Kaine, Case No. 7,598.

Under the treaty with Great Britain of August, 1842, a person charged with piracy on board a British vessel on the high seas may be arrested and surrendered without any special act to carry the treaty into effect.—In re Sheazle, Case No. 12,734.

The treaty of extradition with Bavaria of 1853 was not abrogated by the operation of the constitution of the German empire, adopted in 1871.—In re Thomas, Case No. 13,887.

The treaty of March 23, 1868, between the United States and Italy, construed as covering the case of a crime committed before the treaty was made, is not open to the objection that it is a bill of attainder or an ex post facto law, within the meaning of Const. U. S. art. 1, § 9.—In re De Giacomo, Case No. 3,747.

The British extradition act of August 9, 1870 (33 & 34 Vict. c. 52), is not binding on the courts of the United States in respect to the construction of the treaty of 1842.—United States v. Lawrence, Case No. 15,573.

Under the treaty of 1874 with Belgium, the date of the signing, and not the date of the ratification, is the time intended in the declaration that its provisions shall not apply to any crime committed prior to its date.—In re Vandervelpen, Case No. 16,844.

Article 27 of the treaty of 1794 with Great Britain, which provides for the reciprocal extradition of fugitives charged with the crimes of murder and forgery, is not in contravention of the constitution of the United States, as violating the right of trial by jury.—United States v. Robins, Case No. 16,175.

§ 3. Executive authority and jurisdiction of courts.

It is optional with the executive to surrender a fugitive from justice where there is no treaty or act of congress requiring it to be done.—In re Sheazle, Case No. 12,734.

Where a judge had ordered a warrant of extradition to issue, the secretary of state, upon a review of the case, refused to issue the warrant, and the accused was discharged.—In re Palmer, Case No. 10,679.

Where the treaty of extradition does not require the issuing of an executive mandate, it is not a prerequisite to jurisdiction.—In re Thomas, Case No. 13,887.

Necessity of a mandate from the executive for the arrest of a fugitive from justice before the commissioner can entertain jurisdiction of proceedings.—In re MacDonnell, Case No. 8,771.

A federal judge has authority to issue a warrant for the arrest of a fugitive under the treaty with Great Britain of 1842, and the statutes passed to aid in carrying it into effect, without a previous application having been made to the executive.—In re Kelley, Case No. 7,655; Ex parte Ross, Id. 12,069.

Whether the government is bound, under a treaty, to deliver the fugitive, and whether he is within the description of persons named therein as subject to extradition, are questions for the political, not the judicial, department.—In re Metzger, Case No. 9,511.

An alleged agreement before extradition that the prisoner should not be tried for any other offense until he had opportunity to return to the country from which he was extradited does not affect the jurisdiction of the court to try him on a different charge.—United States v. Lawrence, Case No. 15,573.

Where a treaty of extradition does not state which department of the government shall execute its provisions, the judiciary will take jurisdiction.—United States v. Robins, Case No. 16,175.

No order of the president in relation to the prosecution of an extradited prisoner can legally restrict or enlarge the jurisdiction of the courts.—United States v. Lawrence, Case No. 15,573.

§ 4. Application, complaint, and requisition.

The court cannot question the authority to make the application for extradition where it is sustained by complaint on oath.—In re Dugan, Case No. 4,120.

The application may be renewed after a discharge on a previous application in another state, where the case does not appear to have been fully investigated.—Muller's Case, Case No. 9,913.

The complaint on which the warrant is issued need not set forth the issuing of a mandate by the executive for the arrest of the fugitive.—In re MacDonnell, Case No. 8,771.

Where the crime is forgery, the complaint on which the warrant is founded may charge more than one forgery.—In re Henrich, Case No. 6,369.

The complaint must be as specific as in the case of an offense committed in the United States.—In re Farez, Case No. 4,644.

The substance of the offense charged should be clearly set forth in the complaint praying for the issuing of the warrant.—In re Farez, Case No. 4,644.

The complaint need not allege that a warrant was issued abroad against the offender, as the issuing of such warrant is not a necessary preliminary step.—In re Farez, Case No. 4,645.

The verification of a complaint by a foreign consul may be on information and belief.—In re Farez, Case No. 4,645.

A complaint on oath, made by the consul general of a foreign country before a commissioner in the district, on the strength of telegrams and depositions taken abroad, *held* sufficient to justify the court in remanding the prisoner for examination before the commissioner before whom the complaint was made, and who issued the warrant of arrest.—Ex parte Van Hoven, Case No. 16,859.

The application for the surrender may be made by the British minister, and need not be founded upon a previous indictment or warrant.—In re Sheazle, Case No. 12,734.

An indictment, or its equivalent, in the foreign country, is not necessary to authorize extradition for a crime committed therein.—Muller's Case, Case No. 9,913.

The requisition for the extradition of a fugitive criminal under the treaty with Great Britain of 1842, and Act Aug. 12, 1848, is properly made through the executive of the United States.—In re Heilbronn, Case No. 6,323.

§ 5. Demand.

The federal judiciary has no authority to assist in the execution of the penal laws of a foreign country by surrendering a fugitive from the justice of a foreign government, or to detain him in custody until a formal demand can be made of the executive. Piracy is no exception to this rule.—Ex parte Dos Santos, Case No. 4,016.

Under the treaty with Great Britain of August 9, 1842, a demand must first be made directly upon the government for the surrender of a fugitive, and its authority obtained before a warrant of arrest can be issued.—Ex parte Kaine, Case No. 7,597.

§ 6. Warrant and mandate.

Sufficiency of warrant to give jurisdiction to arrest and commit a fugitive from justice.—In re Henrich, Case No. 6,369.

The authority of the commissioner to issue a warrant for the apprehension of a fugitive must appear upon the face of the warrant, or it is void.—In re Farez, Case No. 4,644.

The authority of the commissioner is sufficiently shown where it appears that he was authorized to issue warrants generally in cases of extradition, embracing the one covered by such warrant.—In re Farez, Case No. 4,645.

The warrant for the arrest of an alleged fugitive may follow the words of the treaty in describing the offense charged.—In re MacDonnell, Case No. 8,771.

Pending extradition proceedings, a second warrant, on a new complaint, for a distinct offense, may be issued.—In re MacDonnell, Case No. 8,772.

The order to surrender may be signed by the secretary of state, and be issued from the state department.—In re Sheazle, Case No. 12,734.

It is not a necessary preliminary to an investigation that a warrant of arrest should have been issued or proceedings had against the accused in the foreign jurisdiction.—In re Thomas, Case No. 13,887.

The warrant on a requisition from the government of Belgium under the treaty of May 1, 1874, art. 6, is sufficient if issued from the state department under its official seal.—Ex parte Van Hoven, Case No. 16,858.

The warrant remains in force, notwithstanding the commitment under it was set aside for errors in the examination before the commissioner.—In re Farez, Cases Nos. 4,645, 4,646.

The judicial department will presume from the mandate of the secretary of state that a warrant for the arrest of the alleged fugitive for the crime imputed to him was issued in Belgium.—Ex parte Van Hoven, Case No. 16,859.

A mandate, purporting to be issued by the government of the United States, and issued under the hand of the secretary of state and the seal of the department of state, is a sufficient mandate.—In re Farez, Case No. 4,644.

A description in the mandate of the offense charged, in the terms of the treaty, is sufficient.—In re MacDonnell, Case No. 8,771.

§ 7. Evidence.

The testimony of accused is not admissible in a case of extradition, tried by a federal judge, though sitting in a state where such evidence would be received.—In re Dugan, Case No. 4,120.

The evidence against accused may be in the form authorized in the country whence it comes, and, in substance, sufficient to warrant action in the country whose action is invoked.—In re Dugan, Case No. 4,120.

The statutes in relation to documentary evidence from abroad in extradition cases (Act Aug. 12, 1848, § 2; Act June 22, 1860; Rev. St. § 5271) examined.—In re Stupp, Case No. 13,563.

To render papers admissible in evidence under Act June 22, 1860, it is not necessary that they should be papers on which a warrant of arrest was issued abroad.—In re Farez, Case No. 4,645.

Admissibility of copies of depositions taken abroad in extradition proceedings.—In re MacDonnell, Case No. 8,772.

Forged papers produced to and deposed to by witnesses giving depositions abroad, where the charge is forgery, need not be produced here before the commissioner.—In re Farez, Case No. 4,645.

Documents which are so authenticated that the tribunals of the country where the offense was committed would receive them are admissible in support of the charge.—In re Henrich, Case No. 6,369; Muller's Case, Id. 9,913.

The proper form of such authentication considered.—In re Henrich, Case No. 6,369.

What is a sufficient certificate of authentication of papers under Act 1860.—In re Farez, Case No. 4,645.

Upon the hearing, copies of depositions and of warrants and other papers certified under the hand of the person issuing them, and attested upon the oath of the party producing them to be true copies, are admissible.—Ex parte Ross, Case No. 12,069.

Documentary evidence of the prisoner having committed the offense charged *held* sufficient, both in form and substance, to warrant his commitment for extradition.—In re Heilbronn, Case No. 6,323.

Testimony of a vice consul that he had received official information from his government in respect to the crime and the fugitive, together with verified depositions in proceedings before a judge of instruction in France, with other evidence, *held* sufficient to justify detaining the fugitive for trial.—In re Metzger, Case No. 9,511.

Sufficiency of evidence to justify the extradition of a prisoner charged with having forged an acceptance in England under the provisions of the treaty of August 9, 1842.—United States v. Warr, Case No. 16,644.

The proof to warrant a commitment for extradition to a foreign country must be sufficient to authorize a conviction.—Ex parte Kaine, Case No. 7,597; In re Metzger, Id. 9,511.

§ 8. Procedure.

Rules prescribed for the conduct of proceedings under extradition treaties.—In re Henrich, Case No. 6,369.

The treaty with Great Britain does not give accused the right to be confronted with the witnesses against him.—In re Dugan, Case No. 4,120.

Where the complaint is made upon information and belief only, the accused cannot claim the right to cross-examine the affiant before the prosecution gives evidence.—In re Farez, Case No. 4,645.

Proceedings for the arrest and commitment of a fugitive under the treaty with Great Britain of August 9, 1842, and the duties and powers of magistrates thereunder.—In re Kaine, Case No. 7,598.

The commissioner may, in his discretion, grant reasonable adjournments, in the course of hearing the evidence, to enable testimony to be produced.—In re MacDonnell, Case No. 8,771.

The commissioner *held* justified in not adjourning the case to allow time for the prisoner to procure alleged evidence on his behalf from abroad.—In re Farez, Case No. 4,645.

A person charged with piracy on board a British vessel may be examined by a state magistrate, and ordered into custody, with a view to a future surrender.—In re Sheazle, Case No. 12,734.

§ 9. What law governs.

The law of the state in force at the date of the commission of the offense, and at the time of the hearing under the application, will control.—Muller's Case, Case No. 9,913.

The preliminary examination of the accused must be conducted according to the mode of procedure which prevails in the state where the offender is found.—In re Farez, Case No. 4,645.

The laws of France, and not those of the United States, form the basis for the inquiry whether an extraditable offense has been committed, under the treaty of November 9, 1843.—In re Metzger, Case No. 9,511.

The specific applications of the definitions of the crimes named in a treaty are determinable in particular cases by the jurisprudence and legislation of the particular places of arrest.—Muller's Case, Case No. 9,913.

§ 10. Crimes for which extradition may be demanded.

A crime subject to infamous punishment in Switzerland is an extraditable crime under the treaty with that country, although not subject to such punishment in this country.—In re Farez, Case No. 4,645.

The crime is shown to be subject to infamous punishment in Switzerland by showing that it is punishable by imprisonment in the state prison, by the laws of the canton of Berne, in which it was committed.—In re Farez, Case No. 4,645.

A person may be surrendered under the treaty of March 23, 1868, for murder committed in Italy before the treaty was made.—In re De Giacomo, Case No. 3,747.

Manslaughter is not an extraditable offense under the treaty with Great Britain of 1842, not being included in the term "murder."—In re Kelley, Case No. 7,655.

The lowest grade of inexcusable homicide is within the generic term "murder," as used in the treaty of 1842 with Great Britain, and the tribunal where the fugitive is found will not inquire into the grade of guilt.—In re Palmer, Case No. 10,679.

A charge of having committed, within the jurisdiction of a foreign country, the crime of vol qualifie, being one of the crimes enumerated and provided for in a treaty of extradition, *held* sufficient to sustain a commitment and warrant of extradition.—In re Veremaitre, Case No. 16,915.

It is not a good plea to an indictment for bribery that defendant was brought into the jurisdiction of the court under an extradition treaty on a charge of forgery.—United States v. Caldwell, Case No. 14,707.

§ 11. Place of commission of crime.

A subject of the king of Prussia, charged with having committed a crime in Belgium, is extraditable under the treaty with Prussia of June 16, 1852, as for a crime "committed within the jurisdiction" of Prussia, where such person is punishable for such crime in Prussia, where a prosecution therefor has been commenced.—In re Stupp, Case No. 13,562.

A murder committed on board a British ship of war is committed within the jurisdiction of Great Britain, under the treaty of extradition.—United States v. Cooper, Case No. 14,865; Same v. Robins, Id. 16,175.

§ 12. Persons subject to surrender.

A person against whom a complaint has been made and accepted before a judge of instruction in France is a person accused, within the meaning of the extradition treaty.—In re Metzger, Case No. 9,511.

Article 27 of the treaty of 1794 with Great Britain applies to citizens of the United States who have committed the specified crimes within the jurisdiction of Great Britain, and have fled to this country.—United States v. Robins, Case No. 16,175.

§ 13. Review of commissioner's decision.

Where the commissioner acts on legal evidence the court will not reverse his judgment

except for substantial error in law, or for such manifest error in fact as would warrant a court in granting a new trial for a verdict against evidence.—In re Henrich, Case No. 6,369.

Extradition proceeding may be reviewed upon certiorari after a warrant of surrender has been issued by the president.—In re MacDonnell, Case No. 8,772.

Where the commissioner has jurisdiction, and has before him legal and competent evidence, his decision on its weight and effect is not subject to review.—Ex parte Van Aernam, Case No. 16,824; In re Vandervelpen, Id. 16,844; In re Wahl, Id. 17,041; In re Wiegand, Id. 17,618.

See, also, "Habeas Corpus," § 15.

§ 14. Effect of extradition proceedings.

Extradition proceedings do not, by their nature, secure immunity from prosecution for other offenses than that for which the prisoner was surrendered.—United States v. Lawrence, Case No. 15,573.

There is no provision conferring such immunity in the treaty with Great Britain of August 9, 1842, or in Act Aug. 12, 1848, or Act March 3, 1869.—United States v. Lawrence, Case No. 15,573.

§ 15. Waiver of right to demand prisoner.

Authority from the Swedish government to emigrate to the United States precludes it from subsequently demanding the surrender of the person as a deserting seaman under the treaty of 1827, art. 14.—In re Pederson, Case No. 10,899a.

II. INTERSTATE.

§ 16. Executive authority.

A state executive has no authority to cause the arrest and surrender of a citizen, unless it appears that the alleged crime was committed in the state making the demand.—Ex parte Smith, Case No. 12,968.

State governors, in issuing warrants for the arrest and surrender of an alleged fugitive, act under the authority of the United States laws, although the state may have legislated on the subject.—Ex parte Smith, Case No. 12,968.

§ 17. Crimes for which extradition may be demanded.

"Crime," in Const. U. S. art. 4, § 2, relating to extradition, means any offense indictable by the laws of the state demanding the surrender, and is not confined to common-law crimes.—In re Burke, Case No. 2,158.

Acts made criminal by the law of the demanding state, passed subsequent to the adoption of the constitution and the passage of Rev. St. § 5278, are extraditable crimes.—In re Leary, Case No. 8,162.

§ 18. Warrant and issuance thereof.

A copy of the indictment or an affidavit made before some magistrate charging the crime must be presented with the demand for extradition.—In re Jackson, Case No. 7,125.

A prima facie case must be made out by competent evidence showing that the person charged with crime is a fugitive from the state by whose executive he is demanded, before the warrant of arrest can issue.—In re Jackson, Case No. 7,125.

A copy of the indictment authenticated in the manner provided by Rev. St. § 905, need not be produced to the governor before the issue of the warrant.—In re Leary, Case No. 8,162.

Though the prisoner denies that there is any indictment against him, and craves oyer of the same, respondent need not produce a copy of the indictment or of the requisition of the governor of the demanding state.—In re Leary, Case No. 8,162.

If the affidavit on which the requisition and warrant are founded do not distinctly show that the prisoner committed any crime in the state making the requisition, or that he fled therefrom, he must be discharged.—Ex parte Smith, Case No. 12,968.

The warrant of the executive is conclusive evidence that the person named therein stands charged with the crime in another state.—In re Leary, Case No. 8,162.

§ 19. Commitment for trial.

A fugitive extradited from another state may be held for trial, even if the arrest under the rendition proceedings was without legal authority.—New Jersey v. Noyes, Case No. 10,164.

The four requisites of a valid commitment for trial in another state are a charge of crime therein, a demand from its governor, an indictment found or affidavit certified by the governor, and the presence of the prisoner in the state when the crime was committed.—Ex parte McKean, Case No. 8,848.

§ 20. Procedure and pleading.

Regularity of procedure on extradition for statutory crime.—In re Burke, Case No. 2,158.

No pleading is required after the traverse to the return.—In re Leary, Case No. 8,162.

F

FACTORS.

§ 1, Appointment or employment. § 2, Authority conferred in general. § 3, Duties to principal in general. § 4, Control and care of goods. § 5, Obligation to make advances. § 6, Mortgage or pledge of goods. § 7, Sale of goods—Authority to sell. § 8, —— Place, time, and mode of sale. § 9, —— Price. § 10, —— Credit to buyer. § 11, Del credere agency. § 12, Proceeds of goods. § 13, Keeping and rendering accounts. § 14, Rights and liabilities as to third persons. § 15, Rights of creditors of factor. § 16, Commission or other compensation for service. § 17, Reimbursement of advances, expenses, or losses. § 18, Lien. § 19, Actions between principal and factor.

See, also, "Brokers"; "Principal and Agent."

§ 1. Appointment or employment.

Where the consignee gives acceptances for the value of the goods, and agrees to account for the whole price, guarantying the sales, and to receive a commission, the transaction is a consignment on sale, as distinguished from a consignment on del credere guarantee.—Ex parte Flannagans, Case No. 4,855.

The factor is under no obligations to complete a purchase for the principal, where the latter has failed to send the money therefor as agreed.—Rice v. Montgomery, Case No. 11,753.

§ 2. Authority conferred in general.

Authority to a consignee to furnish a cargo under a charter gives no right to waive any of its stipulations, or make any agreement as to

the manner in which the ship shall be loaded or ballasted.—Rich v. Parrott, Case No. 11,761.

Omission to answer a letter reciting a breach of orders, or to state in a letter of complaint that the factor will be held responsible, is not, per se, a ratification.—Cunningham v. Bell, Case No. 3,479.

If a consignee writes a letter to his consignor and fully informs him what he has done, the silence of the consignor, after a reasonable time, is an approval of his conduct.—Norris v. Cook, Case No. 10,305.

In making the disclosure the consignee is not bound to relate facts of a general nature which he may reasonably presume the consignor has knowledge of.—Norris v. Cook, Case No. 10,305.

In cases of necessity or great urgency, it is only necessary that the supercargo should act bona fide, and with reasonable discretion, to bind the owner.—Forrestier v. Bordman, Case No. 4,945.

A cargo was shipped during a war, without positive instructions as to its destination. *Held*, that the silence of the consignor, after apprised of its destination, was an implied approval of the act of the consignees.—Dunbar v. Miller, Case No. 4,130.

A factor has no property or interest in the goods beyond his commission, and cannot control the right of the principal over them.—Walter v. Ross, Case No. 17,122.

§ 3. Duties to principal in general.

The making of a freight list by the factor of the vessel owner, prepared as if the whole cargo was shipped at specified rates of freight, where a portion is shipped at half profits, amounts to a misrepresentation.—Delano v. Winsor, Case No. 3,754.

§ 4. Control and care of goods.

The owner's right to dispose of property shipped to a factor under a general consignment as security for advances, commissions, and expenses, is subject only to the factor's lien therefor.—The Packet, Case No. 10,655.

Where a factor having a lien and a person claiming a derivative title under the owner contest the right to the proceeds, the court will decide upon the equities of all concerned.—The Packet, Case No. 10,655.

In the absence of an agreement or instructions, or an established usage to insure the principal's goods, the factor is not required to insure them.—Odorless Rubber Co. v. North Bennington Boot & Shoe Co., Case No. 10,438.

A parol agreement by a factor to see to his own insurance will not render him liable for the loss of the principal's goods by fire where they were not insured.—Odorless Rubber Co. v. North Bennington Boot & Shoe Co., Case No. 10,438.

A factor accepting a bill drawn against a consignment of goods already placed in the hands of a third person to be delivered to him has a property in the goods, and may replevin them from an attaching creditor of the consignor.—Nesmith v. Dyeing, Bleaching & Calendering Co., Case No. 10,124.

A custom of London being proved for consignees having a lien on the cargo to insure the same against fire, *held* that, if the custom were intended for the benefit of the consignor, a consignee was bound to insure, and, if he did not, was himself held as insurer, and was entitled to the premium; otherwise if the custom were merely to protect the consignee's interest.—Kingston v. Wilson, Case No. 7,823.

§ 5. Obligation to make advances.

The consignee of goods waives any personal claim against the owner for advances where he agrees to "hold for reimbursement on the amount and net proceeds of said goods which are only considered answerable for said amount advanced."—Peisch v. Dickson, Case No. 10,911.

A principal procuring and receiving the benefit of advances cannot object that they do not comply with the agreement of the factor.—Bradley v. Richardson, Case No. 1,786.

§ 6. Mortgage or pledge of goods.

A factor is bound to good faith and reasonable diligence. He cannot pledge the property of his principal for his own debts, but he may for the payment of the duties accruing on the specific goods.—Evans v. Potter, Case No. 4,569.

Property intrusted to a broker for sale, and pledged by him to secure a personal loan, may be recovered by the owner from the lender.—Bragg v. Meyer, Case No. 1,801.

A factor who pledges his principal's goods to secure individual advances, with power of sale, is guilty of conversion, and liable for their value at the time of the pledge.—Kelly v. Smith, Case No. 7,675.

In the settlement of accounts between the principal and factor, the former is entitled to an adjustment of a claim for such conversion without being driven to a cross action.—Kelly v. Smith, Case No. 7,675.

A factor cannot pledge the goods of his principal for his own debt, and, if he does, the principal may, after a demand and refusal, maintain trover for them against the pledgee.—Van Amringe v. Peabody, Case No. 16,825.

§ 7. Sale of goods—Authority to sell.

Where a sale is made in disregard of instructions, the consignor may recover damages.—Chapin v. Siger, Case No. 2,600; Marshall v. Williams, Id. 9,136.

A supercargo is not bound to observe the exact terms of his instructions, if thereby the interests of the owner would be sacrificed, or his objects frustrated.—Forrestier v. Bordman, Case No. 4,945.

A consignee upon whom bills are drawn on a shipment must sell the goods to meet payment of such bills.—Potts v. Findlay, Case No. 11,345.

§ 8. —— Place, time, and mode of sale.

A consignee impliedly contracts for the exercise of a sound judgment, and, if he be authorized to direct the destination of the ship with a view to the best market, he must make all necessary inquiries to find the best market; but, if the consignment be general, he is not bound to look for any other market than that to which the vessel is consigned.—Kingston v. Wilson, Case No. 7,823.

§ 9. —— Price.

The act of the factor in selling goods below the limited price is ratified where he renders an account of the sales and prices, and the principal draws on him as authorized for the balance, and makes no objection thereto.—Richmond Mfg. Co. v. Starks, Case No. 11,802.

§ 10. —— Credit to buyer.

A factor authorized generally to sell on credit is liable for the loss on a sale to one who is insolvent or doubtful, if, by reasonable diligence, he might have known such fact.—Burrill v. Phillips, Case No. 2,200.

In the absence of a special contract, a credit sale is at the risk of the shipper, where the usage of trade allows discretionary sales on cash or credit.—Forrestier v. Bordman, Case No. 4,945.

All sales by a supercargo except those by del credere commission are at the risk of the shipper.—Forrestier v. Bordman, Case No. 4,945.

The validity of a sale on credit depends upon the usage of trade in the place where the sale

is made, and such usage is a question of fact for the jury.—Forrestier v. Bordman, Case No. 4,945.

In the case of a sale on credit, the factor is bound to exercise due discretion in enforcing payment, and must not sue or put the owner to expense unless there is reasonable ground to believe that he will be benefited.—Forrestier v. Bordman, Case No. 4,945.

A failure to give notice of the insolvency of the purchaser will render the factor liable for all damages suffered in consequence of such failure.—Forrestier v. Bordman, Case No. 4,945.

A commission merchant who takes a bond for a simple contract debt for goods sold on commission, and for a debt of his own, is answerable to the principal for the amount of the goods sold.—Jackson v. Baker, Case No. 7,129.

In such case a demand of the bond before bringing suit is not necessary.—Jackson v. Baker, Case No. 7,130.

Receiving without objection accounts of sales made on credit is a waiver of instructions to sell for cash, and authorizes the factor to make further sales on credit.—Marshall v. Williams, Case No. 9,136.

§ 11. Del credere agency.

A consignee selling goods under a del credere commission is bound to account for the full price in specie, though he subsequently receives payment in bank notes at a depreciated value, upon suspension of specie payment in the state.—Dunnell v. Mason, Case No. 4,179.

Where the proceeds of notes taken by a factor del credere on the sale of his principal's goods are received by the assignees in insolvency of the factor, they may be recovered by the principal, subject to a deduction for the factor's commissions and charges.—Thompson v. Perkins, Case No. 13,972.

§ 12. Proceeds of goods.

An action for money had and received lies against an agent employed to sell goods on commission, who has received the proceeds, which have been lost through the embezzlement of a person employed by him.—Read v. Bertrand, Case No. 11,601.

In assumpsit against a consignee for proceeds of goods sold, interest is allowable from the time of demand.—Pope v. Barrett, Case No. 11,273.

A consignee, by the terms of his agency, may be the agent of the consignor until the consigned goods are sold, and when they are sold become, as between him and the consignor, the purchaser of and principal debtor for the goods sold.—Nutter v. Wheeler, Case No. 10,384.

Factors selling goods consigned under a del credere commission *held* liable for loss on a bill of exchange received in payment, and remitted, but not on one purchased for remission, as authorized.—Muller v. Bohlens, Case No. 9,914.

Bills transmitted to a factor for sale, and credit on his debt against the principal, *held* to amount to payment, where the notes received therefor were dealt with as the property of the factor.—Hamilton v. Cunningham, Case No. 5,978.

Factor selling bills of his principal, remitted to raise funds, *held* not liable for taking note of third person covering such bills, with other sums, though it is not indorsed by the purchaser.—Hamilton v. Cunningham, Case No. 5,978.

The owner ratifies a sale by the supercargo by receiving the proceeds without objecting.—Forrestier v. Bordman, Case No. 4,945.

Factors at Kansas City, instructed by their principal to deposit proceeds of sale in a certain bank in Denver to his credit, are liable for a loss by the failure of a bank in Kansas City in which they deposited the money to the credit of the bank in Denver.—Ernest v. Stoller, Case No. 4,520.

Consignees *held* liable for breach of orders to invest proceeds, though they fell short of estimated amount.—Cunningham v. Bell, Case No. 3,479.

Damages in such case are calculated upon the actual injury in the events of the voyage.—Cunningham v. Bell, Case No. 3,479.

Conduct of master in receiving proceeds of sale *held* not a ratification.—Cunningham v. Bell, Case No. 3,479.

§ 13. Keeping and rendering accounts.

If a consignee has rendered no account of sales of merchandise for many years, and at the trial offers no evidence to prove what part was sold, and at what prices, it will be presumed that the goods were sold at the invoice prices.—Field v. Moulson, Case No. 4,770.

§ 14. Rights and liabilities as to third persons.

A purchaser from a factor who sold in his own name cannot set off an unmatured claim against the factor's principal.—McCobb v. Lindsay, Case No. 8,704.

A merchant, knowing that the supercargo of a vessel is the agent of several shippers, having separate interests, cannot take from him the cargo of one shipper in payment of the debt of another.—Merrick v. Bernard, Case No. 9,464.

§ 15. Rights of creditors of factor.

On a consignment on sale, the consignor cannot, without special agreement, reserve a special property in notes and accounts which the consignee may take from purchasers, as against other creditors of the consignee in bankruptcy.—Ex parte Flannagans, Case No. 4,855.

§ 16. Commission or other compensation for service.

Under a contract to pay a factor a certain per cent. of the net profits of the business, the owner is liable for the factor's proportion of an amount offered in settlement of a claim barred by statute, which the owner refused to receive.—Foster v. Goddard, Case No. 4,970.

Under a written contract to pay a factor one-tenth of the net profits, after deducting expenses "that may appertain to the goods themselves," the expenses of clerk hire, advertising, and taxes are properly deducted.—Foster v. Goddard, Case No. 4,970.

Construction of contract with a factor for a share of the net profits arising out of a general foreign trading and shipping business, and the computation of profits at the end of the period.—Foster v. Goddard, Case No. 4,970.

The consignee to whose possession the property has not come, it having been seized by a foreign government, is only entitled, out of the indemnity awarded, to his expenses and commissions.—Ridgway v. Hays, Case No. 11,817.

A usage for a consignee of a vessel, who is also owner of the cargo, to charge a commission on freight paid by himself to the master, is unreasonable and not binding.—Jelison v. Lee, Case No. 7,256.

A del credere commission is not demandable when the sale is made on credit, but is, nevertheless, paid for in cash upon the deduction of a percentage.—Kingston v. Wilson, Case No. 7,823.

§ 17. Reimbursement of advances, expenses, or losses.

Advances by a factor are considered as made on the joint credit of the fund deposited with him and the principal.—Burrill v. Phillips, Case No. 2,200.

Shipments made, after the death of a member of a firm, to its regular factor, cannot be

applied in liquidation of the general debt for advances on shipments prior to the dissolution, until after payment of the bills drawn upon the credit of such shipments.—Dick v. Laird, Case No. 3,892.

Part owners of vessel acting as factors in a certain adventure *held* to have a right to retain, out of a part owner's share of the proceeds of the adventure, advances and disbursements in his behalf made in such adventure.—De Wolf v. Howland, Case No. 3,852.

A bill drawn on such part owner for such advances, and accepted by him, *held* not a waiver of the lien on the proceeds as against one having notice.—De Wolf v. Howland, Case No. 3,852.

All moneys advanced by the factor on account beyond the amount agreed constitute a present legal debt giving a present legal right of action. —Bradley v. Richardson, Case No. 1,786.

In an action to recover such surplus the factor will not be compelled to offset it against immature acceptances and bills for the principal upon which he is liable.—Bradley v. Richardson, Case No. 1,786.

A supercargo has the right to retain the proceeds of cargo for a general balance due to him by the owner, though they have assigned the cargo and bill of lading to a trustee for the benefit of certain creditors.—Vowell v. West, Case No. 17,024.

The violation of the laws of a foreign country by a supercargo, which subjected the cargo to seizure and condemnation, *held*, would not prevent his recovery from the owner of a sum of money lawfully paid to procure the release of the goods.—Peyton v. Veitch, Case No. 11,057.

§ 18. Lien.

A factor ordered by his principal to ship goods in his possession has a right to retain no more than enough to secure any lien that he may have upon the goods.—Jolly v. Blanchard, Case No. 7,438.

He may consign the entire lot to a third person, with orders to deliver the goods to the owner on payment of the sum due.—Jolly v. Blanchard, Case No. 7,438.

Existing liens on goods unsold are discharged by the sale, and the proceeds become the subject of mutual accounts.—Marks v. Barker, Case No. 9,096.

The transferee, for value, of a bill of lading, before the goods come to the possession of the consignee, has a right thereto, as against the consignee's lien for a general balance of account against the consignor.—Ryberg v. Snell, Cases Nos. 12,189, 12,190.

The factor has no lien for a balance without possession of the goods, and a right in the principal to the property on which the lien is to operate.—Ryberg v. Snell, Case No. 12,190.

§ 19. Actions between principal and factor.

Where goods are received to be sold at certain prices or returned on demand, and are sold and the money received, no special demand is necessary in an action for such money; but otherwise where the action is for a failure to return the goods.—Wyman v. Fowler, Case No. 18,114.

In assumpsit against a consignee of goods, "to sell the same and render a reasonable account," damages for not remitting when exchange was favorable cannot be recovered.—Pope v. Barrett, Case No. 11,273.

The receipt and retention of an invoice of goods by the consignee, without objection, is evidence that the goods enumerated therein were received by him.—Field v. Moulson, Case No. 4,770.

The consignors, by bringing assumpsit for the proceeds of cargo taken under legal process by the consignees for a debt of the prior owners of the ship, waive the tort, and defendants are entitled to the customary commissions, and are chargeable with interest.—Ricketson v. Wright, Case No. 11,805.

FALSE IMPRISONMENT.

§ 1, Acts constituting false imprisonment. § 2, Defenses. § 3, Actions—Nature and form of remedy. § 4, —— Pleading. § 5, —— Evidence. § 6, —— Damages.

See, also, "Malicious Prosecutions."
Liability of judge, see "Judges," § 3.
Of seamen, see "Seamen," § 158.

§ 1. Acts constituting false imprisonment.

The detention of a person arrested in the Indian country beyond the time allowed by law for removal is a false imprisonment.—Barclay v. Goodale, Case No. 972.

It is a false imprisonment to detain another by threats of personal violence, or to deprive him of the freedom of going at will by a well-grounded apprehension of personal danger.—Johnson v. Tompkins, Case No. 7,416.

A magistrate who orders the arrest or detention of a person without oath, warrant, and probable cause, as well as the persons concerned in the execution of such order, is a trespasser.—Johnson v. Tompkins, Case No. 7,416.

A justice of the peace, who either requests, directs, or commands a constable to arrest a person out of his jurisdiction, is liable for false imprisonment.—Robinson v. Dow, Case No. 11,950.

A collector of taxes may be sued in trespass for imprisoning a party taxed as an inhabitant of a town, who is not an inhabitant.—Thurston v. Martin, Case No. 14,018.

§ 2. Defenses.

An action for false imprisonment will not lie for an arrest upon an execution which is only voidable, and not void.—Devlin v. Gibbs, Case No. 3,842.

It seems that an act suspending the writ of habeas corpus is itself a protection to officers making arrests thereunder, as against any action by the party arrested.—McCall v. McDowell, Case No. 8,673.

The action will not lie where the affidavit on which plaintiff's arrest was procured was sufficient on its face.—Norman v. Manciette, Case No. 10,300.

A justice of the peace is not liable in an action of false imprisonment under an illegal warrant issued by him, unless it be issued maliciously.—Neale v. Minifie, Case No. 10,070.

A military subordinate is not liable in damages for making an illegal arrest pursuant to an order from his superior, legal on its face. The superior alone is liable.—McCall v. McDowell, Case No. 8,673.

§ 3. Actions—Nature and form of remedy.

An action for false imprisonment is an action of trespass, whether the imprisonment be charged under color of process or not.—Stanton v. Seymour, Case No. 13,298.

§ 4. —— Pleading.

Defendant may plead the general issue, and give in evidence justification under warrant from the proper magistrate.—Ingram v. Butt, Case No. 7,047.

Matters of aggravation may be proved without being stated in the declaration.—Stanton v. Seymour, Case No. 13,298.

§ 5. —— Evidence.

A person, to sustain an action against an officer for an arrest for violation of a by-law of a municipal corporation, must show his exemption from the provisions thereof.—Brown v. Robertson, Case No. 2,027.

§ 6. —— Damages.

A military officer causing the arrest of a civilian not amenable to military law is liable to enhanced damages for suffering him to be confined in a guardhouse with drunken soldiers, and to be compelled to labor in common with military culprits.—McCall v. McDowell, Case No. 8,673.

One illegally arrested by the commander of a military department, with good motives, and solely on considerations of the public peace and safety, is entitled to compensatory damages only.—McCall v. McDowell, Case No. 8,673.

Exemplary damages are recoverable where an officer causing the arrest and detention of a person is influenced by any motive other than an honest discharge of his official duty.—Walker v. Crane, Case No. 17,067.

Where an illegal arrest was provoked by gross and incendiary language, on receipt of the news of the assassination of President Lincoln, *held*, that such provocation must be taken into account in mitigation of damages.—McCall v. McDowell, Case No. 8,673.

In an action for false imprisonment, the question of probable cause is only material in mitigation of damages.—Norman v. Manciette, Case No. 10,300.

FALSE PRETENSES.

§ 1, Nature and elements of offense. § 2, Persons liable. § 3, Indictment. § 4, Evidence.

§ 1. Nature and elements of offense.

A false assertion by means of which money or goods, etc., are fraudulently obtained, is a false pretense.—Jones v. United States, Case No. 7,499.

The false pretense is complete when defendant fraudulently obtained the indorsement of the prosecutor to a draft, whether the money is paid thereon or not.—Bargie v. United States, Case No. 18,229.

It is not an indictable offense at common law to obtain books of account from a merchant by means of false and fraudulent pretenses.—United States v. Carico, Case No. 14,723.

An indictment will not lie at common law for obtaining goods on credit upon the false pretense that the purchaser was master of a vessel and a man of property, and by exhibiting letters that the purchaser was captain of and interested in a certain vessel.—United States v. Hale, Case No. 15,279.

§ 2. Persons liable.

Persons jointly indicted for obtaining a check by false pretenses are equally guilty where they participate in the proceeds, though the check was given to one only.—Jones v. United States, Case No. 7,499.

§ 3. Indictment.

In an indictment under Act March 2, 1831, for obtaining goods, etc., by false pretenses, it is error to aver "that by reason of which false pretense the prisoner did then and there unlawfully obtain," etc.—Wright v. United States, Case No. 18,098.

An indictment for obtaining money by false pretenses must state what was pretended, and that it was false, and in what particular it was false.—United States v. Watkins, Case No. 16,649.

§ 4. Evidence.

On an indictment for obtaining money under false pretenses, evidence of previous false representations to others for the purpose of obtaining money is admissible, but not evidence that defendant obtained money thereby.—Waight v. United States, Cases Nos. 17,042; Wright v. Same, Id. 18,097.

FALSE SWEARING.

See "Perjury."

FEDERAL COURTS.

See "Courts," §§ 14–108.
Criminal jurisdiction, see "Criminal Law," §§ 9–14.
Judges of, see "Judges."
Jurisdiction and powers to issue writ of habeas corpus, see "Habeas Corpus."

FEDERAL QUESTIONS.

Grounds of jurisdiction, see "Courts," §§ 30–40.
—— of removal of cause, see "Removal of Causes," §§ 7–11.

FEES.

Extortion, see "Extortion."
In admiralty, see "Admiralty," §§ 142–146.
In prize proceedings, see "War," § 67.
Of assignee in bankruptcy, see "Bankruptcy," § 463.
Of attorney, see "Admiralty," § 144; "Attorney and Client," § 5; "Bankruptcy," §§ 464, 665, 666; "Costs," § 16; "District and Prosecuting Attorneys," § 3.
Of clerk of court, see "Admiralty," § 142; "Bankruptcy," § 655; "Clerks of Courts," § 2; "Costs," §§ 17–19, 24.
Of court commissioners, see "United States Commissioners," § 2.
Of district and prosecuting attorneys, see "District and Prosecuting Attorneys," § 3.
Of executor or administrator, see "Executors and Administrators," § 64.
Of marshal, see "Admiralty," § 143; "Bankruptcy," § 663; "Costs," § 24; "United States Marshals," § 8.
Of notary, see "Bankruptcy," § 654.
Of officers in general, see "Officers," § 1.
—— of United States, see "United States," § 10.
Of patent office, see "Patents," § 71.
Of register in bankruptcy, see "Bankruptcy," §§ 656–662.
Of revenue officers, see "Customs Duties," § 24; "Internal Revenue," § 4.
Of sheriff, see "Sheriffs and Constables," § 1.
Of witness, see "Bankruptcy," §§ 335, 667; "Costs," § 15; "Witnesses," §§ 10–17.

FELLOW SERVANTS.

See "Master and Servant," § 5.

FERRIES.

§ 1, Right to maintain. § 2, Franchises and privileges. § 3, Enforcement of right.

Enrollment and license of ferryboat, see "Shipping," § 5.

§ 1. Right to maintain.

A railroad charter describing part of the route as "thence by steamboats or other boats over and across the ferry to East Boston" does not

authorize the company to maintain a ferry for general purposes.—The Maverick, Case No. 9,316.

The grantor of land excepting the right of ferry has a right to use the soil for a ferry way, and may enjoin obstruction thereof.—Bowman v. Wathen, Case No. 1,740.

§ 2. Franchises and privileges.

The circuit court of the District of Columbia has a discretion to grant or refuse a license for a ferry over the Eastern branch of the Potomac river.—Young's Case, Case No. 18,150.

The right to apply for a ferry license belongs to the riparian proprietor, and cannot be taken without compensation.—Bowman v. Wathen, Case No. 1,740.

Under a grant of a ferry franchise, no powers will be construed to have been given by implication.—Minturn v. Larue, Case No. 9,646.

The ferry right is an incorporeal hereditament. It grows out of the soil, and may be granted the same as a rent or an advowson.—Bowman v. Wathen, Case No. 1,740.

A ferry license under the Massachusetts statutes is not assignable.—The Maverick, Case No. 9,316.

A ferry right (in Indiana) may be assigned.—Bowman v. Wathen, Case No. 1,740.

An exclusive ferry franchise granted by charter in 1730 *held* not infringed by the use of a ferry-boat for transporting railroad cars only.—New York v. New England Transfer Co., Case No. 10,197.

§ 3. Enforcement of right.

A delay of 36 years to enforce a ferry right adversely used by another will bar relief in equity.—Bowman v. Wathen, Case No. 1,740.

FILING.

Chattel mortgages, see "Chattel Mortgages," §§ 9–12.
Indictment or presentment, see "Indictment and Information," § 2.
Pleading in admiralty, see "Admiralty," § 88.
Record on appeal or writ of error, see "Appeal and Error," § 21.

FINDING LOST GOODS.

Lien of finder, see "Liens," § 1.
Right to compensation for salvage services, see "Salvage," §§ 17, 42.

FINDINGS.

By court, see "Trial," § 24.
By jury, see "Trial," § 23.
By referee, see "Reference," §§ 4–9.
Review on appeal or writ of error, see "Appeal and Error," § 34.
Setting aside, see "New Trial," §§ 9, 10.

FINES.

See "Criminal Law," § 107; "Jury," § 14; "Militia," § 5.
Effect of pardon, see "Pardon," § 6.

FIRE INSURANCE.

See "Insurance."

FIRES.

Liability for destruction to prevent spread of fire, see "Municipal Corporations," § 12.
Setting out fires, see "Railroads," § 73.

FISH.

§ 1, Fish in public waters. § 2, Nature of property. § 3, Injury to or destruction of fish. § 4, Power to protect and regulate. § 5, Constitutional and statutory provisions. § 6, Violations of regulations.

Bounties, see "Bounties."
Enrollment and license of vessels for fisheries, see "Shipping," § 10.

§ 1. Fish in public waters.

Neither the state nor federal constitutions secures a common right of fishery in the Delaware to the people of New Jersey.—Bennett v. Boggs, Case No. 1,319.

The compact between New Jersey and Pennsylvania recognizes the right of fishery in riparian owners on the Delaware.—Bennett v. Boggs, Case No. 1,319.

The right to the bed of the Delaware river was originally in the crown, and the compact of the New Jersey proprietors of 1676 did not give a common right of fishery therein.—Bennett v. Boggs, Case No. 1,319.

§ 2. Nature of property.

A whale killed and taken into complete possession is the property of the taker, who may maintain an action against one who subsequently finds it adrift, and, without knowledge of the title, appropriates it.—Bartlett v. Budd, Case No. 1,075.

A whale, killed and left anchored with marks of appropriation, is the property of the captors and their title is not devested by a subsequent removal by others.—Taber v. Jenny, Case No. 13,720.

The fastening of a harpoon in a whale, with a line attached, gives the boat the right to the whale, under the usage of whaling, though the whale subsequently escape, and is captured by another.—Swift v. Gifford, Case No. 13,696.

The first iron placed gives title to the whale, whether attached to the boat or not, though the whale is killed by the crew of another vessel.—Bourne v. Ashley, Case No. 1,698.

§ 3. Injury to or destruction of fish.

Anchoring a vessel within fishing grounds, without malice, and to take in residue of cargo, does not make the master liable for damages; otherwise, if it is without reasonable commercial purpose.—Mason v. Mansfield, Case No. 9,243.

§ 4. Power to protect and regulate.

See, also, "Commerce," § 2.

A state has power to regulate fisheries within its territorial limits as to its own citizens and the citizens of other states.—Corfield v. Coryell, Case No. 3,230.

The legislature of New Jersey has power to regulate fisheries on the Delaware, by prohibiting the exercise of a common-law right.—Bennett v. Boggs, Case No. 1,319.

§ 5. Constitutional and statutory provisions.

The New Jersey oyster law of June 9, 1820, is not repugnant to the provisions of the constitution of the United States.—Corfield v. Coryell, Case No. 3,230.

Construction of New Jersey laws regulating fishing on Delaware river.—Bennett v. Boggs, Case No. 1,319.

§ 6. Violations of regulations.

A state statute regulating oyster fisheries, and providing a punishment for a violation thereof, is not repugnant to Const. U. S. art. 4, § 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.—Corfield v. Coryell, Case No. 3,230.

The preparation of a vessel with intent to employ her in seal fisheries in violation of Rev. St.

§ 1956, is not an offense unless seals are actually killed.—The Ocean Spray, Case No. 10,412.

In an indictment for making a false declaration as to the employment of a vessel in the cod fisheries, a variance in the description of the certificate required to be sworn to *held* fatal.—United States v. Lakeman, Case No. 15,552.

The seizure of a vessel which, under a codfishing license, has incidentally caught mackerel, is a municipal seizure, expressly provided for by acts of congress as justifiable if a certificate of probable cause is given.—United States v. The Reindeer, Case No. 16,145.

One allowing his vessel to be taken, on command of officers of the law, for the purpose of making an arrest in an illegal place, but without malice, is not liable for exemplary damages.—The Martha Anne, Case No. 9,146.

FIXTURES.

§ 1, What constitutes part of the realty in general. § 2, Between mortgagor and mortgagee of land. § 3, Between vendor and purchaser of land. § 4, Removal.

§ 1. What constitutes part of the realty in general.

The main millwheel and gearing of a factory, attached to the factory and necessary for its operation, are fixtures and real estate.—Powell v. Monson & Brimfield Mfg. Co., Case No. 11,357.

§ 2. Between mortgagor and mortgagee of land.

A mortgage of a mill covers machinery afterwards purchased and put into the mill.—In re Holland, Case No. 6,603.

Fixtures placed in a brewery by the owner, after mortgaging the premises to secure payment of a debt, pass to the purchaser of the premises on a foreclosure sale.—Farmers' & Mechanics' Bank v. Cover, Case No. 4,653.

§ 3. Between vendor and purchaser of land.

Franklin stoves fixed in the usual manner, with bricks and mortar, pass to the vendee of the house.—Smith v. Heiskell, Case No. 13,056.

§ 4. Removal.

The right to remove fixtures is not lost by nonpayment of rent and notice to quit, but only by quitting.—Ex parte Hemenway, Case No. 6,346.

A parol renewal of a lease renews whatever rights the tenant had to remove the fixtures.—Ex parte Hemenway, Case No. 6,346.

New fixtures substituted for old ones by the tenant cannot be removed without accounting for the latter.—Ex parte Hemenway, Case No. 6,346.

A tenant who erected a wooden shed upon posts inserted two feet in the earth may remove it during the term.—Krouse v. Ross, Case No. 7,939.

The mortgagee may remove that which is not a fixture, and which was placed or constructed on the ground, after the mortgage was executed.—Cope v. Romeyne, Case No. 3,207.

FOOD.

§ 1. Inspection.

Flour inspected under the Virginia act of December 21, 1792, must be branded "Condemned," or it is not within section 10 nor 15.—Cloud v. Hewitt, Case No. 2,904.

In action for penalty for altering inspector's marks on flour, the marks and alterations need not be set out.—Cloud v. Hewitt, Case No. 2,904.

Qui tam action to recover penalty under Virginia act of December 21, 1792, "regulating the inspection of flour and bread," will lie without making the United States a plaintiff.—Cloud v. Hewitt, Case No. 2,904.

FORCIBLE DEFILEMENT.

See "Rape."

FORCIBLE ENTRY AND DETAINER.

§ 1, Actions. § 2, Review.

§ 1. Actions.

Actual possession is necessary to enable a person to maintain the action.—Pitman v. Davis, Case No. 11,184a.

The summons is sufficient if it contains the substance of the complaint, so as to apprise defendant of the nature and extent of the claim.—Russell v. Wheeler, Case No. 12,164a.

An inquisition, describing the property as "one tenement or storehouse, with the appurtenances, in the county aforesaid," will be quashed for uncertainty.—Holmead v. Smith, Case No. 6,630.

As to pleas, practice, and restitution in forcible entry and detainer in Virginia.—United States v. Browning, Case No. 14,674.

§ 2. Review.

Certiorari to review proceedings in forcible entry and detainer is allowed to defendant as well as complainant.—Russell v. Wheeler, Case No. 12,164a.

It is not necessary that it should appear upon certiorari that the inquest was taken on the spot where the force was used, nor that the jurors should appear to be qualified according to the requisites of the common law.—United States v. Donahoo, Case No. 14,982.

Certiorari to magistrate's court to bring up proceedings in forcible entry and detainer dismissed under circumstances stated.—McPherson v. Gallagan, Case No. 8,922.

Quære, whether the circuit court, after setting aside on certiorari the proceedings in a case of forcible entry and detainer, could order a trial de novo.—Nicks v. Mathers, Case No. 10,254a.

FORECLOSURE.

Of lien, see "Railroads," §§ 43–54.
Of mortgage, see "Chattel Mortgages," §§ 22, 23; "Mortgages," §§ 17–47; "Railroads," §§ 43–54.
—— against bankrupt's property, see "Bankruptcy," §§ 280–282.

FOREIGN.

Actions by and against foreigners, see "Admiralty," §§ 5, 6; "Courts," § 58.
Administration, see "Executors and Administrators," §§ 70–74.
Corporations, see "Corporations," §§ 76–85; "Insurance," § 1.
Guardianship, see "Guardian and Ward," § 10.
Judgments, see "Judgment," §§ 65, 66, 80.
Laws, see "Maritime Liens," § 29.

FORFEITURES.

§ 1, Statutory provisions. § 2, When forfeiture takes effect. § 3, Remission of forfeiture. § 4, Revocation of remission. § 5, Nature of proceedings to enforce. § 6, Jurisdiction. § 7, Parties. § 8, Pleading. § 9, Evidence. § 10, Decree. § 11, Effect of forfeiture as to third persons. § 12, Disposition of prop-

erty when not condemned. § 13, Security for release of property. § 14, Disposition of proceeds in general. § 15, Informers—Right to share in general. § 16, —— Sufficiency and character of information produced. § 17, —— To whom information must be given. § 18, —— Who entitled to share as informers. § 19, —— Making claim to share. § 20, —— When right to share becomes vested. § 21, —— Effect of remission of forfeiture. § 22, —— Determination and amount of share. § 23, —— Evidence. § 24, —— Time of payment of share. § 25, —— To whom payment may be made. § 26, —— Waiver and forfeiture of share. § 27, —— Action for share.

See, also, "Searches and Seizures."
Certificate of probable cause of seizure, see "Customs Duties," § 22.
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For nonpayment of tax, see "Taxation," § 18.
For taking usury, see "Banks and Banking," § 20.
For treason, see "Treason," § 20.
For violation of customs laws, see "Customs Duties," §§ 78–108.
—— of embargo and nonintercourse acts, see "War," §§ 16–23.
—— of internal revenue laws, see "Internal Revenue," §§ 66–95.
—— of neutrality laws, see "Neutrality Laws," § 19.
—— of regulations as to cutting timber, see "Public Lands," § 8.
—— of shipping regulations, see "Shipping," §§ 11–15, 192, 206.
Of dower, see "Dower," § 3.
Of enemy's property, see "War," §§ 86–90.
Of franchise, see "Corporations," §§ 69–75.
Of grant, see "Public Lands," §§ 45, 68.
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Of license to use, make, or sell patented article, see "Patents," § 158.
Of salvage, see "Salvage," §§ 28, 29.
Of share of prize money, see "War," § 75.
—— of stock, see "Corporations," § 22; "Joint Stock Companies."
Of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 12.
Of vessels, see "Shipping," § 33.
Of wages of master of vessel, see "Shipping," § 86.
—— of seamen, see "Seamen," §§ 63–79.
Right to trial by jury, see "Jury," § 2.
Under copyright law, see "Copyrights," § 38.

§ 1. Statutory provisions.

See, also, "Statutes," § 15.

Laws imposing forfeitures for fraud are not technically penal, so as to call for a strict construction, but are to be construed so as effectually to accomplish the intention of their makers.—United States v. Willetts, Case No. 16,699.

§ 2. When forfeiture takes effect.

Where property is forfeited, it does not vest in the government until after a seizure, which then relates back to the time of forfeiture.—Clark v. Protection Ins. Co., Case No. 2,832.

The forfeiture takes effect at the time when the offense is committed, if the denunciation is expressed in direct terms.—The Mary Celeste, Case No. 9,202; United States v. Fifty-Six Barrels of Whiskey, Id. 15,095; Same v. One Copper Still, Id. 15,928; Same v. The Reindeer, Id. 16,144; Same v. Sixty-Four Barrels Distilled Spirits, Id. 16,306; Same v. Twenty-One Barrels of High Wines, Id. 16,567.

But if the forfeiture is alternative,—property or its value,—title does not vest until election; and meanwhile an innocent purchaser may acquire a title not forfeitable.—The Mary Celeste, Case No. 9,202; United States v. Fifty-Six Barrels of Whiskey, Id. 15,095; Same v. Sixty-Four Barrels Distilled Spirits, Id. 16,306.

§ 3. Remission of forfeiture.

The power of the secretary is wholly distinct from the constitutional pardoning power of the president, and its object is to afford merited relief, where the courts are obliged to inflict the penalty.—United States v. Morris, Case No. 15,816.

The secretary of the treasury has no authority under Act Feb. 27, 1813, c. 175, to make a remission of part only of the property forfeited.—The Margaretta, Case No. 9,072.

A proceeding under Act March 3, 1797, for the remission of a forfeiture, cannot be maintained until the forfeiture suit has proceeded to judgment.—In re Princess of Orange, Case No. 11,431.

The secretary of the treasury may remit the whole or any part of a forfeiture, and may make conditions upon such remission, the acceptance of which will bind the party by way of estoppel.—Jungbluth v. Redfield, Case No. 7,583.

In a proceeding for the remission of a forfeiture, the judge has jurisdiction to determine whether the case presented to him falls within the statute.—In re Princess of Orange, Case No. 11,431.

When the United States take steps to remit a forfeiture for illegal importation, the collector may show cause against the remission.—In re Princess of Orange, Case No. 11,431.

Where a forfeiture is remitted by the secretary of the treasury, pursuant to the statute authorizing him to do so, the cause of forfeiture is released, and any exactions based thereon are illegal.—Murray v. Arthur, Case No. 9,956.

As to legal proof of facts under Act March 3, 1797, c. 67, upon which the secretary of the treasury is authorized to remit penalties and forfeitures.—The Margaretta, Case No. 9,072.

The collector must restore the property to the petitioner without order of court, where the secretary of the treasury remits the forfeiture under Act March 3, 1797, § 13, before the libel or information is filed; otherwise, where the remission is made after the proceedings are commenced.—The Palo Alto, Case No. 10,700.

§ 4. Revocation of remission.

The secretary may revoke the warrant of remission after it has been communicated to the claimant and until the property is actually delivered.—The Palo Alto, Case No. 10,700.

But where the remission is on condition, the secretary cannot revoke the remission after the condition is performed; and a revocation is not operative until the claimant has notice thereof.—The Palo Alto, Case No. 10,700.

§ 5. Nature of proceedings to enforce.

Informations in rem on the exchequer side of the court are not criminal proceedings.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,503.

§ 6. Jurisdiction.

See, also, "Admiralty," § 34; "Courts," § 96.

A libel of forfeiture against a vessel which has been seized upon water navigable from the sea is a civil cause, of admiralty and maritime jurisdiction.—Clark v. United States, Case No. 2,837; The Meteor, Id. 9,498.

The place of seizure, and not the place of committing the offense, gives the court jurisdiction in cases of forfeiture in rem.—The Octavia, Case No. 10,422; United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Id. 16,502.

To give the court jurisdiction to adjudicate upon a cause of forfeiture, the property must have been seized by process within its territorial jurisdiction, or brought within its limits, where the seizure is upon the high seas.—The Washington, Case No. 17,222.

Correspondence between the collector, secretary of the treasury, and district attorney, and directions to the latter to file a libel, while the vessel is lying within the collector's district, do not constitute a seizure by him which will support a libel.—The Silver Spring, Case No. 12,858.

Possession of property by a sheriff under civil process will not prevent the federal courts from taking jurisdiction on a libel of information, claiming forfeiture.—United States v. The Reindeer, Case No. 16,144.

§ 7. Parties.

An action for a forfeiture must be in the name of the government, unless otherwise expressly provided by statute.—Matthews v. Offley, Case No. 9,290.

§ 8. Pleading.

An information to obtain the forfeiture of property must state in distinct allegations the matters relied on as ground for forfeiture.—In re Eighteen Thousand Gallons of Distilled Spirits, Case No. 4,317.

A libel in rem for a forfeiture must allege that the property has been seized for the offense.—The Silver Spring, Case No. 12,858; The Washington, Id. 17,221.

The allegations in the information must be sufficiently specific to enable the claimant to traverse them, and the court to see that, if proved, a violation of the statute exists. The technical precision of an indictment is not necessary.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,503.

An information of forfeiture need not show that the case was not within the exemption of a proviso of the statute. This is a matter of defense.—The Mary Merritt, Case No. 9,222.

The government will not be compelled to elect which of the several allegations in a libel of information will be relied on to sustain the forfeiture prayed for.—In re Eighteen Thousand Gallons of Distilled Spirits, Case No. 4,317.

A mere conclusion of an information against the form of a statute will not cure the defect of material averments to show that a forfeiture has accrued.—Metcalf v. Officer, Case No. 9,496; The Nancy, Id. 10,008.

In libels of forfeiture it is sufficient to describe the offense and the method of its commission in the words of the statute creating it. The manner or agency of arrest need not be averred, except in prize cases.—United States v. Arms and Ammunitions, Case No. 14,466a.

An information for a statute forfeiture should conclude against the form of the statute, or at least refer to some subsisting statute authorizing the forfeiture.—The Nancy, Case No. 10,008.

The belief of the party should be expressed in the form of verification, not in the body of the pleading.—United States v. Twenty-Five Barrels of Alcohol, Case No. 16,562.

An amendment will not be allowed, to insert a new, substantive defense, where the statute of limitations has run against it.—The Harmony, Case No. 6,081.

Informations filed by United States attorneys are amendable even after pleas filed and in substance.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,503.

The general issue cannot be pleaded to a libel, information, or libel of information for a forfeiture in the federal courts.—United States v. Twenty-Five Barrels of Alcohol, Case No. 16,562.

The conclusion in an answer should not be to the country, but a simple prayer for restitution.—United States v. Twenty-Five Barrels of Alcohol, Case No. 16,562.

A demurrer, and not a motion to quash an information in rem on the exchequer side of the court, is the proper mode of reaching technical or substantial defects.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,503.

The remedy of the claimant where the libel of information does not distinctly state the grounds of forfeiture is by motion to make the pleading more definite.—In re Eighteen Thousand Gallons of Distilled Spirits, Case No. 4,317.

If the information be in writing, the party may nevertheless give parol proof or other information given, leading to the seizure of articles not mentioned in the written information.—Westcot v. Bradford, Case No. 17,429.

Where the evidence does not agree with the specification of the offense, it is fatal on an information of forfeiture.—United States v. Forty-Eight Hundred Gallons of Spirits, Case No. 15,153.

A libel for forfeiture of a vessel charging the violation of certain provisions of the law will be dismissed if the facts do not authorize a forfeiture, although an offense against other provisions of the same law is shown.—United States v. The Hunter, Case No. 15,428.

§ 9. Evidence.

Forfeitures are odious in law, and must clearly appear before courts will enforce them.—Mount Diablo Mill & Mining Co. v. Callison, Case No. 9,886.

On a libel for forfeiture, doubtful circumstances, which the original owners might explain, have not the same weight against bona fide purchasers, who are not presumed to be conversant with them.—The Ruby, Case No. 12,104.

See, also, post, § 23.

§ 10. Decree.

See, also, "Admiralty," § 99.

A decree of forfeiture in rem is conclusive on all claiming an interest in the thing.—The Mary Anne, Case No. 9,195.

The fact that a good defense existed against a decree of condemnation, but which was not pleaded before decree, will not avoid the decree.—Griswold v. Connolly, Case No. 5,833.

§ 11. Effect of forfeiture as to third persons.

A bona fide purchaser of personal property which has been forfeited to the government by previous acts of the former owner is not protected against the title of the government.—United States v. Fifty-Six Barrels of Whiskey, Case No. 15,095.

A purchase of goods which have become forfeited to the United States will not purge the forfeiture, when the purchase has been made under a full knowledge of the facts, or of such facts as were sufficient to put the party on inquiry.—The Ploughboy, Case No. 11,230.

§ 12. Disposition of property when not condemned.

If the claimant does not show a good title to the property, it will not be restored to him, although it is not condemned as forfeited. But it will be retained in the registry until the real owner appears and proves his title.—The Eliza, Case No. 4,346.

§ 13. Security for release of property.

See, also, "Admiralty," § 70.

Where a bond is given upon the return of goods libeled as upon a seizure, and the libel is afterwards, by amendment, changed to an information, and the goods condemned, a compliance with the stipulations in the bond may be enforced by attachment against the obligors.—United States v. Four Part Pieces of Woollen Cloth, Case No. 15,150.

Where the claimant is not a party to the bond, all the obligors are to be deemed principals.—United States v. Four Part Pieces of Woollen Cloth, Case No. 15,150.

The acceptance of a bond to answer a judgment against the claimants of property forfeited does not reinvest the title in them.—United States v. Distillery & Rectifying Establishment of J. C. McCoy, Case No. 14,964.

§ 14. Disposition of proceeds in general.

Rules prescribed by the laws of the United States for the distribution of the proceeds of a forfeiture.—Sawyer v. Steele, Case No. 12,406; United States v. George, Id. 15,198.

The district courts, as courts of admiralty, have jurisdiction of the question who are entitled to the proceeds of a seizure as informers or otherwise.—Robinson v. Hook, Case No. 11,956.

§ 15. Informers—Right to share in general.

In an admiralty seizure cause, the court cannot award a proportion of the proceeds of the property condemned to informers, unless the case be within some statute provision; but it will allow compensation for expenses incurred in securing and preserving the property.—The Langdon Cheeves, Case No. 8,064; Robinson v. Hook, Id. 11,956.

§ 16. —— Sufficiency and character of information produced.

The information to induce a seizure need not be as full as the evidence in the case would authorize. It is sufficient if it induce the prosecution.—Sawyer v. Steele, Case No. 12,406.

The information must be a plain statement in writing of some one substantial cause, matter, or thing, whereby a fine, penalty, or forfeiture shall have been incurred, and it must be sworn to, if required by the officer.—United States v. Funkhouser, Case No. 15,177.

§ 17. —— To whom information must be given.

The information must be given to some government official who has the power and duty to act thereon, and, where several causes exist, information of any one is sufficient.—United States v. Funkhouser, Case No. 15,177; Same v. One Hundred Barrels of Distilled Spirits, Id. 15,946.

§ 18. —— Who entitled to shares as informers.

A person claiming to share in the judgment must be the first informer, and his information must be substantially true and capable of proof.—United States v. Funkhouser, Case No. 15,177.

It is not the one who gives information which leads to the seizure, but the person who gives information of the cause which leads to the condemnation, who is entitled to the informer's share.—One Hundred Barrels of Whiskey, Case No. 10,526.

As between two sets of informers, one who furnished the first information, and one who collected valuable evidence, without which it was doubtful if any considerable sum would have been realized, the former is entitled to the informer's share.—In re Webster, Case No. 17,332.

He who, with the intention of having his information acted upon, first gives information of a violation of law which induces the prosecution, and contributes to the recovery of the fine, penalty, or forfeiture, is entitled to the informer's share.—United States v. George, Case No. 15,198.

Information given by one under arrest for suspected complicity in smuggling, which prevents the smuggling, entitles informer to share in forfeiture.—Anonymous, Case No. 455.

The person who telegraphs the officer that a certain vessel within his district has goods on board liable to forfeiture, and not the deputy collector, who receives and forwards it, and verifies some of its statements, is the informer.—In re Fifty Thousand Cigars, Case No. 4,782.

Where a seizure is made by a collector in pursuance of information given by an inspector of customs, the latter is entitled to the informer's share of the forfeiture.—Hooper v. Fifty-One Casks of Brandy, Case No. 6,674.

Under Act 1864, § 179, as amended July 13, 1866, officers of the internal revenue may be informers.—United States v. One Hundred Barrels of Distilled Spirits, Case No. 15,946.

A special agent of the government, appointed to investigate a fraud, is not an informer in respect to facts found in the ordinary and regular discharge of his duty.—United States v. Two Hundred and Seventy-Eight Barrels of Distilled Spirits, Case No. 16,581; In re Four Cutting Machines, Id. 4,987.

A deputy collector of internal revenue, who, happening to see improperly branded whisky unloading at a warehouse, gave information which led to its forfeiture, *held* entitled to the informer's share.—United States v. Thirty-Four Barrels of Whiskey, Case No. 16,462.

§ 19. —— Making claim to share.

The officers of a revenue cutter, when giving information, need not make a claim for a part of the forfeiture, nor need they take part in the prosecution to be entitled to a share.—Sawyer v. Steele, Case No. 12,406.

§ 20. —— When right to share becomes vested.

The right of the informer becomes vested only when the money representing the forfeited property is paid over and is ready for distribution, and until then his right is liable to be divested by the act of the government, and the court may set aside a decree of condemnation without the informer's consent.—In re Twenty-Five Thousand Gallons of Distilled Spirits, Case No. 14,282.

The right of the informer becomes fixed on the receipt of the proceeds of the forfeiture by the marshal.—United States v. Twenty-Five Thousand Segars, Case No. 16,565.

The claim of an informer can only date from the time when he actually gave the proper formal information, not when he ascertained the facts.—United States v. Funkhouser, Case No. 15,177.

§ 21. —— Effect of remission of forfeiture.

After a judgment in proceedings for a fine, penalty, or forfeiture, the president cannot, by a pardon, remit or release the moiety accruing to the individual.—United States v. Harris, Case No. 15,312.

A judgment or a decree of condemnation does not vest the right of individuals, so as to secure them against the secretary's power of remission.—United States v. Morris, Case No. 15,816.

The secretary of the treasury has no authority to remit the collector's share of the forfeiture, nor any part of it eo nomine.—The Hollen, Case No. 6,608; The Margaretta, Id. 9,072; United States v. Morris, Id. 15,816.

§ 22. —— Determination and amount of share.

The amount of the informer's share is to be determined by the law as it stands at the time of the final decree of forfeiture.—In re Twenty-Five Thousand Gallons of Distilled Spirits, Case No. 14,282; United States v. Twenty-Five Gallons of Distilled Spirits, Id. 16,564.

The informer is entitled to his share, to be determined by the regulations in force when the proceeds of the sale of forfeited property are paid to the marshal.—In re Eight Barrels of Distilled Spirits, Case No. 4,316.

The share of an informer in the proceeds of forfeited property is fixed by the law in force at the time of payment of the proceeds into the registry, and the submission of the proofs as to the informer, and not by that subsequently adopted.—United States v. Twenty Barrels of Distilled Spirits, Case No. 16,557.

The share of the informer must be taken from the net, and not the gross, proceeds.—In re One Still, Case No. 10,534; United States v. Funkhouser, Id. 15,177; Same v. One Still, Id. 15,955.

It will be made in such case without deduction of costs.—In re One Still, Case No. 10,534; United States v. One Still, Id. 15,955.

Where the proceeds of a condemnation do not exceed $500, the informer is entitled to his percentage upon the gross amount after deducting costs of the proceedings.—United States v. Seven Large Fermenting Tubs, Case No. 16,254.

The regulation of September 2, 1867, charging informers with a proportionate share of the costs of the proceedings, is valid; the secretary's power to issue regulations on the subject not having been previously exhausted.—United States v. Twelve Barrels of Paraffine Oil, Case No. 16,552.

On a sale of property condemned as forfeited for violation of the internal revenue laws, the informer is entitled to half the proceeds. Act 1864, § 41.—United States v. Hook, Case No. 15,387.

The reward given by Rev. St. Me. c. 121, § 11, must be apportioned by the court between the informer and prosecutor according to their respective merit.—United States v. Card, Case No. 14,720a.

§ 23. —— Evidence.

Where liquor is forfeited by consent in pursuance of an agreement with the commissioner of internal revenue, a person, to be entitled to a share in the proceeds, must make out a clear case.—United States v. Ninety-Five Barrels of Distilled Spirits, Case No. 15,888.

§ 24. —— Time of payment of share.

In case of money brought into court under a sentence of condemnation, the court, before it is paid over to the collector, may decree to the informer his proportion.—Westcot v. Bradford, Case No. 17,429.

§ 25. —— To whom payment may be made.

An informer's share in the registry of the court should be decreed to be paid directly to the persons beneficially interested, and entitled to hold it.—United States v. Stockwell, Case No. 16,406.

§ 26. —— Waiver and forfeiture of share.

The consent by officers of a revenue cutter that property seized on their information shall be sent to another district for trial, and a disavowal of having instituted the suit, does not constitute a waiver.—Sawyer v. Steele, Case No. 12,406.

The right of the informer to his proportion is not defeated by his misconduct in dealing with the property seized which is trusted to his care.—Westcot v. Bradford, Case No. 17,429.

§ 27. —— Action for share.

Where the fact that a party is informer is not in controversy, a court of common law or equity may sustain a suit for an account and distribution of his share.—Robinson v. Hook, Case No. 11,956.

An informer may sue in his own name under Act Feb. 28, 1799, § 8.—United States v. The Planter, Case No. 16,054.

The officers of a revenue cutter may join in an action of assumpsit against the collector for their proportion of a forfeiture.—Sawyer v. Steele, Case No. 12,407.

Where the informer is not a government officer, the United States is not liable for costs.—United States v. The Planter, Case No. 16,054.

The court may require an informer to give security for costs, and in case of refusal strike his name from the record.—United States v. The Planter, Case No. 16,054.

Officers of a revenue cutter suing for the informer's share of a forfeiture need not prove their commissions.—Sawyer v. Steele, Case No. 12,406.

After the money brought into court under the condemnation is paid over to the collector, the court has no power to decree in favor of the informer against the collector in personam, or against money of his in court arising from some source other than the admiralty proceeding.—Westcot v. Bradford, Case No. 17,429.

FORGERY. [v]

§ 1, Nature and element of offense—Statutory provisions. § 2, —— Making and signing. § 3, —— Alterations. § 4, —— Character of the instrument. § 5, —— Aiding forgery. § 6, Uttering forged instruments. § 7, Indictment. § 8, Evidence.

See, also, "Counterfeiting."

Redemption of forged notes, see "United States," § 23.

Venue, see "Criminal Law," § 19.

§ 1. Nature and elements of offense—Statutory provisions.

Act April 30, 1790, § 14, punishing forgery of public securities with death, was impliedly repealed by Act March 3, 1825, § 17.—United States v. Irwin, Case No. 15,445.

§ 2. —— Making and signing.

To forge the name of a magistrate to the jurat of an affidavit is a forgery of the affidavit.—United States v. Osgood, Case No. 15,971a.

§ 3. —— Alterations.

Any addition to a genuine paper, or any alteration of it in an essential particular, so as to give it a different meaning, is a forgery.—United States v. Osgood, Case No. 15,971a.

Falsely altering a promissory note in a material part, with intent to defraud any person, is forgery.—United States v. Wood, Case No. 16,753.

§ 4. —— Character of the instrument.

A written request to lend money may be the subject of forgery at common law.—United States v. Green, Case No. 15,255.

Act March 3, 1823, § 1, applies only to instruments altered or forged for the purpose of obtaining moneys from the United States, their officers or agents.—United States v. Reese, Case No. 16,138.

The words "other writing," as used in Act March 3, 1823, making it a crime to forge certain writings with intent to defraud the United States, does not cover a forged indorsement on a genuine check drawn by a pension agent upon a depositary of the United States.—United States v. Wilson, Case No. 16,732.

A military land warrant is neither an indenture nor a public security, within the meaning of

the Crimes Act of March 3, 1825, § 17.—United States v. Irwin, Case No. 15,445.

The crime of forgery, under Act March 3, 1823, § 1, does not include a false bond given on the exportation of distilled spirits under Act June 30, 1864, § 61.—United States v. Barney, Case No. 14,524.

Forgery of writings used in entering goods at the customhouse is punishable under Rev. St. § 5418, relating to forgery of certain writings named, or "other writing."—United States v. Lawrence, Case No. 15,572.

An order: "Please let the bearer, A., have such articles as he may choose on my account, to the value of $30; also $20 in cash,"—is within Act Md. 1799, c. 75.—United States v. Brown, Case No. 14,658.

An order: "Please let the bearer have one pair boots," is a draft for the delivery of goods, within Act Md. 1799, c. 75, § 2.—United States v. Book, Case No. 14,624.

A note of an unincorporated bank, "payable out of the joint funds thereof, and no other," is a promissory note, within Act Md. 1799, c. 75, § 1.—United States v. Smith, Case No. 16,326.

To support an indictment for forgery it is not necessary that the drawer should have a right to draw, or that the draft should purport to be by a person having a right to draw. Act Md. 1799, c. 75, § 2.—United States v. Bates, Case No. 14,542.

§ 5. —— Aiding forgery.

Aiding or assisting in forging papers with intent to defraud the government consists in the commission of any act having a tendency to forward or facilitate a forgery committed by another.—United States v. Osgood, Case No. 15,971a.

To trace a name with a pencil, afterwards filled up with another in ink, or to take measures to prevent surprise or detection while the forgery is being committed, would be such an act.—United States v. Osgood, Case No. 15,971a.

§ 6. Uttering forged instruments.

The place where forged papers are inclosed and sealed up with a letter and put in the post office is the place where they are uttered, and not the place of their destination.—United States v. Wright, Case No. 16,773; Same v. Plympton, Id. 16,058.

The delivery of a sealed forged letter to the clerk of a person to whom it is addressed, and whom it is supposed is authorized to open it, is an uttering of it.—United States v. Carter, Case No. 14,739.

The act of knowingly uttering as true a false and forged letter requesting the person to whom it is addressed to pay to the bearer a sum of money, with intent to defraud any person, is an offense at common law.—United States v. Carter, Case No. 14,739.

§ 7. Indictment.

An indictment at common law for forgery by erasure must use the technical term "forge or counterfeit."—United States v. Watkins, Case No. 16,649.

In an indictment, under Act March 2, 1831, § 11, for uttering a forged check, it is not necessary to aver that such uttering was "to the prejudice of the right of any other person," or that the check was "a paper writing or printed paper."—United States v. McCarthy, Case No. 15,656.

This question discussed.—United States v. Larned, Case No. 15,566.

An indictment under Rev. St. § 5463, charging a person with forging a material indorsement on a post-office money order, with intent to defraud a person named, is sufficient.—United States v. Morris, Case No. 15,813.

In an indictment under Rev. St. § 5418, for forging writings used in entering goods at the customhouse, it is unnecessary to aver the existence of the goods mentioned in the writings.—United States v. Lawrence, Case No. 15,572.

In an indictment for forging a bill in the name of a fictitious drawer and indorser, the subsequent indorsements need not be stated.—United States v. Peacock, Case No. 16,019.

In an indictment for forging a bill of exchange, the omission of the words "account of" is fatal.—United States v. Peacock, Case No. 16,019.

An indictment for obtaining money by false pretenses, one of which is stated to be an erasure in an account rendered to defendant, cannot be supported as an indictment for forgery.—United States v. Watkins, Case No. 16,649.

An indictment charging that defendant, "ostensibly, for the service, but falsely and without authority, caused and procured to be issued from the navy department of the United States" a certain requisition, set forth in the indictment, cannot be supported as an indictment for forgery.—United States v. Watkins, Case No. 16,649.

The tenor of the instrument must generally be set forth in the indictment, and it must be proved as alleged.—United States v. Britton, Case No. 14,650.

The tenor of the instrument need not be set forth where it is stated in the indictment that the instrument has been destroyed or suppressed by the prisoner.—United States v. Britton, Case No. 14,650.

§ 8. Evidence.

On an indictment for forging a bill in the name of a fictitious drawer and indorser, the prisoner's indorsement is admissible to prove his intent to defraud, although such indorsement be not set forth in the indictment.—United States v. Peacock, Case No. 16,019.

An order on the cashier of the Bank of the United States is evidence in support of an indictment for forging an order on the cashier of the corporation of the Bank of the United States.—United States v. Hinman, Case No. 15,370.

The scienter may be proved by the fact of similar forged orders found in possession of defendant or of an accomplice in passing them.—United States v. Hinman, Case No. 15,370.

Where the instrument alleged to have been forged has been destroyed or suppressed by the prisoner, the tenor may be proved by parol evidence.—United States v. Britton, Case No. 14,650.

Witnesses skilled in handwriting will not be permitted to give their opinion, upon inspection of the papers, whether the forgery was done by defendant.—United States v. Prout, Case No. 16,094.

FORMEDON.

Limitation of actions, see "Limitation of Actions," § 8.
Writ of, see "Entry, Writ of."

FORMER ADJUDICATION.

See "Judgment," §§ 46–51, 65, 66.
In criminal cases, see "Criminal Law," § 36.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," §§ 30–37.

FRANCHISES.

See "Banks and Banking," § 8; "Corporations," §§ 10, 13, 38; "Ferries," §§ 1, 2; "Railroads," §§ 7, 11.
Forfeiture, see "Corporations," §§ 69–75.
Of insurance companies, see "Insurance," § 4.

FRAUD.

§ 1, Deception constituting fraud—Knowledge of fraud or falsity of statements. § 2, —— Expression of opinion. § 3, —— Representations as to financial condition. § 4, —— Concealment. § 5, —— Representations to obtain money. § 6, Action—Rights of action and defenses. § 7, —— Pleading. § 8, —— Evidence. § 9, —— Damages. § 10, Criminal responsibility—Nature and elements of offense. § 11, —— Prosecution.

See, also, "False Pretenses"; "Frauds, Statute of"; "Fraudulent Conveyances."
Acquisition of property by, see "Trusts," § 6.
Debts contracted through fraud, see "Bankruptcy," §§ 612, 627.
Effect on limitation, see "Limitation of Actions," § 14.
Ground of cancellation of written instrument, see "Cancellation of Instruments." § 1.
—— of jurisdiction in equity, see "Equity," § 2.
—— of reformation of written instrument, see "Reformation of Instruments," §§ 2, 3.
—— of relief against judgment, see "Judgment," § 41.
—— of rescission of contract, see "Sales," §§ 13–15; "Vendor and Purchaser," § 7.
Of agent, see "Principal and Agent," § 29.

In particular classes of conveyances, contracts, or transactions.

See "Assignment for Benefit of Creditors," § 5; "Bills and Notes," § 89; "Contracts," § 6; "Insurance," §§ 44–65; "Payment," § 25; "Pensions," § 4; "Release," § 2; "Sales," § 4; "Wills," § 11.
Bottomry bond, see "Shipping," § 116.
Patents, see "Public Lands," §§ 55, 56.
Subscription to corporate stock, see "Corporations," § 18.

§ 1. Deception constituting fraud — Knowledge of fraud or falsity of statements.

An action for a false affirmation of the credit of another cannot be sustained if the representation was in substance true according to the party's knowledge and belief.—Tappan v. Darling, Case No. 13,746.

Shippers for the account and risk of another, having no opportunity to examine the goods, *held* not liable for a false description in the invoice, copied from a prior invoice, upon the faith of which the consignee made advances to the owner.—Jacques v. Collins, Case No. 7,168.

To charge a respondent on account of fraud, there must not only be evidence of it, but also that he was conusant of the fraud, or profited by it.—Ferson v. Sanger, Case No. 4,752.

§ 2. —— Expression of opinion.

An expression of belief by the seller of a note, that the maker is responsible, is equivalent to an assertion of the fact, if meant to be so understood, and if made with knowledge that he is not responsible.—Foster v. Swasey, Case No. 4,984.

§ 3. —— Representations as to financial condition.

Where part payment for property is made by a note of a third person, taken by the seller under the false and fraudulent representation of the purchaser that the maker was responsible, the seller may recover the amount thereof from the purchaser.—Foster v. Swasey, Case No. 4,984.

No action will lie for false representations as to credit made in a letter to defendant's agent, marked "Confidential," without proof of authority from the writer to exhibit it.—Iasigi v. Brown, Case No. 6,994.

§ 4. —— Concealment.

The vendors of a mine, directors of the purchasing company, are guilty of actionable concealment in withholding from their co-directors material facts affecting the mine, with intention to mislead, where the concealment operated to induce the purchase.—Emma Silver Min. Co. v. Park, Case No. 4,467.

§ 5. —— Representations to obtain money.

A warehouseman who draws a fabricated receipt is liable to the person who accepted and paid a draft on the faith of it for the injury received.—Suydam v. Watts, Case No. 13,658.

§ 6. Action—Rights of action and defenses.

See, also, "Arrest," § 2.

The nonperformance of a promise is not sufficient to support an action on the case for deceit.—Fenwick v. Grimes, Case No. 4,733.

An action upon the case for deceit will lie against a person who by false and fraudulent representations induces the plaintiff to sell a slave for less than her value.—Fenwick v. Grimes, Case No. 4,734.

§ 7. —— Pleading.

Where the declaration sets forth, as the cause of action, fraudulent representations inducing a sale on credit, the averments of fraud will not be stricken out on motion of defendant, so as to make the action one of assumpsit for goods sold and delivered.—Walker v. Brynes, Case No. 17,066.

In Texas a charge of fraud should point out, at least in general terms, the acts relied upon to sustain it.—Hitchcock v. Galveston, Case No. 6,534.

§ 8. —— Evidence.

Fraud may be proved by circumstances.—Tardy v. Morgan, Case No. 13,752.

Though fraud may be inferred from facts and circumstances without direct proof, the presumption is in favor of innocence when they may be explained naturally, consistent with innocence.—Garrow v. Davis, Case No. 5,257.

Fraud will never be presumed. The facts to show it must be clearly stated and proved.—Ridgeway v. Ogden, Case No. 11,814.

Collateral facts are admissible to establish intent or guilty knowledge where material to the issue of fraud.—Bottomley v. United States, Case No. 1,688.

Parol evidence is admissible in all cases to establish fraud.—Bottomley v. United States, Case No. 1,688.

Negotiations and conversations of a party charged with false and fraudulent representations will be considered in determining the question of fraud.—Crocker v. Lewis, Case No. 3,399.

Where fraud is charged, evidence tending to prove it, though it be slight, is admissible.—Carr v. Gale, Case No. 2,434.

Strong presumptive circumstances of fraud may outweigh positive testimony against it.—The Short Staple, Case No. 12,813.

In an action for deceit in selling goods fraudulently marked with plaintiff's trade-mark, evidence may be given of any number of sales under a count for selling on a particular day and divers others between that and the date of the writ.—Taylor v. Carpenter, Case No. 13,785.

§ 9. —— Damages.

Measure of damages in an action of deceit in selling a vessel under false representation as to her national character.—Sherwood v. Sutton, Case No. 12,781.

In the case of commission merchants, the amount of commissions which they expected to receive is an item of damage.—Suydam v. Watts, Case No. 13,658.

§ 10. Criminal responsibility — Nature and elements of offense.

See, also, "Bankruptcy," §§ 674–677.

Fraud is not indictable unless it concerns the public, or be committed by false tokens or false pretenses.—United States v. Porter, Case No. 16,072.

All frauds affecting the public at large, or an indefinite number of persons, who have suffered a common or joint damage by reason of the fraud, are indictable offenses at common law.—United States v. Watkins, Case No. 16,649.

An indictment for defrauding the United States of a land warrant will not lie, under Act 1823, c. 38.—United States v. Myler, Case No. 15,849.

§ 11. —— Prosecution.

See, also, "Criminal Law," § 18.

An indictment for fraud must aver all the facts which constitute the fraud. It is not sufficient to aver that an act was fraudulently done, or was done with intent to commit a fraud.—United States v. Watkins, Case No. 16,649.

A count describing the deceptive means by which defendant procured the placing of public money in the hands of a navy agent, and also the means by which defendant obtained such money for his own use from such agent, does not charge two separate offenses.—United States v. Watkins, Case No. 16,649.

FRAUDS, STATUTE OF.

§ 1, Promises to answer for debt, default, or miscarriage of another. § 2, Real property and estates and interests therein. § 3, Sales of goods. § 4, Requisites and sufficiency of writing. § 5, Operation and effect of statute. § 6, Pleading.

Validity of trusts, see "Trusts," § 1.

§ 1. Promises to answer for debt, default, or miscarriage of another.

A verbal agreement by a bank, without funds on deposit of the drawer of a check, to pay such check if presented for payment through the clearing house, is within the statute.—Morse v. Massachusetts Nat. Bank, Case No. 9,857.

A separate and express promise by a partner to pay a debt of the firm is not a promise to pay the debt of another within the statute of frauds.—Rice v. Barry, Case No. 11,751.

A verbal acceptance of an order drawn at the foot of an account of a third person against the drawer is not a promise to pay the debt of another within the statute.—Shields v. Middleton, Case No. 12,786.

A written promise absolutely to pay the note of a third person, written at the foot of such note, is an original undertaking, and need not express the consideration.—Fowler v. MacDonald, Case No. 5,002.

A promise by a third party to pay a judgment debt if the creditor will suspend collection for six months is an original promise, and need not be in writing under the Ohio statute.—Stewart v. Hinkle, Case No. 13,430.

The undertaking of a factor is merely a guaranty of payment of the debt of the buyer, and it is not collateral within the statute of frauds.—Bradley v. Richardson, Case No. 1,786.

A promise founded on a new consideration, made to one who owes a third person, to pay the debt, is not within the statute.—Phelps v. Clasen, Case No. 11,074.

A promise to a creditor to pay a debt made by a third person, who had received money from the debtor for that purpose, is not within the statute of frauds, and will support assumpsit.—Goddard v. Mockbee, Case No. 5,493.

§ 2. Real property and estates and interests therein.

An oral agreement among purchasers at a public sale is void.—Arden v. Brown, Case No. 510.

A verbal promise to a dying person by heirs to convey his property in a certain way is void under the statute of frauds, and is not enforceable in absence of fraud.—Bedilian v. Seaton, Case No. 1,218.

A parol agreement to become copartners in the business of purchasing and selling lands and lumber is a parol contract respecting an interest in lands, and therefore void under the statute.—Smith v. Burnham, Case No. 13,019.

§ 3. Sales of goods.

Sales at public auction are not within the statute.—Arden v. Brown, Case No. 510.

A contract for the sale of the notes of a private bank is within the statute.—Riggs v. Magruder, Case No. 11,828.

The statute does not apply so as to require a contract made in France to be evidenced by writing.—Low v. Andrews, Case No. 8,559.

Goods in United States bonded warehouse, on which duties have not been paid, are in possession of the United States; and an order therefor from the owner, though accepted by the warehouseman, is not a sufficient delivery or receipt and acceptance, under the statute of frauds.—In re Clifford, Case No. 2,893.

Where the seller was to deliver goods free of truckage, there is no delivery where they are sent by rail, and left at the station, with a notice to the purchaser that they have arrived.—Salmon Falls Mfg. Co. v. Goddard, Case No. 12,263.

The title passes, within the Massachusetts statute of frauds, where goods bought on a credit of 60 days were weighed out and selected by the buyer, marked with his name, and placed in the seller's warehouse, subject to the buyer's call at any time.—Ex parte Safford, Case No. 12,212.

Oral contract for sale of merchandise in New York, valid in Rhode Island, where made, is enforceable in New York though void under its statute of frauds.—Allen v. Schuchardt, Case No. 236.

§ 4. Requisites and sufficiency of writing.

No memorandum of the sale of lands is sufficient unless it state the price and material terms of the contract.—Smith v. Arnold, Case No. 13,004.

A memorandum, "Received $1,000, to be accounted for if the parties shall furnish satisfactory security for certain lands, say 119,000 acres for $113,000, on or before Friday morning next, otherwise to be forfeited," is a sufficient memorandum of sale.—Clark v. Burnham, Case No. 2,816.

An administrator acting as auctioneer at his own sale of land to pay debts is not an agent of the purchaser, so as to make his memorandum of the sale valid under the Rhode Island statute.—Smith v. Arnold, Case No. 13,004.

An auctioneer's memorandum or entry in his sales book of a sale of lands is not sufficient to take the case out of the statute of frauds if it does not sufficiently describe the land and the terms of sale.—Williams v. Threlkeld, Case No. 17,741.

A note expressed to be held as collateral security for the maker's obligation upon a previous note of another is not void as a promise to pay the debt of another without a consideration therein expressed.—Union Bank of Georgetown v. Corcoran, Case No. 14,353.

Charges and credits made in the books of an administratrix in relation to land which she had agreed by parol to sell *held* sufficient written evidence to take the case out of the statute.—Tufts v. Tufts, Case No. 14,233.

An unsigned memorandum made by plaintiff may be aided by parol evidence that it was made in the presence and with the consent of defendant, and by letters of defendant referring to the contract, but not to the memorandum, so as to take the case out of the statute.—Dodge v. Van Lear, Case No. 3,956.

A sold note signed in duplicate by the brokers only, *held* not sufficient as a memorandum in writing to charge the purchasers.—Butler v. Thomson, Case No. 2,244.

Sufficiency of memorandum of sale of goods.—Salmon Falls Mfg. Co. v. Goddard, Case No. 12,263.

A parol contract set out in the bill is of same force against plaintiff as though in writing.—Aiken v. Ferry, Case No. 112.

A promissory note, with interest, cannot be treated as a mere memorandum of an advance for a purchase upon a copartnership account.—Smith v. Burnham, Case No. 13,019.

§ 5. Operation and effect of statute.

An agreement to extend the time of payment of a debt secured by deed of trust need not be in writing.—In re Betts, Case No. 1,371.

Part performance will take an oral agreement out of the statute of frauds, and the residue will be enforced by a decree for performance.—Hunter v. Marlboro, Case No. 6,908.

Actual possession under a parol agreement for a conveyance, and performance, takes the case out of the statute.—Post v. Corbin, Case No. 11,299.

The taking possession, and cultivating of the land by the vendee, takes the sale out of the statute.—Conway v. Sherron, Case No. 3,147.

Acts done by the vendor alone will not take a verbal sale of land out of the statute.—Reeves v. Pye, Case No. 11,662.

A parol contract in Virginia in 1787 for land in Kentucky, where the consideration was paid, was not void.—Carrington v. Brents, Case No. 2,446.

An agent not having authority to sell real estate cannot bind his principal by the receipt of earnest money.—Bosseau v. O'Brien, Case No. 1,667.

§ 6. Pleading.

A verbal agreement to pay the debt of another, although confessed in the answer, will not be enforced in equity if the statute of frauds is insisted upon in the answer.—Thompson v. Jamesson, Case No. 13,960.

A count, upon a promise to pay the debt of another in a certain event, must aver a consideration.—Offutt v. Hall, Cases Nos. 10,449, 10,450.

FRAUDULENT CONVEYANCES.

I. TRANSFERS AND TRANSACTIONS INVALID.

§ 1, Grounds of invalidity in general. § 2, Attachment and execution. § 3, Insolvency of grantor. § 4, Knowledge and intent of parties. § 5, Consideration—In general. § 6, ——Necessity. § 7, —— Taking notes in payment. § 8, —— Conveyance to protect surety. § 9, —— Securing future advances. § 10,—— Marriage. § 11, —— Conveyances by husband to wife. § 12, —— Conveyances from third person to wife. § 13, —— Mortgage in excess of indebtedness. § 14, —— Partial illegality or invalidity of consideration. § 15, Confidential relations of parties—In general. § 16, —— Transactions between parent and child. § 17, —— Transactions between husband and wife. § 18, —— Conveyances from third person to wife. § 19, Reservations and trusts for grantor. § 20, Preferences to creditors. § 21, Retention of possession or apparent title by grantor—Effect of retaining possession in general. § 22, —— Sufficiency of change of possession. § 23, —— Property in the hands of bailee. § 24, —— Effect of failure to record instrument.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

§ 25, Original parties. § 26, Purchasers from grantee in general. § 27, Bona fide purchasers from grantee.

III. REMEDIES OF CREDITORS.

§ 28, Creditors entitled to assert invalidity. § 29, Right of action to set aside transfer. § 30, Jurisdiction. § 31, Pleading. § 32, Evidence. § 33, Trial. § 34, Judgment or decree. § 35, Disposition of property or proceeds.

See, also, "Bankruptcy," §§ 62–73, 200, 214–248, 594, 601, 673.
By corporation, see "Corporations," § 64.
Marriage settlements, see "Husband and Wife," § 2.

I. TRANSFERS AND TRANSACTIONS INVALID.

§ 1. Grounds of invalidity in general.

Lease of property of insolvent railroad company for indefinite time tends to hinder or delay its creditors.—Cleveland v. La Crosse & M. R. Co., Case No. 2,887.

A mortgage given in part to defraud creditors is void altogether.—Burrill v. Lawry, Case No. 2,199; In re Burrows, Id. 2,204.

§ 2. Attachment and execution.

The fact that time notes given to secure accommodation acceptances were surrendered, and demand notes taken, upon which suit was at once instituted and property attached, does not make the transaction necessarily fraudulent.—Whetmore v. Murdock, Case No. 17,509.

§ 3. Insolvency of grantor.

Conveyances executed by a person who is insolvent, or unable to pay his debts, will be *held* prima facie void in the hands of a grantee with knowledge of the facts.—Walcott v. Almy, Case No. 17,052.

A blanket mortgage given by a banker to a firm of which he was a member, to secure present and future advances, *held* void as a fraud upon creditors, where he was insolvent at the time, with their knowledge, and its existence was concealed until he was on the brink of failure, and credit was obtained upon false representations as to his financial ability.—Stephens v. Sherman, Case No. 13,369a.

A reasonable advancement made by a person of ample fortune, though at the time indebted, is not fraudulent as to existing creditors, where he subsequently becomes insolvent.—Hopkirk v. Randolph, Case No. 6,698.

See, also, "Bankruptcy," §§ 214–250.

§ 4. Knowledge and intent of parties.

Intention of parties, and not fact of payment, is the test in determining fraud.—Alexander v. Todd, Case No. 175.

An intent to defraud subsequent creditors is sufficient to avoid a voluntary conveyance, or one not made in good faith, at the suit of such creditors.—United States v. Stiner, Case No. 16,404.

If the parties to a sale and purchase of property intend thereby to defraud creditors, the fact that a full consideration was paid will not make it valid.—Parrish v. Danford, Case No. 10,770.

A fraudulent intent will, in general, be presumed from the fact that the party conveying was indebted at the time the conveyance was executed.—Gilmore v. North American Land Co., Case No. 5,448.

A voluntary conveyance by a debtor is fraudulent as to creditors if made with intent to delay, hinder, and defraud them.—Gilmore v. North American Land Co., Case No. 5,448.

A conveyance will not be set aside as made to hinder and delay creditors unless the intention of both parties be shown.—Jenkins v. Einstein, Case No. 7,265; Magniac v. Thompson, Id. 8,956; Wilson v. Prewett, Id. 17,828.

It is not necessary that the wife should have known of the fraudulent intent of the husband, to make void a voluntary conveyance to her.—Beecher v. Clark, Case No. 1,223.

Proof of the purchaser's want of knowledge of the existence of a judgment against the seller, or that he was embarrassed, will negative the inference of fraud upon his part.—Erdhouse v. Hickenlooper, Case No. 4,509.

Where a purchaser has notice before obtaining possession and paying the consideration that the transfer is fraudulent, the contract will be set aside at intervention of the creditors of the seller.—Parrish v. Danford, Case No. 10,770.

Failure of a first incumbrancer to give notice after a second incumbrancer has advanced his money is no evidence of fraud.—Bank of the United States v. Lee, Case No. 922.

A deed of marriage settlement by a person in embarrassed circumstances will be set aside where the prospective wife knew of his embarrassment and demanded a marriage settlement before she would marry him.—Wilson v. Prewett, Case No. 17,828.

Actual knowledge, on the part of the prospective wife, of the fraudulent purpose of the grantor in the marriage settlement, is not necessary to avoid the deed. A knowledge of facts sufficient to excite the suspicions of a prudent person, and put her on inquiry, amounts to notice, and is equivalent to actual knowledge.—Wilson v. Prewett, Case No. 17,828.

If the amount of property settled is extravagant, or grossly out of proportion to the station or circumstances of the husband, and he is embarrassed by debt, and the other party knows it, this, of itself, is sufficient notice of fraud.—Wilson v. Prewett, Case No. 17,828.

§ 5. Consideration—In general.

The transfer of property as security for antecedent debts, without extinguishment or surrender of such debts and of the old securities therefor, is not sufficient to constitute the transferee a bona fide purchaser for valuable consideration.—Morse v. Godfrey, Case No. 9,856.

A deed made by one in failing circumstances to a partner, in consideration of partnership funds advanced to the grantor without authority by another partner, *held* not fraudulent as to his creditors.—Pomeroy v. Manin, Case No. 11,260.

§ 6. —— Necessity.

Conveyance by debtor is fraudulent if no consideration is paid and no security or evidence of indebtedness is taken, or if payment of consideration is falsely admitted.—Alexander v. Todd, Case No. 175.

A gratuity cannot afterwards be converted into a debt, so as to support a conveyance to the prejudice of the grantor's creditors.—Clay v. McCally, Case No. 2,869.

The transfer of property without consideration by a debtor on the eve of contracting new debts, though without actual fraud, is void as to creditors.—Caller v. McNabb, Case No. 2,322.

Presumption of fraud arising from nonpayment of consideration, etc., is rebutted by subsequent payment in good faith under prior agreement.—Alexander v. Todd, Case No. 175.

§ 7. —— Taking notes in payment.

A conveyance to one's attorney is not rendered fraudulent by the fact that part of the consideration was the paper of a firm to which the vendor belonged, which was not worth its face value.—Jenkins v. Einstein, Case No. 7,265.

The fact that the negotiator of a loan, who personally guarantied the paper, received a large compensation for so doing, does not vitiate a conveyance made to him in settlement of a part of the loan which he was afterwards compelled to take up.—Jenkins v. Einstein, Case No. 7,265.

§ 8. —— Conveyance to protect surety.

An assignment of an equitable estate in lands under a bond for title made to indemnify sureties, and without intent to delay or defraud creditors, is valid.—In re Reynolds, Case No. 11,724.

§ 9. —— Securing future advances.

An assignment of property to secure advances made and to be made is valid, except as to those made after the liens of third parties have attached.—United States v. Lenox, Case No. 15,592.

§ 10. —— Marriage.

A contract of conveyance in consideration of marriage is valid as against creditors of the husband.—Magniac v. Thompson, Case No. 8,956.

A contract of conveyance in consideration of marriage is within 13 Eliz. c. 5, § 6, if bona fide and without notice of fraud, etc.—Magniac v. Thompson, Case No. 8,956.

§ 11. —— Conveyances by husband to wife.

A purchase by the wife with money received from the sale of her property, which had become the husband's by virtue of the marriage, *held*, in effect, a voluntary conveyance.—Dick v. Hamilton, Case No. 3,890.

A conveyance by an insolvent to his wife of personal property for a consideration of one-fifth of its value is conclusively fraudulent.—Wilson v. Jordan, Case No. 17,814.

Postnuptial deed founded on release of dower in husband's lands and mortgage to his creditors of lands held in trust for the wife's separate use, is not voluntary.—Bank of the United States v. Lee, Case No. 922.

A conveyance by the husband to the wife, in consideration of the relinquishment of the right of dower of other lands worth three times as much as the dower right, is not absolutely void in a court of law.—Wright v. Stanard, Case No. 18,094.

See, also, post, § 17.

§ 12. —— Conveyances from third person to wife.

The release of dower is a sufficient consideration for the conveyance of property to the wife by a third person, and is valid as against the existing or subsequent creditors of the husband.—Dick v. Hamilton, Case No. 3,890.

See, also, post, § 18.

§ 13. —— Mortgage in excess of indebtedness.

A mortgage to secure the payment of $90,000, where but $4,000 was due the mortgagees, is fraudulent as to creditors.—Hubbard v. Turner, Case No. 6,819.

§ 14. —— Partial illegality or invalidity of consideration.

In a court of law a deed cannot be sustained in part and avoided in part for inadequacy of consideration.—Wright v. Stanard, Case No. 18,094.

§ 15. Confidential relations of parties—In general.

Conveyance to a son-in-law by one who shortly afterwards took benefit of bankrupt act, and scheduled the property, no claim thereunder having been made for 50 years, *held* fraudulent.—Bulkley v. Buffington, Case No. 2,117.

§ 16. —— Transactions between parent and child.

A deed is not fraudulent, if procured to be made by a father to his infant son in payment of a just debt, though the father be in embarrassed circumstances.—Hinde v. Vattier, Case No. 6,512.

A conveyance by a father to his son of all his property *held* evidence of intent to defraud creditors.—Middleton v. Sinclair, Case No. 9,534.

A conveyance by an insolvent to his mother, which recites an alleged account, as the consideration thereof, is fraudulent, where it had been running for 23 years without a demand for payment, and it appears that some of the items had been guessed at, and the account was first reduced to writing when the conveyance was made.—Clay v. McCally, Case No. 2,869.

Conveyance by insolvent to his mother for expressed consideration of an account due to her, and conveyance by her immediately afterwards to her daughter in consideration of natural love and affection, are indications of bad faith.—Clay v. McCally, Case No. 2,869.

Right of creditors of father to gifts made by him to his children.—In re Grant, Case No. 5,693.

§ 17. —— Transactions between husband and wife.

A voluntary conveyance to wife or children by solvent grantor, not impeachable by subsequent creditors, if not actually fraudulent.—Barker v. Barker's Assignee, Case No. 986.

Such deed may become fraudulent by concealment from the public, and credit by reason of supposed ownership.—Barker v. Barker's Assignee, Case No. 986.

A postnuptial settlement, made by the husband upon his wife for a valuable consideration, or voluntary, if not indebted at the time, or not disproportionate to his means, is valid.—Picquet v. Swan, Case No. 11,133.

Settlements of property upon a wife amounting to nearly $100,000, during a time when the husband's firm was losing money rapidly, *held* fraudulent as to creditors.—Sedgwick v. Place, Case No. 12,621.

If the settlement is not bona fide, the fact that it is made for a valuable consideration will not save it.—Wilson v. Prewett, Case No. 17,828.

A conveyance by a solvent grantor to his wife through a third person, where there was no intention to defraud creditors, will not be set aside on behalf of subsequent creditors.—Sedgwick v. Place, Case No. 12,619.

A purchase of lands by a husband with money belonging to his wife before marriage, and the taking of a deed to her, pursuant to a verbal agreement with her before marriage, is no fraud on his creditors.—Mechanics' Bank of Alexandria v. Taylor, Case No. 9,386.

Payment of the sum stipulated in the articles may be made after marriage, on the eve of a judgment against the husband.—Magniac v. Thompson, Case No. 8,956.

An indiscreet expenditure for furniture is not per se fraudulent against creditors, where the husband agreed by the marriage articles to furnish a house as he saw fit.—Magniac v. Thompson, Case No. 8,956.

Creditors have no claim on the property of the wife of the debtor for the value of repairs made by the debtor, who occupies the premises with his family.—Dick v. Hamilton, Case No. 3,890.

A subsequent creditor has no claim on the property of the wife for money expended thereon, unless it appear that it was so expended with intent to defraud such creditor.—Dick v. Hamilton, Case No. 3,890.

A voluntary conveyance to wife through a third person *held* void.—Beecher v. Clark, Case No. 1,223.

The creditors of an embarrassed debtor are entitled to the benefit of a transaction, the result of his skill and judgment, but made in his wife's name, to conceal his interest from his creditors.—In re Eldred, Case No. 4,328.

The giving of a joint note by husband and wife for lands purchased by her, will not subject the lands to his creditors, where the note is paid out of the wife's separate property.—Mills v. Chapman, Case No. 9,612b.

See, also, ante, § 11.

§ 18. —— Conveyances from third person to wife.

A conveyance to a married woman in consideration of a promissory note signed by herself and husband, secured by a mortgage on her separate property, will be presumed to have been made on the faith of such security.—Dick v. Hamilton, Case No. 3,890.

It is a strong circumstance of fraud that the consideration passed from the grantor to the grantee with a view of covering the property by a conveyance to the grantor's wife.—Walcott v. Almy, Case No. 17,052.

See, also, ante, § 12.

§ 19. Reservations and trusts for grantor.

Power reserved in trust deed to dispose of trust property with consent of trustee, upon substituting an equivalent, is not evidence of fraud.—Bank of United States v. Lee, Case No. 922.

Deed absolute executed the same day, with an agreement to hold the property in trust for the grantor, *held* void as to creditors and prior purchasers.—Burbank v. Hammond, Case No. 2,137.

In a postnuptial settlement, a power of appointment and to create new trust may be reserved to the wife toties quoties.—Picquet v. Swan, Case No. 11,133.

§ 20. Preferences to creditors.

A failing debtor may pay any debt justly due, and secure any indorser against liability, if done in good faith.—Walker v. Adair, Case No. 17,064.

§ 21. Retention of possession or apparent title by grantor—Effect of retaining possession in general.

See, also, "Chattel Mortgages."

Possession and control by grantor is evidence of fraud.—Alexander v. Todd, Case No. 175; Meeker v. Wilson, Id. 9,392.

Possession of goods by any other than the real owner is neither fraudulent, nor a badge of fraud, if the want of possession is fairly accounted for, and there is no fraud in fact.—Merrill v. Rinker, Case No. 9,471.

The right in a chattel under a contract which does not give a right to possession is no badge of fraud.—Atlantic Ins. Co. v. Conard, Case No. 627.

Want of possession of real estate is not, as it is of personalty, a presumption of fraud.—Phettiplace v. Sayles, Case No. 11,083.

Liens and mortgages are good as between the parties and against creditors, although the possession is not changed, if there be no fraudulent intent.—Fletcher v. Morey, Case No. 4,864.

An assignment of chattels is not perfect against creditors unless possession accompanies and follows the deed.—Meeker v. Wilson, Case No. 9,392; Reed v. Minor, Id. 11,647; Smith v. Ringgold, Id. 13,101; Williamson v. Same, Id. 17,755; Mitchell v. McKibbin, Id. 9,666.

The fact that the possession remained with the seller for justifiable purposes will not vary the rule that possession must accompany the sale.—The Romp, Case No. 12,030.

The possession by the seller, after the sale, of fixtures used in a tobacco factory, *held* not fraudulent in Virginia.—Howard v. Prince, Case No. 6,762.

A deed of personal property, to become void if the grantor on demand pay a certain sum to the grantee, is invalid as to creditors, unless accompanied by change of possession. This, although the deed be acknowledged and recorded under the statute. Act Md. 1729, c. 8, §§ 5, 6.—Smith v. Hunter, Case No. 13,063.

A transfer by the nominal owner to the creditor of the equitable owner in possession at the latter's request, where unaccompanied by possession, *held* inoperative as against the creditors of the equitable owner.—In re Long, Case No. 8,477.

The parties may agree that the possession and use of the property may be retained by the debtor until the creditor shall assert his rights against it as a security for the debt.—Mitchell v. Winslow, Case No. 9,673.

An execution will be *held* fraudulent, as respects a subsequent one, where the creditor allows the debtor to retain possession of property levied upon, for an unreasonable length of time.—United States v. Conyngham, Case No. 14,850.

§ 22. —— Sufficiency of change of possession.

Where both parties to a sale of chattels live together in the same house, the possession will be presumed to remain in the seller until the contrary is shown.—Travers v. Ramsay, Case No. 14,152.

Transfer of furniture between persons living in the same house, who continue use as before, is fraudulent.—Allen v. Massey, Case No. 231.

A transfer of title to an agent in possession, carrying on business in the transferror's name, is void as against creditors unless made known to the public.—Comly v. Fisher, Case No. 3,053.

A change in the title to real estate on which personalty is situated is insufficient to show a change of possession as to the personalty.—Cramton v. Tarbell, Case No. 3,349.

The making of a lease of such realty by the mortgagee does not show change of possession of the personalty.—Cramton v. Tarbell, Case No. 3,349.

The purchaser of property transferred abroad, either as security or absolutely, takes a good title as against creditors if he use due diligence to take possession of the proceeds upon their arrival, although consigned to the seller.—De Wolf v. Harris, Case No. 4,221; Meeker v. Wilson, Id. 9,392.

The validity of such transfer is not affected by the proviso in the customs act of 1799 (chapter 22, § 62), relating to the transfer before entry of goods.—De Wolf v. Harris, Case No. 4,221.

§ 23. —— Property in the hands of bailee.

A sale of goods in the possession of the seller's bailee is fraudulent as to creditors, unless the possession accompany and follow the sale, or an order be given by the seller, and served on the bailee, to deliver possession to the purchaser.—Gilman v. Herbert, Case No. 5,442.

§ 24. —— Effect of failure to record instrument.

Delay of 18 months to record deeds of conveyance to wife through third person *held* a badge of fraud.—Beecher v. Clark, Case No. 1,223.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

§ 25. Original parties.

Donees will not be *held* liable only for the proportions which their respective gifts bear to the donor's debts, but the whole of every gift will be subjected to the payment of the debts.—Hopkirk v. Randolph, Case No. 6,698.

A fraudulent conveyance is binding upon parties and their privies.—Randall v. Phillips, Case No. 11,555.

The donee of slaves is liable to the creditors of the insolvent donor only for the slaves and their issue living at the time of the demand therefor, and their hire from such time, and the proceeds of sales by him.—Backhouse v. Jett, Case No. 710.

See, also, "Bankruptcy," §§ 200, 275.

§ 26. Purchasers from grantee in general.

A debtor divided his estate between three sons, on condition that they give their bonds in certain amount to the husband of his daughter. *Held*, that the latter was liable to the creditors for the amount received by him on the bonds thus given.—Hopkirk v. Randolph, Case No. 6,698.

A mere volunteer from a grantee under a fraudulent conveyance stands in the same predicament as his grantor, as against the persons intended to be defrauded.—Dexter v. Smith, Case No. 3,866.

§ 27. Bona fide purchasers from grantee.

One taking an assignment of a mortgage, with notice of the insolvency of the mortgagor, as collateral security for antecedent debts, is not a bona fide purchaser for valuable consideration, without notice.—Morse v. Godfrey, Case No. 9,856.

A bona fide purchaser for a valuable consideration and without notice from a fraudulent grantee will hold the estate at law against the original grantor.—Wood v. Mann, Case No. 17,951; Bean v. Smith, Id. 1,174.

Bona fide purchasers from the wife of property conveyed to her by the husband, in fraud of his creditors, acquire a good title as against such creditors.—Sedgwick v. Place, Case No. 12,621.

III. REMEDIES OF CREDITORS.

§ 28. Creditors entitled to assert invalidity.

Construction of the statute of 27 Eliz. as to fraudulent conveyances in respect to prior and subsequent creditors and subsequent purchasers.—Ridgeway v. Underwood, Case No. 11,815.

A creditor, in Mississippi, cannot enforce payment out of property purchased by a debtor in his own name, but with his wife's funds, unless he show that credit was given in specific reliance upon such property.—Friedlander v. Johnson, Case No. 5,117.

A creditor who, with full knowledge of the facts that constitute the fraud, concurs with other creditors in assenting to its execution, cannot impeach it as fraudulent.—Johnson v. Rogers, Case No. 7,408.

But an assenting creditor may impeach the transfer as to a claim which he has purchased from a nonassenting creditor.—Johnson v. Rogers, Case No. 7,408.

§ 29. Right of action to set aside transfer.

The action of equity on the fraudulent grantor or assignee is only to the extent of supplying a remedy to the creditor suing. As to all others the assignment is unaffected.—McCalmont v. Lawrence, Case No. 8,676.

§ 30. Jurisdiction.

Equity has jurisdiction of suit to set aside fraudulent conveyances by a judgment debtor.—Bean v. Smith, Case No. 1,174.

§ 31. Pleading.

A subsequent purchaser of land, made defendant to a bill to set aside a conveyance by the debtor as fraudulent, as against creditors, must be charged to have had knowledge of the fraud.—Pratt v. Curtis, Case No. 11,375.

§ 32. Evidence.

A conveyance, which purports to be bona fide, and for a valuable consideration, will be taken to be so, until the contrary is shown.—Briggs v. French, Case No. 1,871.

To ascertain the purpose of the grantor in a marriage settlement, evidence of fraudulent transfers by him to other persons at or about the time of the settlement is admissible.—Wilson v. Prewett, Case No. 17,828.

§ 33. Trial.

On a bill to set aside a fraudulent conveyance of land levied on by execution, the court will not inquire whether there was not personal property on which the marshal should first have levied.—United States v. Lotridge, Case No. 15,628.

§ 34. Judgment or decree.

Where a conveyance was fraudulent, the court will set it aside, and order the land sold subject to the lien of the original vendor.—United States v. Lotridge, Case No. 15,628.

Equity may order the assignee of real estate fraudulently conveyed to reconvey, so that an execution may act upon it; or may order him to convey it to an officer of the court, or otherwise, so as best to appropriate it in satisfaction of the judgment.—McCalmont v. Lawrence, Case No. 8,676.

A conveyance made with intent to defraud creditors, not permitted to stand as security for advances made to the grantor on account of such conveyance.—Bean v. Smith, Case No. 1,174.

§ 35. Disposition of property or proceeds.

A creditor who first sues in the circuit court to set aside a fraudulent assignment has a prior equity to the payment of his entire debt, notwithstanding provisions of state laws in such cases for equal distribution.—Burt v. Keyes, Case No. 2,212.

FREIGHT.

See "Carriers," § 36; "Shipping," §§ 180–190.

FUGITIVE FROM JUSTICE.

See "Extradition."
Limitation of prosecution, see "Criminal Law," § 29.

G

GAME.

See "Fish."

GAMING.

§ 1, Gambling contracts and transactions. § 2, Penalties. § 3, Offenses. § 4, Criminal prosecutions.

See, also, "Lotteries."

§ 1. Gambling contracts and transactions.

All wagers are not void, but all gaming contracts are.—Harding v. Walker, Case No. 6,050a.

Notes given to a broker in payment of market differences on settlement of a gambling contract are void for want of consideration.—In re Green, Case No. 5,751.

An action will not lie on a note given for the purchase of a ticket in a lottery prohibited by law.—Hawkins v. Cox, Case No. 6,243.

A duebill by an agent to his principal for money received for the sale of lottery tickets, in violation of a state statute, cannot be sued upon.—Lanahan v. Pattison, Case No. 8,036; Lanham v. Patterson, Id. 8,069.

A note given as indemnity to a bail who has paid a judgment for a gaming debt for which he was liable is not a note the consideration of which was money or other valuable thing won at gaming.—Welford v. Gilham, Case No. 17,376.

An assignment of an order for the payment of money, by one who obtained it from the owner and payee as the result of a wager, is void under St. 9 Anne, c. 14.—McGunnigle v. Simmes, Case No. 8,817.

A wager may be recovered at common law, although the parties have no other interest in the subject of the wager than that which is created by the wager itself.—Fleming v. Foy, Case No. 4,862.

Money paid on a wager cannot be recovered back at common law, but an action will lie under the Michigan statute for money lost at play, etc.—Grant v. Hamilton, Case No. 5,695.

The judgments which are made void by the Virginia statute against gaming are judgments voluntarily confessed by way of security for a gaming debt, not judgments rendered in invitum.—Welford v. Gilham, Case No. 17,376.

Money won at billiards is money won at play, within 9 Anne, c. 14, § 5.—Sardo v. Fongeres, Case No. 12,358.

Contracts for future delivery, see "Sales," § 6.
Wager contracts, see "Contracts," § 9.
—— policies, see "Insurance," § 18.

§ 2. Penalties.

Under the by-law of the corporation of Washington of August 16, 1809, a person who suffers and permits a faro table to be set up and kept in his house is liable to a separate prosecution for every day he shall so have suffered and permitted it to be set up and kept.—Washington v. Strother, Case No. 17,233.

A warrant upon the by-law of the city of Washington of January 12, 1830, § 1, for setting up a faro table, must state it to be "for the purpose of gaming for money."—Washington v. Cooly, Case No. 17,226.

The penalty for keeping a faro table in a place occupied as a tavern (Act Md. 1797, c. 110) may be recovered by indictment.—United States v. Evans, Case No. 15,065.

§ 3. Offenses.

The playing at games for money is not an offense, except as prescribed by statute.—United States v. Willis, Case No. 16,728.

Sections 1, 12, Act March 2, 1831, so far as they relate to the offense of keeping a faro bank, or other common gaming table, are to be construed together, and when so construed they contain a complete description of the offense and its punishment.—United States v. Smith, Case No. 16,328.

A single day's use of a gaming table, called a "sweat cloth," at a race track, is not the keeping of a common gaming table, within Act March 2, 1831, §§ 1, 12.—United States v. Smith, Case No. 16,329.

Under Act Md. 1797, c. 110, the offense of keeping a faro table can only be committed by a tavern keeper or retailer of spirituous liquors.—United States v. Lefevre, Case No. 15,591.

The game called "equality" *held* within the meaning of the words "other device," as used in the Maryland Gaming Act (1797, c. 110).—United States v. Speeden, Case No. 16,366.

The by-law of Georgetown prescribing a penalty for keeping a public gaming table does not supersede nor repeal Act Md. 1797, c. 110, prescribing a penalty for keeping a faro table in a house occupied by a tavern keeper.—United States v. Wells, Case No. 16,662.

A person who hires out his billiard room for two days is liable to the penalty of Act Md. 1798, c. 113.—United States v. Duvall, Case No. 15,016.

A person who keeps a gaming table is equally guilty, under the statutes of Maryland, whether he acted as principal, or as agent or servant of the owner.—United States v. Conner, Case No. 14,846.

A public gaming house is a public nuisance at common law.—United States v. Ismenard, Case No. 15,450.

It is an indictable offense at common law to keep a common gaming house for the purpose of gain.—United States v. Dixon, Case No. 14,970.

The keeper of a room in which common gaming is carried on, for his gain and under his management, is guilty of keeping a disorderly house; and evidence of his keeping a faro bank therein may be given under an indictment therefor.—United States v. Milburn, Case No. 15,767.

All acts of keeping a gaming house before indictment constitute but one offense.—United States v. McCormick, Case No. 15,661.

§ 4. Criminal prosecutions.

An indictment for keeping a "gaming table" is insufficient. So, also, is an indictment for keeping a "faro bank." The indictment should charge the keeping of a common gaming table, or a common faro bank, or a faro bank, the same being a common gaming table, the statute punishing the offense "of keeping a faro bank or other common gaming table." Act May 2, 1831, c. 37.—Marcus v. United States, Case No. 9,062a; United States v. Cooly, Id. 14,859; Same v. Milburn, Id. 15,767, 15,768; Same v. Ringgold, Id. 16,167.

In an indictment for keeping a public gaming house, the day laid is not material, so that it is within the time of limitation, and not within the time of previous conviction or acquittal.—United States v. McCormick, Case No. 15,661.

Bank notes are not money within the meaning of an indictment charging defendant with cheating another of his "money" at cards.—United States v. Wells, Case No. 16,661.

Evidence that defendant dealt the cards at faro is prima facie evidence that he kept the house.—United States v. Miller, Case No. 15,773.

GARNISHMENT.

§ 1, Construction of statutes. § 2, Persons and property subject to garnishment. § 3, Writ, service, and return. § 4, Lien of garnishment and rights and liabilities of garnishee. § 5, Proceedings to support or enforce. § 6, Operation and effect of garnishment or judgment.

See, also, "Attachment"; "Execution."
In admiralty, see "Admiralty," §§ 58–61.

§ 1. Construction of statutes.

The garnishment act of the territory of Arkansas of November, 1831, is not retrospective.—Ashley v. Maddox, Case No. 18,227.

§ 2. Persons and property subject to garnishment.

The cashier of a bank in which money is deposited is not liable as garnishee of the depositor.—Lewis v. Smith, Case No. 8,332.

A member of a firm indebted to defendant cannot be chargeable alone as garnishee. Act Md. 1795, c. 56.—Ellicott v. Smith, Case No. 4,387.

Government agent for payment of salaries and treasurer of the United States are public agents, and not liable as garnishees for employé's salary.—Averill v. Tucker, Case No. 670.

A citizen of Maine is not liable to be sued in Massachusetts, under its trustee attachment process, as a trustee of another citizen of Maine, though he pass half his time in Massachusetts.—Peters v. Rogers, Case No. 11,033.

Funds of the debtor in the hands of a third person are subject to garnishment, though such third person is liable as indorser on the bills of the debtor, which he is subsequently compelled to pay.—Taylor v. Gardner, Case No. 13,791.

Any corporation having property in the state is "a body politic within this state," within section 13 of the Nevada act, directing proceedings against trustees of debtors.—Thornburgh v. Savage Min. Co., Case No. 13,986.

An executor is not liable to be charged as the trustee of a legatee in a foreign attachment.—Picquet v. Swan, Case No. 11,133.

Executors cannot be charged as garnishees in a suit against legatees before probate of the will.—Picquet v. Swan, Case No. 11,133.

A judgment debtor is not liable to be attached as a garnishee.—Franklin v. Ward, Case No. 5,055; Lamson v. Mix, Id. 8,034.

And cannot be required to pay the amount of the judgment into court to be applied to complainant's claims.—Lamson v. Mix, Case No. 8,034.

Property held by an assignee under a fraudulent assignment may be reached by garnishee process.—Perego v. Bonesteel, Case No. 10,977.

Funds in the hands of an assignee for the benefit of creditors are not subject to garnishment under executions issued against the assignor after the date of the assignment.—Haust v. Burgess, Case No. 6,225a.

Property pledged, and on which the party has a lien, is not liable to be attached by trustee process.—Picquet v. Swan, Case No. 11,133.

The undivided interest of defendant in a negotiable treasury certificate issued in payment of an award can be attached in the hands of a gar-

nishee, even before it is due.—Stratton v. Young, Case No. 13,528.

The Massachusetts trustee process lies in favor of the United States against assignees to whom property has been assigned to pay debts due on customhouse bonds, although the assignment passed the entire property to the assignees in trust.—United States v. Langton, Case No. 15,560.

§ 3. Writ, service, and return.

As to the form of a capias against a garnishee.—Jones v. Kemper, Case No. 7,472.

When service of process containing a clause of foreign attachment *held* sufficient to charge credits and effects in the hands of garnishees.—Cushing v. Laird, Case No. 3,508.

Sufficiency of return of service by marshal in such case, and amendment thereof.—Cushing v. Laird, Case No. 3,508.

§ 4. Lien of garnishment and rights and liabilities of garnishee.

The attachment first served on a garnishee binds the property in his hands, though the marshal had prior attachments in his hands at the time.—McCobb v. Tyler, Case No. 8,705.

A direction by the debtor to the garnishee to pay the debt to the attaching creditor, where he assented to it, is equivalent to payment, so far as subsequent attachments are concerned.—Rudd v. Paine, Case No. 12,108.

An acceptance by the garnishee of defendant's draft in favor of a third person before service of the attachment binds the garnishee, and cannot be overreached by the attachment.—Tucker v. Marsteller, Case No. 14,222.

A draft by defendant on the garnishee in favor of a third person, of which he has notice before the attachment, will be preferred thereto.—Miller v. Hubbard, Case No. 9,574.

Money in the hands of a garnishee must be applied to drafts drawn upon it by the debtor before service of the attachment, although the garnishee had no notice of the drafts until afterwards.—King v. Gorsline, Case No. 7,796.

The garnishee is not liable to the plaintiff for goods of defendant in the garnishee's custody in another jurisdiction, where the debtor himself resides.—Miller v. Hooe, Case No. 9,573.

A bank is not liable on trustee process against a depositor for moneys paid out on his check on the day of, but before, the service of the writ on it, though the entry was not made on its books until some days later.—Foster v. Swasey, Case No. 4,985.

A garnishee who received the goods of the defendant under a deed of trust, fraudulent in law as to some of the creditors, if he acted bona fide is entitled to a reasonable compensation for taking care of the goods and selling them.—Noyes v. Brent, Case No. 10,372.

Under the trustee process of Massachusetts, the trustee is entitled to be discharged, on swearing that he has no goods, etc., of the debtor unless other parts of his disclosure show the contrary.—United States v. Langton, Case No. 15,560.

§ 5. Proceedings to support or enforce.

A garnishee may set off against the debtor's claim any claim he has against the debtor which could be set off in a suit at law brought by the debtor himself.—Picquet v. Swan, Case No. 11,133.

The statements in the trustees' answer, made on a belief of facts derived from other sources of information, are to be taken as true.—Picquet v. Swan, Case No. 11,133.

The garnishee may answer after bill taken for confessed at the rules.—Hartshorn v. Allison, Case No. 6,165.

The garnishee cannot be charged upon interrogatories unless he admits indebtedness to defendant.—Ellicott v. Smith, Case No. 4,387.

Assignment of debt by defendant, with notice to garnishee before service of attachment, cannot be given in evidence under issue of nulla bona.—Baker v. Mix, Case No. 775.

Garnishee must clearly admit the possession of goods, effects, or credits of the debtors before he can be held on his disclosure.—Picquet v. Swan, Case No. 11,133.

Where the garnishees assert an adverse title to the property in a third person, they are not bound to make disclosures as to their disposal of it.—Picquet v. Swan, Case No. 11,133.

Where the garnishee is taken and *held* to special bail, under Act Md. 1795, c. 56, § 6, no judgment can be rendered against him until he has appeared.—Jones v. Kemper, Case No. 7,472.

A judgment against a garnishee, obtained at a former term by surprise, will be set aside, and the execution quashed.—Homans v. Coombe, Case No. 6,653.

§ 6. Operation and effect of garnishment or judgment.

An assignee of a note with knowledge that the maker had been summoned as garnishee in a suit against the payee cannot recover.—Hacker v. Stevens, Case No. 5,887.

Judgment against the garnishee is no defense in a suit for the debt, if the plaintiff in the original trustee process has, by his neglect to comply with the local laws, put his judgment in a state of suspension, so that execution can no longer issue upon it, and it cannot be revived by a scire facias.—Flower v. Parker, Case No. 4,891.

In an action by the assignee of a creditor, the burden is upon one who admits that the debt is due to show that a prior attachment issuing out of another court in an action against the assignor bound the debt in his hands.—Crook v. Audenreid, Case No. 3,412.

GENERAL APPEARANCE.

See "Appearance."

GENERAL AVERAGE.

See "Shipping," §§ 223–243.

GIFTS.

§ 1, Inter vivos. § 2, Causa mortis.

Charitable gifts, see "Charities."
To wife, see "Husband and Wife," § 5.

§ 1. Inter vivos.

A condition precedent annexed to a gift cannot be repudiated and the gift taken unconditionally.—The Lucy Anne, Case No. 8,596.

A parol promise to trustee that he should have property after the death of the cestui is not an absolute gift.—Lee v. Luther, Case No. 8,196.

Parol evidence of a declaration of gift is inadmissible to contradict a prior written declaration of trust.—Lee v. Luther, Case No. 8,196.

Evidence of a parol gift to a trustee, made after the declaration of trust, is rebutted by proof that the cestui que use continued to take the profits.—Lee v. Luther, Case No. 8,196.

§ 2. Causa mortis.

To constitute a donatio causa mortis, there must have been a transfer of property in expectation of death from an existing illness, the donation depending on the condition of death from such illness.—Grattan v. Appleton, Case No. 5,707.

The indorsement of a certificate of deposit, when of such a character as to absolutely prohibit the indorsee from claiming any present title to the money, or any right to demand payment, until after the death of the indorser, *held* not a valid gift causa mortis.—Hassell v. Basket, Case No. 6,198.

Choses in action may be the subject of gifts causa mortis.—Chaney v. Basket, Case No. 2,595.

Money on deposit may be delivered as a gift causa mortis by delivery of the certificate of deposit.—Chaney v. Basket, Case No. 2,595.

GOOD WILL.

§ 1, Nature of property. § 2, What constitutes good will.

§ 1. Nature of property.

A good will which rests only on the voluntary and unconstrained forbearance of those engaged in a particular trade is not property.—Sheldon v. Houghton, Case No. 12,748.

§ 2. What constitutes good will.

What the incorporeal right called "good will," considered as property capable of conveyance, does and does not carry with it.—Sheldon v. Houghton, Case No. 12,748.

Corporeal property cannot adhere as an incident to good will.—Sheldon v. Houghton, Case No. 12,748.

GRAND JURY.

§ 1, Drawing, summoning, and impaneling. § 2, Authority of grand jury. § 3, Evidence. § 4, Witnesses. § 5, Presence and authority of prosecuting attorney. § 6, Minutes of proceedings. § 7, Power and charge of court. § 8, Qualification of jurors. § 9, Discharge and withdrawal of jurors. § 10, Challenges. § 11, Motion to quash panel. § 12, Secrecy. § 13, Liability of jurors for misconduct.

See, also, "Embracery"; "Indictment and Information"; "Jury."

Furnishing minutes of proceedings to prisoner, see "Criminal Law," § 85.

Pleading disqualification of jurors, see "Criminal Law," § 45.

§ 1. Drawing, summoning, and impaneling.

Under Act Aug. 8, 1846, providing that no grand jury shall be summoned except upon an order for a venire to be made by a judge, a verbal order given by the judge to the clerk is sufficient, though no order be filed or entered of record.—United States v. Reed, Case No. 16,134.

The federal court sitting in Ohio has authority, in its discretion, to adopt the mode of impaneling grand juries practiced in the inferior courts of the state. Act July 20, 1840.—United States v. Wilson, Case No. 16,737.

The federal officers in New York have no right to change or alter the state boxes and ballots as furnished to them by the state officer.—United States v. Reed, Case No. 16,134.

§ 2. Authority of grand jury.

The authority of the grand jury to investigate a criminal charge is not affected by an order from the president directing the district attorney not to prosecute the party.—In re Miller, Case No. 9,552.

The grand jury are not restricted to acting upon such cases as may be brought before them by the district attorney, but may examine any other cases, as they see fit.—Charge to Grand Jury, Case No. 18,248.

A grand jury of the United States sitting in California has no such general authority to inspect the books of officers of the United States as is exercised by the grand juries of the state in relation to the books of the state officers.—Charge to Grand Jury, Case No. 18,255.

A grand jury of the United States is limited, as to the scope of its investigations, (1) to such matters as may be called to its attention by the court; or (2) may be submitted by the district attorney; or (3) may come to the knowledge of the grand jurors in the course of their investigations of the matters thus brought before them, or from their own observations; or (4) may come to their knowledge from the disclosures of their associates on the grand jury.—Charge to Grand Jury, Case No. 18,255.

A presentment by a grand jury of an offense of which the court has no jurisdiction is coram non judice.—United States v. Hill, Case No. 15,364.

A grand jury impaneled, sworn, and charged by the court during the lifetime of a district attorney have jurisdiction, after his death, to indict a person afterwards committed by a commissioner.—United States v. McAvoy, Case No. 15,654.

§ 3. Evidence.

Witnesses cannot be sent to the grand jury on the part of the accused.—United States v. Palmer, Case No. 15,989; Same v. Blodgett, Id. 18,312. But see United States v. White, Case No. 16,685; Same v. Lawrence, Id. 15,576.

The prosecution is not required to summon witnesses to the grand jury to prove the sanity of the accused.—United States v. Lawrence, Case No. 15,576.

Evidence before a grand jury must be competent legal evidence, such as is legitimate and proper before a petit jury.—United States v. Reed, Case No. 16,134.

A paper to go before the grand jury must be relevant to the case, but the fact that it is referred to by a witness, and wanted by the grand jury, is sufficient to establish its relevancy.—United States v. Burr, Case No. 14,693.

To justify the finding of an indictment, the grand jury must believe that the accused is guilty. They should be convinced that the evidence before them, unexplained and uncontradicted, would warrant a conviction by a petit jury.—Charge to Grand Jury, Cases Nos. 18,255, 18,257.

§ 4. Witnesses.

Witnesses before the grand jury may consult their previous affidavit to refresh their recollection, and affirm facts previously stated on paper.—United States v. Reed, Case No. 16,134.

Sufficiency of oath of witnesses sworn to testify before a grand jury.—United States v. Reed, Case No. 16,134.

A general oath to give evidence touching criminal charges to be laid before the grand jury without reference to any particular person is unobjectionable.—United States v. Reed, Case No. 16,134.

But where the oath names one or more persons, evidence cannot be given under it in support of an accusation against others.—United States v. Reed, Case No. 16,134.

Any abuse or improper conduct on the part of any person admitted to the grand jury will be investigated by the court.—United States v. Reed, Case No. 16,134.

§ 5. Presence and authority of prosecuting attorney.

The government attorney has a right to be present during the sitting of the grand jury, to conduct the evidence and confer with them.—Ex parte Crittenden, Case No. 3,393a; In re District Attorney of United States, Id. 3,925; Charge to Grand Jury, Id. 18,255.

Such attorney has no right to give an opinion as to finding a bill unless requested on a matter of law by the grand jury.—Ex parte Crittenden, Case No. 3,393a.

And he should neither give advice as to the sufficiency of evidence nor take part in the deliberations.—In re District Attorney of United States, Case No. 3,925.

He has no right to be present during deliberations of the grand jury.—Charge to Grand Jury, Case No. 18,255.

§ 6. Minutes of proceedings.

The minutes of the evidence taken before the grand jury should be deposited with the district attorney, to be kept among the records of the government.—In re District Attorney of United States, Case No. 3,925.

§ 7. Power and charge of court.

The court will not interpose for technical irregularities for which there is no right of challenge, unless it appear that the accused is prejudiced.—United States v. Reed, Case No. 16,134.

The court, in its discretion, may give or refuse to give an instruction to the grand jury when asked either by the accused or the prosecutor.—United States v. Watkins, Case No. 16,649.

The federal district courts have the power to direct the grand jury as completely as the circuit courts to the extent of their criminal jurisdiction.—United States v. Hill, Case No. 15,364.

As to the power and duty of the court to instruct the grand jury as to the admissibility and competency of evidence to be offered.—United States v. Burr, Case No. 14,693.

The court, in its discretion, may give an additional charge to the grand jury, although they do not ask it.—United States v. Watkins, Case No. 16,649.

Charge to grand jury on the law of embezzlement by officers of national banks.—Charge to Grand Jury, Case No. 18,246.

§ 8. Qualification of jurors.

The word "qualification," as used in Act July 20, 1840, refers to the general qualifications, such as age, citizenship, etc., which will exclude the juror from the panel.—United States v. Williams, Case No. 16,716.

§ 9. Discharge and withdrawal of jurors.

A grand juror cannot be withdrawn after he is sworn, for a cause which existed before he was sworn.—United States v. Palmer, Case No. 15,989.

A grand juror may be discharged for intemperance.—In re Ellis, Case No. 4,399a.

§ 10. Challenges.

The provisions of 2 Rev. St. N. Y. 724, §§ 27, 28, prescribing the objections that may be taken to the organization of grand juries, are, by Act July 20, 1840, made applicable to the federal courts.—United States v. Tallman, Case No. 16,429; Same v. Pike, Id.

Challenges to the array of grand jurors, being abolished by the laws of New York, are abolished in the federal courts of New York; but in the case of improper conduct in designating, summoning, and returning them, the accused has a remedy by motion.—United States v. Reed, Case No. 16,134.

A challenge to the array of the grand jury cannot be made after the jury is organized and has entered upon its duties.—United States v. Butler, Case No. 14,700.

Where there is reasonable excuse for the delay, challenges to members of the grand jury will be heard after the body has been fully organized.—United States v. Blodgett, Case No. 18,312.

Where a period of two full years has elapsed between the beginnings of two terms at which a juror was summoned, he is not liable to challenge under Rev. St. § 812, irrespective of the term of service.—United States v. Reeves, Case No. 16,139.

Under 2 Rev. St. N. Y. p. 724, §§ 27, 28, persons "held to answer" are the only persons who can challenge either the array of grand jurors, or the individual grand jurors, for favor.—United States v. Reed, Case No. 16,134.

Grand jurors may, for cause, be challenged by any person to be affected by their finding. The right is not restricted to such persons as are in prison or under bail upon charges of crime; it may be exercised by one who, though still at large, has been warned by the prosecuting attorney of the court that he will be made, during the term, the subject of an indictment for perjury.—United States v. Blodgett, Case No. 18,312.

A challenge to the array on the ground that the jurors have been selected, summoned, and returned by a person unfit to summon an indifferent jury touches the qualification of the panel.—United States v. Reed, Case No. 16,134.

A challenge to a grand juror for favor, on the ground that he is the prosecutor, or a witness for the prosecution, duly subpœnaed or recognized, goes to his qualification.—United States v. Reed, Case No. 16,134.

Under Act Aug. 8, 1846, the omission to issue a venire is ground of challenge to the array.—United States v. Reed, Case No. 16,134.

Exceptions to grand jurors for favor are only cause for challenge before indictment found, not for a plea in abatement.—United States v. White, Case No. 16,679.

The absence of a venire for the summoning of a grand jury, in a case where it is required, is a ground of challenge to the array.—United States v. Reed, Case No. 16,134.

§ 11. Motion to quash panel.

Under Act Aug. 8, 1846, the omission to issue a venire is not good ground for a motion to set aside the panel for cause.—United States v. Reed, Case No. 16,134.

§ 12. Secrecy.

It is the duty of the grand jurors to keep their deliberations secret. They are not at liberty to state even that they have had a particular matter under consideration. They should allow no one to question them as to their own individual actions or the actions of their associates on the grand jury.—Charge to Grand Jury, Case No. 18,255.

A grand juror may be required to testify as to the evidence given before the grand jury.—United States v. Porter, Case No. 16,072.

§ 13. Liability of jurors for misconduct.

A grand juror may be fined for intemperance.—In re Ellis, Case No. 4,399a.

GRANTS.

See "Boundaries."
Of public lands, see "Public Lands."

GROUND RENTS.

§ 1, Liability of administrator of grantee. § 2, Actions for ground rent.

§ 1. Liability of administrator of grantee.

The administrator of a grantee of land under a deed reserving ground rent is liable for rent accruing after the death of the grantee, though the land has descended to his heirs subject to

the ground rent.—Scott v. Lunt, Case No. 12,540.

§ 2. Actions for ground rent.
To recover arrears of ground rent the landlord may proceed by distress, re-entry, ejectment, and action of covenant. These remedies are cumulative, and one does not suspend the other.—Newman v. Keffer, Case No. 10,177.

GUARANTY.

I. REQUISITES AND VALIDITY.
§ 1, What constitutes a guaranty. § 2, Offer and acceptance. § 3, Consideration.
II. CONSTRUCTION AND OPERATION.
§ 4, Scope. § 5, Revocation. § 6, Negotiable instruments.
III. DISCHARGE OF GUARANTOR.
§ 7, Change in principal contract. § 8, Failure to proceed against principal. § 9, Notice of default of principal.
IV. REMEDIES OF PARTIES.
§ 10, Actions on guaranty by creditor—Right of action. § 11, —— Pleading. § 12, —— Damages. § 13, Remedy of guarantor.

See, also, "Indemnity"; "Principal and Surety."

I. REQUISITES AND VALIDITY.

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

§ 1. What constitutes a guaranty.
Where notes issued by the trustee of two railroad companies are indorsed by one of the companies that it guaranties payment, principal and interest, according to its tenor, and orders the contents to be paid to bearer, such company is liable on the notes as guarantor.—Codman v. Vermont & C. R. Co., Case No. 2,935.

§ 2. Offer and acceptance.
A guarantor of the payment of a specific sum offered in compromise of a claim for taxes, fines, and penalties is not liable on the guaranty until the specific offer has been accepted.—United States v. Libby, Case No. 15,596.

Plaintiff must show notice of acceptance of the letter of guaranty within a reasonable time, and of the value of the articles furnished thereunder.—Burns v. Semmes, Case No. 2,183.

A person making advances or giving credit on the faith of a letter of guaranty must give notice within a reasonable time to the guarantor.—Cremer v. Higginson, Case No. 3,383; Dobbins v. Bradley, Id. 3,944.

Where the guarantor examines and approves the invoices for goods purchased, no notice of the acceptance of the guaranty is necessary.—Bleeker v. Hyde, Case No. 1,537.

A guarantor *held* discharged by five days' delay in giving notice of a six months' credit given upon a guaranty.—Dobbins v. Bradley, Case No. 3,944.

Upon a guaranty for future advances it is the duty of the parties making the advances to give notice to the guarantor of his acceptance thereof, and his consent to act under the guaranty, and to make the advances; but this doctrine does not apply where the agreement to accept is cotemporaneous with the guaranty.—Wildes v. Savage, Case No. 17,653.

It is not necessary that a further distinct notice should be given to the guarantor of the amount of the advances actually made, or the terms upon which they were made, after the transactions are complete. There are, however, certain exceptions, as when the advances are contingent, or there is a continuing guaranty.—Wildes v. Savage, Case No. 17,653.

§ 3. Consideration.
A guaranty made subsequent to the contract must be founded on a distinct consideration.—Bebee v. Moore, Case No. 1,202.

A guaranty of payment, indorsed upon a negotiable bond made before the security is delivered, is supported by the same consideration which upholds the original contract.—Toppan v. Cleveland, C. & C. R. Co., Case No. 14,099.

Where the guarantors of a note are the holders, their guaranty will be considered a part of the transfer, and as importing a consideration.—How v. Kemball, Case No. 6,748.

II. CONSTRUCTION AND OPERATION.

§ 4. Scope.
A guaranty of paper of a certain person payable at a certain bank will not cover paper not made payable at such bank.—Dobbins v. Bradley, Case No. 3,944.

A guaranty of the notes of a certain person cannot be applied as the guaranty of the joint notes of that person and another, given in renewal of the notes of the former.—Russell v. Perkins, Case No. 12,160.

A letter of credit to a particular firm is not binding if the purchase be made of other persons.—Bleecker v. Hyde, Case No. 1,537.

But the guarantor is liable if the goods were purchased in his name, and he examined and approved the invoices.—Bleeker v. Hyde, Case No. 1,537.

A certificate of railroad stock issued to a bank was taken by it as collateral security. On payment of the loan, the cashier signed a blank transfer on the back of the certificate and delivered it to the pledgor. Subsequently plaintiff loaned money to said pledgor on the security of the certificate, which was found to be forged. *Held*, that the bank was liable for plaintiff's loss.—Matthews v. Massachusetts Nat. Bank, Case No. 9,286.

§ 5. Revocation.
A letter requesting the addressee to furnish S. & H., who will reimburse the amount, "with any sum they may want so far as $50,000," the writers holding themselves answerable, *held* not to be an original undertaking, but a guaranty covering but one advance on partnership account, and revoked by the dissolution of the partnership.—Cremer v. Higginson, Case No. 3,383.

§ 6. Negotiable instruments.
A contract of guaranty indorsed on the note can only be enforced between the parties to it.—How v. Kemball, Case No. 6,748.

Quære, whether a guaranty running "to the bearer" of a negotiable note is negotiable.—Codman v. Vermont & C. R. Co., Case No. 2,935.

III. DISCHARGE OF GUARANTOR.

§ 7. Change in principal contract.
One guarantying advances to a partnership is discharged where the creditor divides the debt between the partners on dissolution, discharging the partnership account, without notice to the guarantor.—Cremer v. Higginson, Case No. 3,383.

§ 8. Failure to proceed against principal.
To recover upon a guaranty to pay any balance that cannot be collected on a certain bond and mortgage, after due course of law, plaintiff must show that he has used reasonable diligence in resorting to every course of law necessary to reach the property of the obligor.—Dwight v. Williams, Case No. 4,218.

§ 9. Notice of default of principal.

A guaranty of a certain annual dividend on corporate stock, indorsed thereon, is a collateral undertaking; and a demand and notice must be averred and proved, or an excuse alleged, to charge the guarantor.—Hank v. Crittenden, Case No. 6,024.

To charge a guarantor on his principal's failure to deliver flour, a demand when due must be made, and a reasonable notice of failure to deliver given.—Bebee v. Moore, Case No. 1,202.

If, after the credit has expired, and the amount become due under a guaranty, a demand be made upon the debtor, and there be a default of payment, notice thereof must be given to the guarantor within reasonable time; but a demand is not necessary if the debtor be insolvent at the time when the debt becomes due, and the credit has expired.—Wildes v. Savage, Case No. 17,653; Dunbar v. Brown, Id. 4,129.

The same strictness is not required, in such a case, as is required to charge the indorser on a bill or promissory note.—Dunbar v. Brown, Case No. 4,129.

In order to discharge the guarantor, there must not only be a want of such notice, but there must also be some loss or damage sustained by him in consequence, and then there will be a pro tanto allowance.—Wildes v. Savage, Case No. 17,653.

A guarantor is entitled to notice of the dishonor of notes whose payment is guarantied, and notice must be averred in a declaration on the guaranty.—Lewis v. Brewster, Case No. 8,318.

Notice need not be given the guarantor where the payee is insolvent at the time the note becomes due.—Lewis v. Brewster, Case No. 8,318.

The total insolvency of the principal supersedes the necessity of a demand of the principal, and notice to the guarantor.—Hank v. Crittenden, Case No. 6,024.

IV. REMEDIES OF PARTIES.

§ 10. Actions on guaranty by creditor—Right of action.

A holder of dishonored paper may sue the guarantor thereof without waiting the result of a suit against the principal debtor.—Memphis v. Brown, Case No. 9,415.

The creditor must first enforce his remedies against the principal debtor or show that any pursuit of him would prove fruitless, before resorting to the guarantor.—Parker v. Culvertson, Case No. 10,732.

§ 11. —— Pleading.

A declaration on a guaranty *held* not demurrable because it failed to allege steps taken to collect securities.—Benedict v. Maynard, Case No. 1,295.

The seller of goods cannot recover upon a letter of guaranty under a count for money had and received, though the defendant obtained by credit from the purchaser the value of the goods purchased thereunder.—Burns v. Semmes, Case No. 2,183.

An averment in a declaration on a guaranty of a certain annual "dividend or income" on corporate stock, that the company, within the time specified, "neither declared or paid any dividend or income whatever," *held* insufficient.—Hank v. Crittenden, Case No. 6,024.

Averment that notice was given to the guarantor more than seven months after the note became due is bad on demurrer.—Lewis v. Brewster, Case No. 8,318.

§ 12. —— Damages.

The measure of damages for breach of guaranty of the "amount due" on a note is the value of a judgment, if one had been obtained against the makers.—Head v. Green, Case No. 6,292.

Where the makers were solvent, but proved payment, the measure is the full amount due on the note at the time of bringing suit, as stated in the guaranty.—Head v. Green, Case No. 6,292.

§ 13. Remedy of guarantor.

A guarantor whose obligation has become absolute, and who pays the debt, cannot sue the original debtor in the name of the creditor, although he took an assignment from him; otherwise, where the debt is assigned in consideration of the payment.—Brown v. Decatur, Case No. 2,001.

GUARDIAN AND WARD.

§ 1, Guardianship in general. § 2, Appointment—By will. § 3, —— Proceedings for appointment. § 4, Custody and care of ward's person and estate. § 5, Sales and conveyances by guardian—In general. § 6, —— Under special act of legislature. § 7, —— Under order of court. § 8, Actions. § 9, Accounting and settlement. § 10, Foreign and ancillary guardianship. § 11, Liabilities on guardianship bonds.

See, also, "Infants."
Administrator acting as guardian of distributee see "Executors and Administrators," § 36.
Guardian ad litem, see "Infants," § 4.
Guardianship of insane persons, see "Insane Persons," § 3.

§ 1. Guardianship in general.

The rights and duties of guardians are strictly local.—Powers v. Mortee, Case No. 11,362.

Of the various kinds of guardians at common law, only one exists in Maryland, namely, the guardian by nature. Various kinds of guardianship considered and defined.—Mauro v. Ritchie, Case No. 9,312.

§ 2. Appointment—By will.

The appointment of a guardian by will cannot be predicated upon words of implication which do not convey the powers essential to the office.—Gaines v. Spann, Case No. 5,178.

The recognition, in a will made abroad, of the executors under a will made here, as guardians, will not amount to an appointment of them by implication, where it does not appear that testator had the domestic will before him when he executed the foreign will.—Gaines v. Spann, Case No. 5,178.

§ 3. —— Proceedings for appointment.

The court of common pleas in Ohio have the power to appoint guardians, and also guardians ad litem.—Sprague v. Litherberry, Case No. 13,251.

Temporary absence from the county does not affect the jurisdiction of the court to appoint a guardian.—Sprague v. Litherberry, Case No. 13,251.

A notice of the appointment of a guardian by reading the order of the court *held* not sufficient under Act R. I. Dig. 1822, p. 246, § 3.—Hart v. Gray, Case No. 6,152.

The appointment of a guardian of a nonresident minor under a statute authorizing such appointment "after notice," etc., is void where the record does not affirmatively show that the notice was given.—Seaverns v. Gerke, Case No. 12,595.

A guardian appointed before the infant arrives at 14 years of age continues until the infant arrives at full age.—Smoot v. Bell, Case No. 13,132.

The authority of a guardian appointed by the orphans' court, under Act Md. 1798, continues until full age of the ward, and he cannot be re-

moved, except for refusal to give security. The ward cannot choose another, at the age of 14.—Mauro v. Ritchie, Case No. 9,312.

An order of the orphans' court that R. enter into bond as guardian of O. is not an appointment to the office of guardian.—United States v. Litle, Case No. 15,608.

§ 4. Custody and care of ward's person and estate.

In all cases where an infant is a ward of chancery, no act can be done affecting the person, property, or estate of the minor, unless under the direction, expressed or implied, of the chancery court itself.—In re Lindsley, Case No. 18,308.

A guardian who receives a negotiable note for a debt due his ward is liable for the amount of the debt, though the note has not been paid.—United States v. Bender, Case No. 14,567.

A guardian is liable for waste, and entitled to credit for permanent improvements, and the education of the children.—Williams v. Barrett, Case No. 17,714.

Where a guardian without bond assumes a debt to his ward, his heirs are not liable.—Alston v. Munford, Case No. 267.

A direction by a testator that his estate shall be held in trust for his daughter and her heirs, free from the control or disposal of any husband she might have, and exempt from his debts, contracts, or engagements, does not refer to the right of guardianship of the husband over the children after the death of the wife.—De Kraft v. Barney, Case No. 18,288.

A tenant by the curtesy, guardian for the remainder-man, cannot apply the ward's estate to remove an incumbrance.—Bourne v. Maybin, Case No. 1,700.

The Virginia act concerning guardians, etc. (1 Rev. Code, c. 108, § 12), and the act concerning wills, intestacy, and distribution (Id. c. 104, § 60), construed in relation to the claim of a ward as to priority and the liability of heirs and devisees.—Black v. Scott, Case No. 1,464.

§ 5. Sales and conveyances by guardian—In general.

A guardian has power to convey land in trust to secure a debt due to the elegit creditor of his wards, and an exoneration of the lien created by the elegit.—Ronald v. Barkley, Case No. 12,031.

A sale by the guardian of his ward's land is void as against the ward, or those claiming under him, unless it appears that the same was made at public auction, after due notice. Act Or. Dec. 16, 1853.—Hobart v. Upton, Case No. 6,548.

The guardian of the person and estate of an infant appointed by a probate court has incidental power to sell personal property of the ward.—Wallace v. Holmes, Case No. 17,100.

A statute (Gen. St. Mass. c. 109, § 22) providing that certain courts may authorize or require a guardian to sell personal property and invest the proceeds does not take away the power of the guardian to sell without an order of court.—Wallace v. Holmes, Case No. 17,100.

§ 6. —— Under special act of legislature.

The legislature may by special act authorize a guardian to sell real estate of a ward.—Ward v. New England Screw Co., Case No. 17,157.

Under petition by a guardian to sell a ward's land to a town, "to erect a pest-house upon," leave was granted by special act to sell the land "for the said purpose," by deed which should vest in the purchaser all the right, title, and interest that the parent of the minor had in the estate. *Held*, that the guardian was authorized to sell the estate without conditions.—Ward v. New England Screw Co., Case No. 17,157.

§ 7. —— Under order of court.

The legislation of the state of Nebraska, as respects sales of real estate by guardians, considered.—Miller v. Sullivan, Case No. 9,592.

The court cannot decree the sale of the whole of the ward's real estate, under Act Md. 1798, c. 101, subc. 12, § 10.—In re Mount, Case No. 9,885a.

The county court acquires jurisdiction on the filing of the petition for the sale of the ward's lands (Laws Or. p. 738), and its judgment cannot be collaterally questioned for errors in the proceedings, except as provided by statute.—Gager v. Henry, Case No. 5,172.

A petition by a guardian for the sale of his ward's lands is in the nature of a proceeding in rem, and is not adverse to the next of kin, to whom notice is required to be given.—Gager v. Henry, Case No. 5,172.

A guardian's sale was *held* to have been made upon the original notice, though, upon the day named, it was adjourned for four weeks, where the statute forbade an adjournment for more than one week at a time.—Gager v. Henry, Case No. 5,172.

A sale by a guardian, who was not regularly appointed, the proper notice not having been given, is not validated by a statute making valid all sales under orders of the probate court, where there have been "defects of form, or omissions, or errors."—Seaverns v. Gerke, Case No. 12,595.

An order of a probate court, which is a court of record having jurisdiction of the matter, is conclusive that notice of the sale of infant's estate, as recited therein, was given, when questioned in collateral preceedings.—Segee v. Thomas, Case No. 12,633.

A sale of land lying in the outer part of a town may be made in lump, and not in parcels, though a company had been formed to purchase the same in lump, which might prevent competition in bidding.—Johns v. Slack, Case No. 7,363.

A guardian's sale, authorized by the proper court, is a "judicial sale," and cannot be questioned collaterally for error in the adjournment thereof.—Gager v. Henry, Case No. 5,172.

The defect in the title of a person purchasing at a guardian's sale can be taken advantage of only by the cestuis que trust.—Flagg v. Mann, Case No. 4,847.

Sufficiency of deed of sale of infant's estate under order of a court of probate in Connecticut.—Segee v. Thomas, Case No. 12,633.

§ 8. Actions.

A guardian may waive process, and enter his appearance for his wards.—Sprague v. Litherberry, Case No. 13,251.

Act R. I. 1822, § 10, requiring service of notice on wards and their guardians, is repealed.—Mathewson v. Sprague, Case No. 9,278.

§ 9. Accounting and settlement.

The whole administration is subject to challenge and examination upon filing the final account.—Bourne v. Maybin, Case No. 1,700.

A ward (in Mississippi) is not concluded by his guardian's annual account, filed and passed upon, without notice by the probate court, during his infancy.—Bourne v. Maybin, Case No. 1,700.

The Mississippi statute creates the relation of creditor and debtor between the ward and guardian on the latter's failure to account to the ward on his arriving at age.—Bourne v. Maybin, Case No. 1,700.

A guardian who used the ward's estate as if it were his own, filing neither inventory nor account, must pay interest on its value.—Bourne v. Maybin, Case No. 1,700.

The father, if guardian, must support his child if of sufficient ability, but it is within the discretion of the court to allow him compensation out of the estate.—Bourne v. Maybin, Case No. 1,700.

A guardian appointed in two jurisdictions, who has given separate bonds, is not bound to account in one jurisdiction for moneys received in the other.—Smoot v. Bell, Case No. 13,132.

A guardian in the District of Columbia is liable to account for money of his ward received in Maryland for land sold in Maryland.—United States v. Bender, Case No. 14,567.

The pendency of the settlement of the guardian's accounts does not preclude the ward from proving a claim in the probate court.—Bourne v. Maybin, Case No. 1,700.

The decree of the Pennsylvania orphans' court settling a deceased guardian's account, the subsequent guardian of the infant being a party to the controversy, is conclusive.—Blount v. Darrach, Case No. 1,567.

§ 10. Foreign and ancillary guardianship.

A foreign guardian cannot sue in Connecticut as guardian either at law or in equity.—Curtis v. Smith, Case No. 3,505.

The authority conferred on a guardian in another state will give him no right to the minor's property in Louisiana which is already in the possession of a legal tutrix.—Powers v. Mortee, Case No. 11,362.

A guardian appointed in one county (in Maryland) *held* competent to give a valid receipt for the purchase money of land in another county.—Brooke v. Potowmack Co., Case No. 1,935.

§ 11. Liabilities on guardianship bonds.

A guardian is liable upon his bond to pay over the money in his hands to a person appointed as his successor, though the latter has not given bond as guardian.—United States v. Nichols, Case No. 15,876.

A guardian will be held liable on his bond for money received in another jurisdiction for the use of his ward.—United States v. Nicholls, Case No. 15,875; Same v. Nichols, Id. 15,876.

In an action on a guardian's bond, for failure to comply with an order of court, it is not necessary to set forth the facts justifying the granting of the order.—United States v. Nicholls, Case No. 15,875.

In debt on a guardian's bond defendant will not be allowed to show any facts to impeach the authority or jurisdiction of the court to take the bond.—United States v. Bender, Case No. 14,567.

H

HABEAS CORPUS.

§ 1, Nature of remedy. § 2, Grounds of issuing writ. § 3, Jurisdiction. § 4, Procedure in general. § 5, Application. § 6, Successive writs. § 7, Service and return of writ. § 8, Certiorari as an auxiliary proceeding. § 9, Hearing and determination—Notice of proceedings. § 10, —— What questions may be examined. § 11, —— Evidence. § 12, —— Granting or refusing discharge. § 13, Conflicts between civil and military authorities. § 14, Review. § 15, Extradition proceedings. § 16, Suspension of remedy.

See, also, "De Homine Replegiando."
Conflict of jurisdiction, see "Courts," §§ 114, 115.
To compel attendance of witness, see "Witnesses," § 5.

§ 1. Nature of remedy.

To ascertain the nature of the writ which the federal courts and judges are authorized to issue, reference must be made to the common law.—In re Keeler, Case No. 7,637.

The history of the writ, under the judiciary acts and the force bill, as drawn from the adjudicated cases, given and explained by Treat, J.—In re McDonald, Case No. 8,751.

§ 2. Grounds of issuing writ.

The writ may be issued to inquire into the cause of commitment under a civil process, as well as in the case of a criminal process.—Ex parte Randolph, Case No. 11,558.

The fact that the prisoner is retained for a time, either before or after sentence, in the county jail, does not, in either case, authorize a writ of habeas corpus.—Ex parte Geary, Case No. 5,293.

The writ will not be granted after an unconditional pardon to one not restrained of his liberty, although he refuse to accept the pardon.—In re Callicot, Case No. 2,323.

The federal district court, or the judge thereof, has jurisdiction to issue the writ and hear the case when petitioner is held under illegal restraint, without any formal or technical commitment.—In re McDonald, Case No. 8,751.

When a debtor is in the prison bounds, the court will not award a habeas corpus to discharge him on the ground that his creditor has refused to pay his daily allowance.—Wilson v. Marshal of District of Columbia, Case No. 17,822.

Courts will refuse the writ where no probable ground of relief is shown in the petition, or where it appears that petitioner is duly committed for felony or treason plainly expressed in the warrant of commitment.—In re Winder, Case No. 17,867.

But where probable ground is shown that the party is in custody under or by color of the authority of the United States, and is imprisoned without just cause, and therefore has a right to be delivered, the writ of habeas corpus then becomes a writ of right, which may not be denied.—In re Winder, Case No. 17,867.

A prisoner committed for assault, with intent to kill, on the president of the United States, *held* not entitled to a writ of habeas corpus for the purpose of examining into his sanity.—United States v. Lawrence, Case No. 15,577.

§ 3. Jurisdiction.

Act 1789, § 14, cl. 1, does not authorize the federal courts to issue the writ unless it is necessary in aid of jurisdiction in a case or proceeding pending therein.—Ex parte Everts, Case No. 4,581.

The case of a father claiming the custody of an infant child is not one in which the writ can issue, as ancillary to the exercise of jurisdiction, under Act 1789, § 14.—Ex parte Everts, Case No. 4,581.

Nor can the circuit court take jurisdiction under § 11, although the father is a citizen of an-

other state, as the matter in dispute has no pecuniary value, and cannot be estimated in money.—Ex parte Everts, Case No. 4,581.

The circuit courts and federal judges may apply the writ to all cases which it would reach at common law, provided it is not issued to any person in jail, unless confined under or by color of the authority of the United States.—Ex parte Des Rochers, Case No. 3,824.

The federal courts may issue the writ in behalf of any one restrained of liberty in violation of the constitution or treaties or laws of the United States.—Ex parte Bridges, Case No. 1,862.

An Indian is a "person," within the meaning of the habeas corpus act, and may sue out the writ in the federal courts, when deprived of his liberty under color of authority of the United States, or when in custody for violation of its constitution, laws, or treaties.—United States v. Crook, Case No. 14,891.

The proviso in section 14 of the judiciary act restricts the issue of the writ only in cases of state prisoners.—Bennett v. Bennett, Case No. 1,318.

The federal courts have exclusive jurisdiction whenever the applicant is illegally restrained of his liberty under or by color of the authority of the United States, and a district judge may issue the writ.—In re McDonald, Case No. 8,751.

Where the court which passed sentence had jurisdiction, its proceedings are not subject to review on habeas corpus.—Johnson v. United States, Case No. 7,418.

A circuit judge has no jurisdiction to review, on habeas corpus, the judgment of the circuit court, on a conviction under a repealed statute.—In re Callicot, Case No. 2,323.

The power to issue the writ may be exercised by the judge at chambers.—Bennett v. Bennett, Case No. 1,318. CONTRA, see Ex parte Benedict, Case No. 1,292.

Act Aug. 23, 1842, empowering federal judges to issue habeas corpus in certain cases, applies only to subjects of foreign states.—Ex parte McCann, Case No. 8,679.

A writ of habeas corpus from the circuit court for the Western district of Arkansas will run to the Indian Territory to inquire into the cause of imprisonment of a person convicted by an Indian court without jurisdiction.—Ex parte Kenyon, Case No. 7,720.

§ 4. Procedure in general.

The proceedings in the federal courts are not governed by the local law, but by the common law.—Ex parte Kaine, Cases Nos. 7,597, 7,598.

Under the common law a prisoner cannot traverse the returns of the writ, nor demand an issue on the legality of his commitment.—In re Kaine, Case No. 7,598.

§ 5. Application.

The writ is not granted of course without reasonable cause shown.—Ex parte Davis, Case No. 3,613.

The writ is not grantable as of course, but will only issue upon a sufficient showing; and a refusal to issue the writ is justifiable if the court is satisfied that the petitioner would not be discharged upon a hearing after its return.—Ex parte Vallandigham, Case No. 16,816.

The writ should not be granted to a prisoner whose commitment by a United States commissioner has been duly approved by the circuit court unless all the proceedings before the commissioner and the court are laid before the judge to whom the application is made.—In re Kaine, Case No. 7,597a.

The writ will not be granted where the application is sworn to before a justice of the peace of another state, of whose official character there is no evidence.—In re Keeler, Case No. 7,637.

The application must be supported by an affidavit stating the circumstances under which the prisoner is entitled to the benefit of the writ.—In re Keeler, Case No. 7,637.

The petitioner must produce a copy of the warrant of commitment, or an affidavit that the jailer refused to give a copy.—Harrison's Case, Case No. 6,131.

§ 6. Successive writs.

A decision under one writ refusing the discharge of a prisoner is no bar to the issuing of other successive writs by any court or magistrate having jurisdiction.—Ex parte Kaine, Case No. 7,597.

One decision on habeas corpus is not final where a full trial was not had.—Ex parte Robinson, Case No. 11,935.

The decision of a state court remanding the prisoner on habeas corpus proceedings is no bar to the subsequent issue of the writ by a federal court, and a full investigation by it of the cause of detention.—In re Reynolds, Case No. 11,721.

§ 7. Service and return of writ.

A district judge allowing the writ at his chambers in term time of the circuit may make it returnable in the circuit court.—In re Kaine, Case No. 7,598.

A sheriff having a so-called "writ of habeas corpus" under the Ohio statute of 1856, and having knowledge that the prisoner is in custody of an officer of the United States under legal process, is under no obligation to attempt to serve the writ.—Ex parte Sifford, Case No. 12,848.

Where the service of the writ was prevented by force, it was ordered to be placed on the files of the court to be served when and where practicable.—In re Winder, Case No. 17,867.

Under 2 Rev. St. N. Y. 566, § 32, a return to the writ issued by a state judge need not be verified by oath when made by an officer of the United States army.—In re Neill, Case No. 10,089.

Where the return to a writ of habeas corpus is evasive and insufficient, the person to whom it is addressed, if present in court, will be committed until he produce the prisoners, or be otherwise discharged.—United States v. Davis, Case No. 14,926.

An attachment is not necessary where the party has not made a true return, if he is present in court; but an order may issue directing him immediately to answer interrogatories.—United States v. Green, Case No. 15,256.

An attachment for not returning a writ of habeas corpus at the appointed time will not be issued until three days have expired after the service of the writ.—United States v. Bollman, Case No. 14,622.

A person who makes a false and evasive return, though he cannot produce the relator, is in contempt.—United States v. Williamson, Case No. 16,725.

§ 8. Certiorari as an auxiliary proceeding.

A certiorari will be issued on request of the prisoner to the committing magistrate to certify the proceedings.—Ex parte Bennett, Case No. 1,311.

Where a prisoner committed by a United States commissioner is brought up on habeas corpus, the circuit court may issue a writ of certiorari to the commissioner to bring up the proceedings had before him.—In re Martin, Case No. 9,151.

§ 9. Hearing and determination—Notice of proceedings.

Where the return shows that petitioner is held under a commitment, regular on its face, of a

competent state court, but petitioner alleges that he is really held for an act done under authority of the United States, the court will adjourn the hearing, and give notice to the county attorney.—United States v. Jailer, Case No. 15,463.

Notice to those who represent the state, as required by the local authorities, is not essential.—Ramsey v. Jailer of Warren County, Case No. 11,547.

§ 10. —— What questions may be examined.

The court has jurisdiction to inquire into the legality of the imprisonment of a person held under its own sentence.—In re Greathouse, Case No. 5,741.

On habeas corpus the court has the power to review its former judgment so far as to determine whether it exceeded its powers in passing such judgment.—Ex parte Joyce, Case No. 7,556.

Where the averments in an indictment gave the district court jurisdiction, and a trial, verdict, sentence, and imprisonment followed, error in the proceedings cannot be reviewed in the circuit court by habeas corpus.—Ex parte Parks, Case No. 10,764.

An erroneous decision of a court having jurisdiction of the offense, and of the person indicted, cannot be re-examined on habeas corpus.—Ex parte Shaffenburg, Case No. 12,696.

A former conviction and a statute of limitations, being matters of defense, and not affecting the jurisdiction, cannot be inquired into.—In re Bogart, Case No. 1,596.

Where proceedings under which a person is held for trial by a commissioner are brought before the court for review by habeas corpus and certiorari, the court will examine the evidence before the commissioner, and will do what he ought to have done.—In re Van Campen, Case No. 16,835.

The court may go behind the finding of a committing magistrate, and by certiorari examine the evidence taken before him; and may examine the magistrate as to evidence given and not reduced to writing.—In re Martin, Case No. 9,151.

The court will only inquire whether the warrant of commitment states a sufficient probable cause to believe that the prisoner has committed the offense stated.—United States v. Bates, Case No. 14,544.

The court may look into the testimony upon which the commitment of the prisoner was made.—United States v. Bates, Case No. 14,544.

On habeas corpus the court will inquire whether the capias was rightfully issued, and this involves the sufficiency of the affidavit.—Nelson v. Cutter, Case No. 10,104.

Whether, in a proceeding before a commissioner for release on habeas corpus, an indictment under which petitioner is held can be examined, quære.—In re Clark, Case No. 2,797.

Where the officer had jurisdiction of the process, and assumed to take proof upon the issuing of the same, his decision as to its sufficiency is not subject to review.—In re Veremaitre, Case No. 16,915.

Where the return to a writ issued by the state court that the prisoner is held as a deserter from the army is traversed, the court may inquire into the truth of the facts alleged, and may discharge the prisoner if it appear that he is illegally held.—In re Reynolds, Case No. 11,721.

On writ of habeas corpus for persons indicted for kidnapping, they may go behind the indictment to show identity of the parties, and that they were indicted for acts done under a requisition of a state governor in extradition proceedings; but they cannot show that the indictment on which the requisition was issued was improperly procured.—United States v. McClay, Case No. 15,660.

A return to a writ issued under the judiciary act of 1789, showing an imprisonment under process legal and valid on its face, precludes further inquiry. But where the writ is issued under Act March 2, 1833, the court may inquire whether the imprisonment is in fact for an act done or omitted under the authority of the United States.—Ex parte Sifford, Case No. 12,848.

§ 11. —— Evidence.

A proceeding by writ of habeas corpus is not a criminal proceeding, but is a civil action, within act July 2, 1864, and the prisoner may testify in his own behalf.—In re Reynolds, Case No. 11,721.

§ 12. —— Granting or refusing discharge.

A convict sentenced in court by a judge de facto, acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, cannot be properly discharged upon habeas corpus.—Griffin's Case, Case No. 5,815.

Where a writ of replevin from a federal court was fraudulently obtained with the purpose of carrying off property, and the party is indicted for larceny therein, the federal court will not discharge him on habeas corpus.—Ex parte Thompson, Case No. 13,934.

Proceedings on habeas corpus in a federal court will be quashed where it appears that the prisoner is confined upon a regular charge and commitment, after examination duly had by a court of competent jurisdiction, for a criminal offense exclusively cognizable in the state court, and that the prisoner is not restrained of his liberty without due process of law.—In re Taylor, Case No. 13,774.

Where it appears that at least two offenses, in an indictment containing four counts, were well joined, and the petitioner, who pleaded guilty, was sentenced to two years' imprisonment on each count, he will not be discharged on habeas corpus before the expiration of four years, on the ground that the court had no authority to render cumulative judgments.—Ex parte Peters, Case No. 11,027.

Where a discharge is asked on the ground that the indictment did not aver an offense against the United States in the district in which an indictment was found, the indictment will be sustained unless so defective that it would be the duty of the court before which it was presented to refuse to take action on it.—In re Clark, Case No. 2,797.

If commitment be informal or insufficient, prisoner will be discharged on habeas corpus, but he will be recommitted in proper form if there be sufficient cause.—Ex parte Bennett, Case No. 1,311.

A nonresident, arrested for an act which would subject a resident to prosecution under a law which is unconstitutional in some of its provisions in regard to nonresidents, is not entitled to discharge on habeas corpus.—Ex parte Touchman, Case No. 14,108.

A person surrendered by his bail, and prayed in custody, but not charged in execution, may be discharged upon habeas corpus.—Ex parte Burford, Case No. 2,149.

A debtor discharged under the insolvent act and arrested for a debt accruing before his discharge may be discharged upon habeas corpus.—Ex parte Reardon, Case No. 11,615.

Where the prisoner is beyond the jurisdiction, and an order for his discharge on habeas corpus would be ineffectual, it should not be granted.—Ex parte Benedict, Case No. 1,292.

One confined for an act done or omitted in pursuance of a law of the United States, or of process from a federal court or judge, is entitled to discharge, whether held under state or fed-

eral process. Act March 2, 1833, § 7.—United States v. Jailer, Case No. 15,463; Ex parte Turner, Id. 14,246.

Upon a habeas corpus to restore an infant to the custody of her parent, defendant will not be discharged simply because he declares that the infant is not in his power, possession, control, or custody, if the conscience of the court is not satisfied that all the material facts are fully disclosed in the return.—United States v. Green, Case No. 15,256.

After a person has been adjudged in contempt for a false return to a writ directing the production of certain abducted slaves, the proceedings will not be quashed upon the statement of one of the slaves that she was not abducted by, and is not under the control of, defendant, where she is not brought before the court to make the statement.—United States v. Williamson, Case No. 16,726.

§ 13. Conflicts between civil and military authorities.

A state court has no jurisdiction on habeas corpus to discharge a soldier or sailor held under a United States law.—In re Veremaitre, Case No. 16,915.

A state court or officer cannot release a soldier on habeas corpus when held to service under a claim as an enlisted soldier, under the authority of the United States.—In re Neill, Case No. 10,089.

The validity of an enlistment into the military service may be inquired into on habeas corpus by a federal judge.—Schmeider v. Barney, Case No. 12,462.

The federal courts have jurisdiction on habeas corpus to discharge a minor unlawfully enlisted, notwithstanding the power given to the secretary of war by Acts Feb. 24, 1864, § 20, and July 4, 1864, § 5.—In re McDonald, Case No. 8,752.

The question of the right of exemption from service may be considered on habeas corpus notwithstanding adverse decision of military commission.—Antrim's Case, Case No. 495.

The wife of an enlisted man may prosecute the writ to inquire into the regularity of the enlistment.—In re Ferrens, Case No. 4,746.

A person illegally conscripted into the federal army may be discharged on habeas corpus.—Stingle's Case, Case No. 13,458.

The district court may release on habeas corpus a prisoner sentenced by a military commission under the reconstruction acts to a longer term of imprisonment than provided by the law of the state.—Ex parte Hewitt, Case No. 6,442.

On habeas corpus to discharge an alleged minor, who swore on his enlistment that he was over 21, evidence may be given as to whether he understood what he was swearing to.—In re Stokes, Case No. 13,474.

The marshal's statement on return of the writ that he had disobeyed it, and deported the prisoner in accordance with instructions from the secretary of war, is a sufficient return.—Ex parte Benedict, Case No. 1,292.

An order from a subordinate in the war department, directing a marshal not to produce a person in his custody on habeas corpus, *held* no justification for his disobedience.—Ex parte Field, Case No. 4,761.

A jailer who acted as mere servant of the marshal in disobeying the writ *held* not punishable.—Ex parte Field, Case No. 4,761.

The court refused to take further action where a military officer made return to the writ that he declined to obey it at the present time under orders from his superior, which were produced in court.—Ex parte McQuillon, Case No. 8,924.

The civil courts have no jurisdiction, upon application for writ of habeas corpus, to determine whether a military commission by which the prisoner was tried was legally constituted, and had jurisdiction of the case.—Ex parte Vallandigham, Case No. 16,816.

The commander of a military department, even in a locality where martial law is not in force, may arrest citizens for mischievous acts of disloyalty impeding or endangering military operations, and the courts have no authority by writ of habeas corpus to inquire into the necessity of such action.—Ex parte Vallandigham, Case No. 16,816.

The only questions to be determined where it appears on the return that petitioner is held for trial by naval court-martial are whether the court has jurisdiction and is proceeding regularly.—In re Bogart, Case No. 1,596.

A prisoner under charges for trial by court-martial will be discharged on habeas corpus where such charges are found wholly insufficient to show jurisdiction.—Ex parte Henderson, Case No. 6,349.

Where the identity of the prisoner arrested as a deserter is established on a traverse to a return that he was a regularly enlisted soldier, he will be remanded.—In re Hamilton, Case No. 5,976.

§ 14. Review.

An appeal to the supreme court will not lie from a judgment of a district judge releasing, under Act March 2, 1833, on habeas corpus, a prisoner confined by a state court for an act done in pursuance of process of a federal court.—United States v. Harris, Case No. 15,313.

An appeal to the circuit court will be allowed from a decision of the district judge discharging on habeas corpus a prisoner held under an illegal sentence of the district court.—Ex parte Joyce, Case No. 7,556.

A defense to an application for the writ not made before the district court is not available on appeal to the circuit court.—Seavey v. Seymour, Case No. 12,596.

§ 15. Extradition proceedings.

The courts of a state through which a prisoner is being carried to the place of the crime, after regular extradition proceedings in another state, have no power to release him on habeas corpus.—In re Burke, Case No. 2,158.

The federal courts have jurisdiction to discharge on habeas corpus a person wrongfully arrested by direction of a state executive for rendition to another state.—Ex parte Smith, Case No. 12,968.

The writ will not issue out of the federal court to inquire into the detention of a person arrested in one state, charged with a crime committed in another state, to await the requisition of the governor of the latter state, and the issuance of a warrant of extradition.—In re Hoyle, Case No. 6,803.

Habeas corpus will not issue from a federal court to release one held for trial in a state court, either on the ground that he was illegally seized in another state, or that he was charged with a different crime than that for which he was extradited.—United States v. Johnson, Case No. 15,487.

The circuit court may, on a writ of habeas corpus, in conjunction with a writ of certiorari, revise the action of a commissioner committing a fugitive from justice for surrender under an extradition treaty with a foreign country.—In re Henrich, Case No. 6,369.

A state judge, on proper affidavit, may issue a writ of habeas corpus and inquire into the cause of detention of a person in possession of another under a claim as a fugitive from labor from another state.—Norris v. Newton, Case No. 10,307.

When it appears, by the return to the habeas corpus, that the alleged fugitives from labor are in the legal custody of the master, and the facts of the return are not denied, there is an end to the jurisdiction of the state judge.—Norris v. Newton, Case No. 10,307.

Where the return to the writ is denied, the master must prove that his custody is legal, or the state court may release them.—Norris v. Newton, Case No. 10,307.

But the master may subsequently arrest them, and prove them to be his slaves.—Norris v. Newton, Case No. 10,307.

An error in a certificate under the fugitive slave law, by which it appears that the adjudication was made without evidence, may be corrected on habeas corpus.—Ex parte Davis, Case No. 3,613.

Decisions on questions as to evidence made by the commissioner on extradition proceedings cannot be reviewed on habeas corpus pending such proceedings.—In re MacDonnell, Case No. 8,771.

On habeas corpus in a federal court, sued out by a prisoner held under a warrant of the governor as a fugitive from justice, it is not necessary that notice of the proceedings be given the attorney general of the state.—In re Leary, Case No. 8,162.

In the case of a person held in custody under commitment by a commissioner for surrender under a treaty of extradition, writs of habeas corpus and certiorari may both be issued.—In re Stupp, Case No. 13,563.

On the return to such writs the court has no power to revise the decision of the commissioner on the question of fact as to the criminality of the accused.—In re Stupp, Case No. 13,563.

The court can only consider the question whether the commissioner had jurisdiction, and whether there was legal evidence before him tending to prove the accusation. The court has no right to inquire into the sufficiency of such evidence as is competent.—Ex parte Van Aernam, Case No. 16,824; In re Stupp, Id. 13,563; In re Kaine, Id. 7,598; In re MacDonnell, Id. 8,772. CONTRA, see In re Henrich, Case No. 6,369.

On habeas corpus, the court or judge does not sit as an appellate tribunal to review the proceedings which have taken place before the commissioner, as upon allegation of error.—In re MacDonnell, Case No. 8,772.

Error of the commissioner in the reception of evidence is no ground of discharge on habeas corpus.—In re MacDonnell, Case No. 8,772.

The prisoner may show on the face of the proceedings or aliunde the incompetency of the committing magistrate to grant the writ, or that the subject-matter was not brought within his jurisdiction.—In re Kaine, Case No. 7,598.

On habeas corpus the question of the identity of the prisoner with the person named in the warrant is always open.—In re Leary, Case No. 8,162.

The testimony of a detective that he was present at the session of the grand jury at which J. was indicted, and that the said J. there referred to was the prisoner, is sufficient proof of identity.—In re Leary, Case No. 8,162.

No appeal lies from the decision of the circuit court on a habeas corpus in an extradition case.—In re Henrich, Case No. 6,369.

Under the extradition treaty of 1874 with Belgium it is no ground of discharge of the alleged fugitive on habeas corpus that the warrant of arrest was issued by the proper judicial officer, instead of by the president.—Ex parte Van Hoven, Case No. 16,859.

The president may lawfully decline to surrender the accused, after his commitment for surrender and the refusal of a discharge on habeas corpus, on the ground that the case is not within the treaty, or for insufficiency of the evidence.—In re Stupp, Case No. 13,563.

§ 16. Suspension of remedy.

The president has no power, under the constitution, to suspend the writ of habeas corpus. Such power is vested solely in congress, and the writ can be suspended only as authorized by congress.—Ex parte Merryman, Case No. 9,487; McCall v. McDowell, Id. 8,673; Ex parte Benedict, Id. 1,292.

The proclamation of September 24, 1862, so far as it attempts to suspend the writ is void as not authorized by congress.—McCall v. McDowell, Case No. 8,673.

Congress is the exclusive judge of "when, in cases of rebellion or invasion," the public service requires suspension of habeas corpus. It may suspend it generally, or in particular cases, or may commit the matter, within proper limits, to the judgment of the president.—McCall v. McDowell, Case No. 8,673.

An arbitrary arrest of a civilian by the commander of a department, of his own will and judgment, as necessary to preserve the peace, is not justified by the act of March 3, 1863, authorizing the president to suspend the writ of habeas corpus, as specified, and the president's proclamation thereunder of September 15, 1863; nor by the act of May 11, 1866.—McCall v. McDowell, Case No. 8,673.

As to the intent of the proclamation of the president of Sept. 15, 1863, suspending the privilege of the writ, see In re Fagan, Case No. 4,604.

Such proclamation was authorized by Act March 3, 1863.—In re Fagan, Case No. 4,604.

Such proclamation suspended all proceedings pending upon writs served prior to its date.—In re Dunn, Case No. 4,171; In re Fagan, Id. 4,604.

A writ of habeas corpus was issued just prior to the suspension of such writ as a military necessity by the president, and the marshal was directed by the president not to execute the same. The court unanimously protested against the action of the military authorities.—United States v. Porter, Case No. 16,074a.

HANDWRITING.

Comparison, see "Evidence," § 78.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 35.

HEALTH.

See "Food."

Representations as to health, see "Insurance," § 63.

HEARING.

By arbitrators, see "Arbitration and Award," § 3.

In admiralty, see "Admiralty," §§ 97–100, 102; "Collision," § 156; "Salvage," § 66.

In equity, see "Copyrights," § 49; "Equity," §§ 99, 116.

Of application for injunction, see "Injunction," § 20.

Of exceptions to master's report, see "Equity," § 116.

Of motion for new trial, see "Criminal Law," § 102.

Of prize proceedings, see "War," § 66.

Of proceedings to establish or confirm grant, see "Public Lands," § 90.

—— or writ of error, see "Appeal and Error," § 26.
On appeal in admiralty, see "Admiralty," § 122.
—— in bankruptcy, see "Bankruptcy," § 693.
On motion, see "Motions," § 2.
—— for new trial, see "New Trial," § 23.

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 42.
In criminal prosecutions, see "Criminal Law," §§ 60–63.

HEIRS.

See "Descent and Distribution."

HIGH SEAS.

Jurisdiction of crimes, see "Criminal Law," §§ 10, 11.
Venue of crimes committed on, see "Criminal Law," § 23.

HIGHWAYS.

§ 1, Establishing and laying out. § 2, Repair. § 3, Officers. § 4, Liability for injuries. § 5, Actions. § 6, Offenses and criminal prosecutions.

See, also, "Bridges"; "Municipal Corporations," §§ 22, 23, 25; "Navigable Waters."
Dedication of, see "Dedication," § 3.

§ 1. Establishing and laying out.
Use of a road for more than 20 years is evidence of its being a public highway.—Hull v. Richmond, Case No. 6,861.

The road from Georgetown, D. C., to Little Falls bridge, *held* not a public highway, because the location thereof was not recorded among the public records.—United States v. Emery, Case No. 15,052.

Special acts for the laying out of a highway are to be construed in conformity to the general highway acts, unless words are used showing that the fee of the land taken is intended to pass.—United States v. Harris, Case No. 15,315.

The use of a certain highway from 40 to 60 years raises a presumption that it was legally laid out as used.—Hicks v. Fish, Case No. 6,459.

The highway, as laid out, must have a certainty of limits and direction. A direction that it shall run from a certain point, "as it may be found the most convenient way," is insufficient. —Hicks v. Fish, Case No. 6,459.

§ 2. Repair.
The Georgetown Bridge Company *held* bound to keep in repair the road leading from Georgetown to the Little Falls bridge.—United States v. Georgetown Bridge Co., Case No. 15,202.

§ 3. Officers.
A road officer in Virginia who has not been notified of his appointment is not liable for the penalty under Act Va. Jan. 5, 1786.—United States v. Custis, Case No. 14,909.

§ 4. Liability for injuries.
Town *held* not liable where plaintiff was injured by a signboard, on an awning over the sidewalk, struck by a passing vehicle, and falling on him.—Merrill v. Portland, Case No. 9,470.

Where a town is liable, under the statute, for a want of repair, and an injury is caused by the united effect of a want of repair and some other cause, the town is not liable.—Merrill v. Portland, Case No. 9,470.

A town *held* liable for injuries to the occupants of a vehicle who were thrown into an uncovered and unguarded cellar extending into the highway.—Nichols v. Brunswick, Case No. 10,238.

The town must have so much of its roads passable as not to delay travelers, or endanger them in getting by, at places not very remote or very inconvenient.—Hull v. Richmond, Case No. 6,861.

§ 5. Actions.
Notice to town to pay damages for neglect in repairing highway, under the Rhode Island statute, before bringing suit, *held* not applicable to claims ex delicto.—Hull v. Richmond, Case No. 6,861.

Damages for injury from defect in a highway will not be aggravated where the road existed for many years in the condition complained of, and had never before been the subject of complaint.—Hull v. Richmond, Case No. 6,861.

§ 6. Offenses and criminal prosecutions.
There is no public road in Maryland the obstruction of which may be punished by a criminal prosecution, unless it be properly laid out and recorded.—United States v. Schwartz, Case No. 16,237.

On an indictment for obstructing a public highway the legality of the highway must be established by the public records of the court.—United States v. Tucker, Case No. 16,543a.

HOLDING OVER.

See "Landlord and Tenant," § 3.

HOLIDAYS.

See, also, "Sunday."

§ 1. Judicial proceedings.
A federal court may be held on a day appointed by the president of the United States and the governor of the state as a day of thanksgiving.—In re McGlynn, Case No. 8,804.

HOLOGRAPHIC WILLS.

See "Wills," § 9.

HOMESTEAD.

§ 1, Statutory provisions. § 2, Persons entitled to homestead. § 3, Acquisition and establishment. § 4, Property constituting homestead. § 5, Liabilities enforceable against homestead. § 6, Transfer or incumbrance of homestead. § 7, Abandonment and waiver. § 8, Protection and enforcement of rights.

See, also, "Exemptions."
Exemptions under bankruptcy laws, see "Bankruptcy," §§ 526–528.
In public lands, see "Public Lands," § 23.

§ 1. Statutory provisions.
As to a reconstructed state, *held*, that constitutional provisions for homestead exemptions took effect from the date of ratification by the people, though the state was not admitted to representation in congress until later.—In re Deckert, Case No. 3,728.

§ 2. Persons entitled to homestead.
One need not have either wife or child, to constitute a head of a family.—In re Cobb, Case No. 2,920.

A person, in Georgia, who keeps a rented house, with hired servants, and makes his home therein with a widow, whom he has educated, and regards as his adopted daughter, though not legally adopted, is entitled to a homestead exemption, as the head of a family, but is not entitled to additional land for the children of such

widow, forming part of his household.—In re Taylor, Case No. 13,775.

An unmarried man, having orphan children bound to him under the apprentice laws of Texas, and conducting a household with hired servants, is not entitled to a homestead as the head of a family.—In re Summers, Case No. 13,604.

A widow having charge of household and domestic affairs in the home of her brother, and making it her home, is a part of his family.—Bailey v. Comings, Case No. 733.

The adoption by an unmarried person of another's child, and keeping servants and a household, does not make him the head of a family, entitled to homestead exemptions under the South Carolina statutes.—In re Lambson, Case No. 8,029.

A family engaged to live in a farm house with the owner, and work the farm on shares, subject to his management and control, is not a part of his family.—Bailey v. Comings, Case No. 733.

An unmarried man, living in one town, and supporting his mother and unmarried sister, who board with a married sister, in another town, is not entitled to the exemptions allowed in Georgia to the head of a family.—Jones v. Gray, Case No. 7,463.

§ 3. Acquisition and establishment.

Occupation by wife and family is equivalent to occupation by husband.—Bartholomew v. West, Case No. 1,071.

The fact that the debtor is insolvent will not prevent a declaration of homestead under the California homestead act. Case No. 6,361 reversed.—In re Henkel, Case No. 6,362.

§ 4. Property constituting homestead.

Defendant *held* entitled to have set apart unincumbered property on which part of his family resides, within the limit of the exemption, rather than a much larger estate subject to an incumbrance to nearly its value.—Manufacturers' & Farmers' Bank v. Bayless, Case No. 9,050.

The wife has no separate rights in a homestead purchased in fraud of creditors.—In re Boothroyd, Case No. 1,653.

Where a leasehold is not susceptible of division, the debtor may retain $1,000 out of its proceeds, under laws of Missouri in force in 1864.—In re Beckerford, Case No. 1,209.

Where a person has acquired a right to a rural homestead under the Texas laws, the subsequent extension of the limits of a city, so as to embrace a part thereof, does not affect such right.—In re Young, Case No. 18,149.

In Texas a homestead may embrace any number of city or town lots, designated and used as a homestead, and not exceeding in the aggregate $5,000 in value, irrespective of improvements thereon, whether remote from or contiguous to each other.—Thebo v. Cain, Case No. 13,875.

Head of family need not be sole owner of fee; it is sufficient that he has an interest subject to execution sale. Neb. Code, § 525.—Bartholomew v. West, Case No. 1,071.

In Nevada the interest of a tenant in common in the dwelling house and land occupied by him as a homestead, not exceeding $5,000, is exempt.—In re Swearinger, Case No. 13,683.

There can be no homestead carved out of land held by parties as partners.—Commercial & Savings Bank v. Corbett, Case No. 3,058.

Construction of Florida constitution reserving a homestead to the head of a family, in its application to one who operated a mill upon his farm.—Greeley v. Scott, Case No. 5,746.

"Lot," as used in the Illinois homestead law, will be construed as confined to a 40-acre tract, according to governmental survey, upon which the debtor's residence is situated.—Kerr v. South Park Com'rs, Case No. 7,733.

If there is a dwelling house and a store upon the same lot, the former may be set off as a homestead; but a building will not be divided and homestead assigned in part of it.—In re Lammer, Case No. 8,031.

Homestead exemption in Wisconsin does not extend to a business block used as a dwelling.—In re Lammer, Case No. 8,031.

Under Const. Kan. art. 15, § 9, the whole house occupied as a home by the bankrupt is exempt, though a portion of it is used, and was constructed with a view to be used, for a brewery.—In re Tertelling, Case No. 13,842.

§ 5. Liabilities enforceable against homestead.

Under the homestead laws an exemption of land cannot be allowed as against debts contracted before its acquisition.—In re Duerson, Case No. 4,117; In re Shipman, Id. 12,791; In re Wyllie, Id. 18,112.

A homestead exemption established by law cannot affect antecedent liens.—Townsend Sav. Bank v. Epping, Case No. 14,120.

A mortgage given and recorded before the filing of the declaration in writing required by law is superior to the homestead claim.—Commercial & Savings Bank v. Corbett, Case No. 3,058.

The cestui que trust under a trust deed to secure present loans and future advances will be protected, as to such advances, against the claims of the borrower, who has declared the land a homestead, and has subsequently obtained such advances, and fraudulently concealed his declaration of homestead.—In re Haake. Case No. 5,883.

The action and judgment upon a bond given to relieve property from seizure for violation of the revenue laws must be considered as a civil proceeding, and the sureties upon the bond are entitled to the homestead exemptions given by the state laws.—Salentine v. Fink, Case No. 12,250.

A homestead exemption against levy by execution founded upon "any demand for any debt contracted" is good against judgments for torts, both principal and costs.—In re Radway, Case No. 11,523.

Obtaining an office judgment for rent by confession for a sum due as "recovered for debt" is a waiver of the specific lien for rent, and renders the judgment inferior, under the Virginia law, to the right of homestead.—In re Lumpkin, Case No. 8,606.

Liability on the official bond of a public administrator at the time of receiving personal property *held* within the meaning of a homestead exemption statute providing that it shall not apply "to any debts or liabilities contracted before" it took effect.—In re Hook, Case No. 6,671.

A note given for money borrowed for building, and actually used for that purpose, and a mortgage on the land to secure it, constitute an obligation for the erection of improvements (Const. Nev. art. 4, § 30) superior to homestead claims.—Commercial & Savings Bank v. Corbett, Cases Nos. 3,057, 3,058.

The homestead in California is exempt from forced sale, though the insolvent owner has devoted money which equitably belonged to all his creditors to the payment of a debt which was a lien thereon. Case No. 6,361 reversed.—In re Henkel, Case No. 6,362.

§ 6. Transfer or incumbrance of homestead.

Property set apart as a homestead under the laws of Virginia cannot be alienated by a hus-

band without joining his wife. Code 1873, §§ 9, 11, 12.—In re Smith, Case No. 12,979.

The husband and wife in Nebraska may make a valid mortgage of the homestead property.—In re Cross, Case No. 3,426.

An express waiver of the homestead right is not essential to the validity of such a mortgage.—In re Cross, Case No. 3,426.

An insolvent merchant cannot sell his homestead for cash, and transfer the exemption to his store, into which he moves his family.—In re Wright, Case No. 18,067.

The head of a family owning a single piece of real estate, mortgaged by himself and wife for more than its value, is not, after condition broken, the owner of a homestead, under the laws of Ohio.—In re May, Case No. 9,326.

§ 7. Abandonment and waiver.

Right to homestead exemption *held* not abandoned by three years' residence in another place.—Bailey v. Comings, Case No. 733.

Whether there has been an abandonment must be determined by the purposes and declarations of the wife, as well as of her husband; and, if she has an intent or desire to return, the homestead may not be lost, though he had no such intent.—Kerr v. South Park Com'rs, Case No. 7,733.

Laws Va. 1869–70, p. 198, allowing a waiver of the homestead exemption given by the state constitution, *held* valid.—In re Solomon, Case No. 13,166.

The homestead-waiving clause inserted in a negotiable note of a firm by the partner who executed it is effective as to each member of the firm, both as to the firm and their individual property.—In re McMurran, Case No. 8,904.

A deed of trust junior to a judgment clears the land of the right of homestead, and renders the judgment operative as a prior lien; and the right of subrogation will not accrue to the trust deed lienor as to other land as to which the homestead right was not expressly waived.—In re Cogbill, Case No. 2,954.

Where a married woman is living with her husband upon a homestead, and she procures a divorce, in which decree alimony is allowed, and she is awarded custody of the children, she is not devested of her rights in the homestead, and ejectment will not lie by the husband to recover it.—Sellon v. Reed, Case No. 12,646.

§ 8. Protection and enforcement of rights.

Homestead exemption must exist and be claimed at the time the writ comes to the officer's hands.—Freeman v. Stewart, Case No. 5,088.

If the sheriff sells as one tract two 40-acre lots, one of which is the homestead, the whole sale will be set aside.—Kerr v. South Park Com'rs, Case No. 7,733.

In Illinois the sale of property under an execution and levy, while occupied as a homestead, is void, whether the premises are worth more or less than the $1,000 allowed as the value of the homestead.—Kerr v. South Park Com'rs, Case No. 7,733.

HOMICIDE.

§ 1, Murder. § 2, Manslaughter. § 3, Assault with intent to kill. § 4, Excusable or justifiable homicide. § 5, Indictment. § 6, Evidence—Presumptions and burden of proof. § 7, —— Admissibility. § 8, —— Weight and sufficiency. § 9, Trial. § 10, Sentence and punishment.

Jurisdiction of homicide on vessels, see "Criminal Law," §§ 10, 11.
Venue, see "Criminal Law," § 20.

§ 1. Murder.

A particular malice against deceased is not necessary to constitute murder, if there be deliberate malignity and depravity in the conduct of the party.—United States v. Ross, Case No. 16,196.

A death of a fever caused by a beating while the person was in a weak state of health is murder, where the beating was with malice aforethought; otherwise it is manslaughter.—United States v. Woods, Case No. 16,760.

It is no defense that one accused of murder was more ignorant, and somewhat more stupid, than common men of bad education, bad passions, and bad habits, if he was not deficient in understanding.—United States v. Cornell, Case No. 14,868.

If a person, while sane and responsible, makes himself intoxicated, and then commits murder by reason of insanity resulting from intoxication, he is responsible.—United States v. McGlue, Case No. 15,679; Same v. Cornell, Id. 14,868.

Insanity directly caused by the immediate influence of intoxicating liquors is no defense on a prosecution for murder committed during such intoxication; otherwise, where insanity is remotely occasioned by undue indulgence in spirituous liquors.—United States v. Drew, Case No. 14,993.

If a number of persons combine together to do an unlawful act, and death happen in the prosecution of the design, it is murder in all. If the unlawful act was a trespass, the murder, to affect all, must be done in the prosecution of the design. If the unlawful act be a felony, it will be murder in all, although the death happen collaterally, or beside the principal design.—United States v. Ross, Case No. 16,196.

A person who encourages, countenances, and supports another in a murder is an accessory.—Baker v. Kansas City Times Co., Case No. 773.

To make a man a principal in murder, it is not necessary that he should inflict the mortal wound, if he be present, aiding and abetting the act.—United States v. Ross, Case No. 16,196.

There are no degrees of murder, under the laws of the United States.—United States v. Outerbridge, Case No. 15,978.

§ 2. Manslaughter.

The difference between murder and manslaughter consists in the existence of malice, express or implied, in one case, and the absence of malice in the other.—United States v. Outerbridge, Case No. 15,978.

If two fight with deadly weapons in a mutual combat, begun in hot blood, and death ensue, it is manslaughter.—United States v. Mingo, Case No. 15,781.

Any officer of a steamboat, through whose negligence or ignorance an explosion takes place, which is destructive of life, is guilty of manslaughter.—United States v. Taylor, Case No. 16,441; The Henry Clay, Id. 6,375.

The essence of the crime under Act July 7, 1838, § 12, consists in the fact of there being "misconduct, negligence, or inattention" in such degree and of such a character as to have produced the result set forth in the indictment, irrespective of the intention of the person charged.—United States v. Warner, Case No. 16,643; Charge to Grand Jury, Id. 18,253.

Death of a human being as the immediate result of the omission by another to perform a legal duty makes the latter guilty of felonious homicide, and where the master fails to rescue a passenger or seaman who has fallen overboard regardless of delay or expense, and willfully omits to stop the ship, he is guilty of manslaughter.—United States v. Knowles, Case No. 15,540.

A master who without malice, and by physical force, compels a seaman to go aloft, when, by reason of great debility or exhaustion, he cannot do so without danger, is guilty of manslaughter, where the seaman falls and is drowned.—United States v. Freeman, Case No. 15,162.

No mere words applied by one to another will reduce the act of killing from murder to manslaughter.—United States v. Carr, Case No. 14,732. But see United States v. Wiltberger, Case No. 16,738.

Homicide in resisting an arrest substantially illegal will, at most, amount to manslaughter.—United States v. Travers, Case No. 16,537.

If a tenant kill a constable who comes to make an unlawful distress, the jury may, according to the circumstances, find a verdict of manslaughter.—United States v. Williams, Case No. 16,710.

§ 3. Assault with intent to kill.

A slave who enters the sleeping room of his master in the nighttime with an axe in his hand, with intent to kill him, is guilty of an attempt to murder, though he was seized by others before he could accomplish his purpose.—United States v. Bowen, Case No. 14,629.

§ 4. Excusable or justifiable homicide.

The order of a superior military officer to an inferior will not, of itself, justify the willful killing of another.—United States v. Carr, Case No. 14,732; Same v. Bevans, Id. 14,589.

Officers charged with the good order of a camp or fort will not be required to weigh with scrupulous decision the exact amount of force necessary to preserve order.—United States v. Carr, Case No. 14,732.

An offender having made public threats against the life of an officer having a warrant for his arrest, the latter is justified in taking his life, where he so acts with a rifle when the attempt at arrest is made that the officer has reason to believe that he intends to execute such threats.—United States v. Rice, Case No. 16,153.

Where an officer attempting to execute lawful process of arrest is resisted by the party to be arrested, so that he is obliged to take the latter's life in self-defense, the process is a justification.—United States v. Jailer, Case No. 15,463.

When homicide excused by the acts of deceased.—United States v. Frye, Case No. 15,173.

A person under reasonable apprehension of danger of life or great bodily harm, not arising out of his own act, has the right, in self-defense, to kill the aggressor.—Baker v. Kansas City Times Co., Case No. 773.

A person may oppose force to force in defense of himself or his family, against one who manifestly endeavors by surprise or violence to commit a felony.—United States v. Wiltberger, Case No. 16,738; Same v. Outerbridge, Id. 15,978.

In the case of shipwreck, where the lifeboats are crowded, the seamen have no right to throw passengers overboard, to protect their own lives, and that of other passengers.—United States v. Holmes, Case No. 15,383.

Neither words nor gestures, however insulting or irritating, nor an assault, will justify the killing of the aggressor.—United States v. Outerbridge, Case No. 15,978.

The danger must be imminent, and the resistance used necessary to avert the danger.—United States v. Wiltberger, Case No. 16,738; Same v. Outerbridge, Id. 15,978.

By "imminent danger" is meant immediate danger, such as must be instantly met, and cannot be guarded against by calling upon the assistance of others, or the protection of the law.—United States v. Outerbridge, Case No. 15,978.

A man is bound to retreat from the moment danger becomes apparent, unless, from the fierceness of the attack, he is prevented from doing so.—United States v. Herbert, Case No. 15,354a.

A person may oppose force to force in defense of his property against one who manifestly endeavors, by surprise or violence, to commit a felony.—United States v. Wiltberger, Case No. 16,738.

The setting of spring guns in open fields or outbuildings, and not within the privilege of the domicile, without notice, will not excuse or justify a homicide which may ensue.—United States v. Gilliam, Case No. 15,205a.

§ 5. Indictment.

Sufficiency of indictment for murder under the act of congress punishing opposition to the enrollment of the national forces.—United States v. Scott, Case No. 16,241.

An indictment for manslaughter need not contain the words, "in the fury of his mind."—United States v. Frye, Case No. 15,173.

An indictment for murder on the high seas need not state the length and depth of the wound which caused death.—United States v. Maunier, Case No. 15,746.

A person present, actually or constructively, at a murder, aiding and abetting it, may be convicted under an indictment charging him with the murder.—United States v. Douglass, Case No. 14,989.

§ 6. Evidence—Presumptions and burden of proof.

The circumstances attending a homicide may be such that the law deems it malicious.—United States v. Armstrong, Case No. 14,467.

Where it is shown that a person was intentionally killed, the law implies malice.—United States v. Outerbridge, Case No. 15,978; Same v. Sickles, Id. 16,287a; Same v. McGlue, Id. 15,679; Same v. Travers, Id. 16,537.

If upon slight provocation one inflicts with a deadly weapon a punishment outrageous in its nature, and beyond all proportion to the offense, and death results, the law presumes that the act was inspired rather by malignity and a depraved spirit recklessly bent on mischief than by human frailty.—United States v. Bevans, Case No. 14,589.

The crime will be considered to have been committed with malice aforethought, however sudden the occasion, when the act is done with such cruel circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit.—United States v. Cornell, Case No. 14,868.

Any circumstances in mitigation or of excuse or justification must be proved by the prisoner.—United States v. Travers, Case No. 16,537; Same v. Bevans, Id. 14,589; Same v. Armstrong, Id. 14,467.

Proof that the blows were given by a dangerous weapon, were followed by alarming symptoms, and soon afterwards by death, is sufficient prima facie proof that the blows caused the death.—United States v. Wiltberger, Case No. 16,738.

Where the defense to a charge of manslaughter by a sea captain, in omitting any attempt to rescue a seaman who fell from the rigging into the sea, was that he was killed by the fall, *held*, that the burden was on defendant to show that the fall was fatal, or to raise a reasonable doubt on the subject.—United States v. Knowles, Case No. 15,540.

On an indictment for murder by throwing a child overboard, the prosecution must prove

(where such a defense is set up) that the child had not died in a fit before it was thrown overboard. — United States v. Hewson, Case No. 15,360.

§ 7. —— Admissibility.

Evidence of the previous bad character of deceased, killed in the act of committing a felony, is admissible on indictment for a murder committed by means of a spring gun.—United States v. Gilliam, Case No. 15,205a.

An examination of a prisoner for commitment, given under impressions of fear, whether signed by him or not, is inadmissible on his trial for murder on the high seas. — United States v. Maunier, Case No. 15,746.

The dying declarations of deceased, made in contemplation of death, are admissible in evidence.—United States v. Taylor, Case No. 16,436; Same v. McGurk, Id. 15,680.

Dying declarations may be given in evidence as to facts, but not as opinions.—United States v. Veitch, Case No. 16,614.

Declarations of deceased, not made in extremis, or with a settled conviction that he is about to die, are not admissible.—United States v. Woods, Case No. 16,760.

§ 8. —— Weight and sufficiency.

The corpus delicti, in murder, may be inferred from circumstances; and when such circumstances are proved, whether they afford a violent or only a reasonable presumption of the death, the declarations of accused in regard thereto are admissible.—United States v. Matthews, Case No. 15,741b.

The fact of death may be proved by presumptive evidence.—United States v. Brown, Case No. 14,656a; Same v. Gibert, Id. 15,204; Same v. Williams, Id. 16,707.

Under an indictment for manslaughter on board a vessel on the high seas or in a foreign port, the prosecutor must prove that the vessel belonged to a citizen of the United States. —United States v. Imbert, Case No. 15,438.

The character of the dying statements, their consistency with the established facts, and all the circumstances of the dying man, are to be considered by the jury in determining the weight to which his account of the transaction is entitled.—United States v. Gleason, Case No. 15,216.

§ 9. Trial.

When the extenuating circumstances can be apprehended by the court, it must declare as matter of law whether it is sufficient to mitigate the offense.—United States v. Armstrong, Case No. 14,467.

Where defendant killed deceased with a dangerous weapon, and the evidence was conflicting as to provocation, and as to which was the assailant, the jury may be instructed that the government, in order to convict, must satisfy the jury beyond a reasonable doubt that the killing was felonious.—United States v. Mingo, Case No. 15,781.

On a trial for murder, the jury may be instructed that the accused is entitled to the benefit of any reasonable doubt as to the elements of murder in the first degree, or second degree, or manslaughter.—United States v. Kie, Case No. 15,528b.

On a joint indictment for murder, one defendant may be found guilty of murder, and another of manslaughter. — United States v. Harding, Case No. 15,301.

On a trial for murder the jury must be kept together, both day and night.—United States v. Woods, Case No. 16,760.

§ 10. Sentence and punishment.

Manslaughter, in the District of Columbia, is punishable by fine and imprisonment.—United States v. Anderson, Case No. 14,451; Same v. McLaughlin, Id. 15,697.

A slave found guilty of manslaughter was sentenced to be burned in the hand and whipped with 10 stripes.—United States v. Clark, Case No. 14,802; Same v. Tom, Id. 16,531.

An unlawful stroke on the sea, without malice, followed by death on shore, is not within either Act April 30, 1790, § 12, or Act March 3, 1825, § 4.—United States v. Armstrong, Case No. 14,467.

HORSE RAILROADS.

See "Street Railroads."

HOUSEBREAKING.

See "Burglary."

HUSBAND AND WIFE.

§ 1, Mutual rights, duties, and liabilities. § 2, Marriage settlements. § 3, Conveyances, contracts, and other transactions between husband and wife. § 4, Disabilities and privileges of coverture. § 5, Wife's separate estate—What constitutes. § 6, —— Rights and liabilities of husband. § 7, —— Liabilities and charges. § 8, —— Conveyances. § 9, Actions—By husband or wife or both. § 10, —— Against husband or wife or both. § 11, Community property. § 12, Separation. § 13, Abandonment.

See, also, "Bigamy"; "Curtesy"; "Divorce"; "Dower"; "Marriage."
Acknowledgment of deed by married women, see "Acknowledgment."
Bankruptcy of married women, see "Bankruptcy," § 10.
Competency as witnesses, see "Witnesses," § 21.
Domicile of wife, see "Domicile," § 4.
Married women as sureties on bonds in admiralty, see "Admiralty," § 68.
—— settlers on public lands, see "Public Lands," §§ 32, 33.
Rights of survivors, see "Descent and Distribution," § 2.

§ 1. Mutual rights, duties, and liabilities.

The rule of the common law that the husband, by virtue of the marriage, became seised of an estate in the inheritance of his wife for their joint lives, is not changed by the statutes of Oregon, which provide that, upon the death of the wife, the husband shall be tenant by the curtesy, whether they had issue born alive or not.—Elliott v. Teal, Case No. 4,396.

A note given for money loaned by the wife while unmarried, and prior to the passage of the married woman's property act (Wisconsin), passes to the husband under the common-law rule, and his interest is unaffected by the subsequent act.—In re Jones, Case No. 7,444.

So long as a legacy to the wife continues a chose in action, it is her property. The marital right of the husband does not attach until it is reduced into possession.—Gallego v. Chevallie, Case No. 5,200.

A chose in action accruing to a married woman survives to her unless the husband reduces it to possession during his lifetime. — Chappelle v. Olney, Case No. 2,613.

Relief will be given a husband who seeks the aid of equity to obtain possession of his wife's choses in action, only upon condition that he make a suitable settlement out of the property for the benefit of his wife.—Shaw v. Mitchell, Case No. 12,722.

Proceeds of the sale of lands descended to the wife, which have never come to the husband's

hands, cannot be attached by his creditors.—McVeight v. McKnight, Case No. 8,931a.

The husband may, as against his creditors, relinquish his marital right in a legacy bequeathed to his wife.—Gallego v. Chevallie, Case No. 5,200.

Prior to February 14, 1859, in Oregon, the husband became seised of a freehold estate in all the lands in which his wife had a state of inheritance during the coverture, which could be taken on execution by his creditors.—Starr v. Hamilton, Case No. 13,314.

A married woman is entitled, under Act Ill. 1869, to retain, as her own, commissions earned in making sales for her husband under a contract of agency with him.—In re Hay, Case No. 6,252.

In Indiana the wife may require that her interest in her husband's land, which she has mortgaged to secure his debt, shall not be sold if her husband's interest will sell for enough to satisfy the debt.—Thames Loan & Trust Co. v. Julian, Case No. 13,861.

A husband is not liable for goods delivered to his wife on her credit after a separate maintenance is allowed by him; but, from his express promise to pay, the jury may infer that the goods were delivered to her on his order.—Shreve v. Dulany, Case No. 12,817.

See, also, post, §§ 5–8, 11; "Bankruptcy," § 204.

§ 2. Marriage settlements.

A will devising real estate *held* to be an execution of the stipulations in a bond before marriage, in the nature of a marriage settlement.—Bryant v. Hunter, Case No. 2,068.

An antenuptial settlement by the husband upon the wife, though not recorded, will protect the goods from the husband's creditors.—Pierce v. Turner, Case No. 11,149.

A postnuptial settlement made by a stranger upon the wife is good, unless expressly dissented from by her husband.—Picquet v. Swan, Case No. 11,133.

A secret settlement by a woman on the eve of her marriage, and in contemplation of that event, is fraudulent and void against the husband.—Linker v. Smith, Case No. 8,373.

A deed of property by a feme sole to a trustee for her separate use, made pending a treaty of marriage, if without the knowledge of the husband is void as to him.—Prather v. Burgess, Case No. 11,367.

Marriage articles are not affected by not being recorded within the time prescribed by the laws of New Jersey.—Magniac v. Thompson, Case No. 8,956.

Marriage articles will not be presumed to have been abandoned by any delay or negligence of the trustee in their execution.—Magniac v. Thompson, Case No. 8,956.

An antenuptial contract between the parties themselves without a trustee, whereby all property then owned or subsequently acquired by either is to be in common during the lives of both and to go to the survivor until death, then to be divided among the heirs of each, is an executory, not an executed, agreement.—Neves v. Scott, Case No. 10,134.

The brothers of a husband are not within the influence of an antenuptial agreement made between the parties to the marriage without the intervention of a trustee, and constituting a marriage settlement. They are mere volunteers, who cannot maintain a bill to enforce performance of the agreement.—Neves v. Scott, Case No. 10,134.

Money received by a person as trustee under a marriage settlement contract, signed and sealed by him, *held* a debt due by specialty, though there was no substantive covenant by him to accept the trust.—Burton v. Smith, Case No. 2,219.

The wife's portion of a marriage settlement was to be raised out of her real estate, of which her father was tenant by the curtesy, by a sale after she arrived of age. The wife died shortly after arriving of age, without any act done by her, or request by her husband. *Held*, that her father was not liable for nonperformance.—Tilghman v. Tilghman, Case No. 14,045.

§ 3. Conveyances, contracts, and other transactions between husband and wife.

Where a husband has reduced a legacy to a wife to his possession, a promise to pay to the wife a sum equal to the proceeds is not supported by the right of the wife to interpose in equity to prevent her husband from so taking possession.—Canby v. McLear, Case No. 2,378.

In Illinois a married woman may enter into copartnership with her husband.—In re Kinkead, Case No. 7,824.

A husband who has borrowed his wife's funds may secure her by payment, pledge, or in any other proper way.—Friedlander v. Johnson, Case No. 5,117.

A wife may, by writing under seal, transfer to her husband money held to her sole and separate use under a marriage settlement.—Dallam v. Wampole, Case No. 3,543.

As to the validity of gifts by the husband to the wife under Const. Or. art. 15, § 5.—Starr v. Hamilton, Case No. 13,314.

Right of husband's creditors to gifts by the husband and by third persons to his wife.—In re Grant, Case No. 5,693.

A note and check given by a husband to a wife do not support a trust, though the note bears the indorsement to the effect that it was given for money accruing to the wife from her father's estate.—Canby v. McLear, Case No. 2,378.

A parol promise by a husband to his wife for love and affection to make a gift does not work a gift, and cannot be enforced.—Williamson v. Colcord, Case No. 17,752.

A conveyance to the grantor's wife or children, resting merely on the moral duty to provide for them, is voluntary, and void against purchasers for valuable consideration, even with notice.—Robinson v. Cathcart, Cases Nos. 11,946, 11,947.

See, also, "Fraudulent Conveyances," §§ 11, 17.

§ 4. Disabilities and privileges of coverture.

Act Cal. April 17, 1850, is inapplicable to husband and wife married out of state, and never having been within its limits.—Bayerque v. Haley, Case No. 1,135.

It is only by statute that the wife's rights and liabilities are enlarged, and only to the extent specified therein.—Boyd v. Withers, Case No. 1,752.

Bills of exchange and promissory notes constitute an exception to the rule that the wife's choses in action, other than chattels real, are assignable only in equity.—Bayerque v. Haley, Case No. 1,135.

To give validity to a deed, for the conveyance of land, executed by a feme covert, she must be privily examined as the statute requires.—Elliott v. Peirsoll, Case No. 4,395.

A widow, by reacknowledging a deed executed by her while married, and therefore void, gives it full validity and force, though she do not re-sign it.—Riggs v. Boylan, Case No. 11,822.

A married woman who comes into Massachusetts without her husband, he never having lived with her in the state, has full power to

contract as if she were sole.—In re Ruddell, Case No. 12,109.

In Illinois a married woman retains all the property, real or personal, which she had at marriage or acquired thereafter, except from her husband, and may contract in regard thereto; and such contracts may be enforced, either at law or in equity, to the same extent as if she were sole.—In re Kinkead, Case No. 7,824.

At common law a contract of a married woman is void, and a conveyance to her in consideration of her promissory note for the purchase money is in effect a gift to her.—Dick v. Hamilton, Case No. 3,890.

A married woman is bound by articles of copartnership signed in her name by her husband, by her authority.—In re Berryman, Case No. 1,360.

The nature of an obligation by a married woman is not changed by the fact that she joins with her husband therein.—Norton v. Meader, Case No. 10,351.

The meaning of the words, "for family supplies or necessaries," as used in Rev. Code Miss. art. 25, § 5, validating the wife's contract, defined.—Boyd v. Withers, Case No. 1,752.

The promise of a feme covert is void, and her subsequent promise when sole, without a new consideration, is also void.—Watson v. Dunlap, Case No. 17,282.

Under the laws of New York a married woman is authorized to carry on the business of a distiller, on her own account and for her own benefit; and she will be bound by a bond given to the government, conditioned according to the laws relating to bonded warehouses.—United States v. Garlinghouse, Case No. 15,189.

She may engage in trade, with her husband's consent, and, it seems, without his consent, using her own property, and may bind herself by contracts in her business.—In re Kinkead, Case No. 7,824.

A married woman, in carrying on business on her own account and for her own interest, may employ her husband as agent.—Driggs v. Russell, Case No. 4,084.

The provision in the statute that it shall not be construed to give the wife any right to compensation for any labor performed for her husband or minor children, is inapplicable to cases where there is a special agreement between the husband and wife.—In re Hay, Case No. 6,252.

A married woman, living with her husband and carrying on trade in her own name, cannot, in Wisconsin, become his debtor, nor be garnished in proceedings against him.—Avery v. Doane, Case No. 673.

It seems that a married woman cannot hold, to the exclusion of her husband or his creditors, a stock of goods purchased on credit, nor the proceeds or profits. Act Wis. Feb. 1, 1850.—Avery v. Doane, Case No. 673.

A wife engaging in trade, not in accordance with the statute of the state, may avail herself of her coverture to defeat the debt.—In re Slichter, Case No. 12,943.

A married woman, member of firm, represented therein by her husband, is not liable as a partner in a new firm continuing the old business after limitation of copartnership, without her consent.—In re Berryman, Case No. 1,360.

Creditors of a partnership, consisting of husband and wife, are entitled to payment from the partnership assets in preference to individual creditors of the husband.—In re Kinkead, Case No. 7,824.

Right of married women to naturalization, see "Aliens," § 8.
Testamentary capacity of married women, see "Wills," § 4.

§ 5. Wife's separate estate—What constitutes.

Property conveyed by the husband to the wife through a third person is not acquired by her from a "person other than her husband" (Act Ill. Feb. 21, 1861), and the rents and profits still belong to him.—In re Brandt, Case No. 1,811.

To fully protect the wife's rights, the deed to her must indicate the intent to convey for her sole and separate use. Act Ill. 1861.—In re Brandt, Case No. 1,811.

A legacy to a wife of a share of the residue of her father's estate, including proceeds of lands and stocks, does not constitute a separate estate under the Delaware statute of 1865.—Canby v. McLear, Case No. 2,378.

A conveyance of property to a married woman in fulfillment of an agreement made in good faith between her and the grantor does not, under the New York laws, entitle her husband to the property, even though labor and services performed by him formed a part of the inducement to the making of the agreement.—Voorhies v. Bonesteel, Case No. 17,001.

Securities taken in the wife's name by the husband will not be considered as a settlement upon her, where it appears that they were used and collected by him with the wife's consent.—In re Jones, Case No. 7,444.

The furniture, etc., and house of a wife living separate from her husband will be presumed to have been purchased with her own funds, where she has an ample separate estate.—Picquet v. Swan, Case No. 11,133.

The statute of Connecticut in regard to the personal property of married women, construed.—Williams v. King, Case No. 17,725.

§ 6. —— Rights and liabilities of husband.

Const. Or. art. 18, § 10, concerning property of married women, does not operate retroactively, so as to affect rights already vested in the husband.—Starr v. Hamilton, Case No. 13,314.

What is the separate property of a wife under such provision.—Starr v. Hamilton, Case No. 13,314.

A husband has no right in or to realty conveyed to the wife, to hold free from the control of her husband and for her own use.—Dick v. Hamilton, Case No. 3,890.

Money belonging to a fund conveyed to trustees for the sole and separate use of a married woman, free from the control of her husband, loaned and unpaid at the death of the wife, does not become the property of the husband, nor is he entitled thereto in equity.—Dorsett v. Marshall, Case No. 4,012.

Where the husband habitually receives the income of the wife's separate estate, and disposes of it for the benefit of the family, he will not be required to account therefor.—In re Jones, Case No. 7,444.

§ 7. —— Liabilities and charges.

The fact that a married woman employs her husband in the business of using her capital in trade, and supports him out of the profits, will not make the business or the profits the property of the husband.—Voorhies v. Bonesteel, Case No. 17,001.

Where the wife consents to the purchase of property with her means by her husband in his own name, she cannot afterwards reclaim it as against his creditors, whose debts accrued while the property was so held by him.—Keating v. Keefer, Case No. 7,635.

The statute rendering the separate property of the wife liable for her contracts must be strictly construed.—Boyd v. Withers, Case No. 1,752.

Where a woman, during coverture, makes a contract in reference to her separate estate, and subsequently, after the death of her husband, promises to pay the same, she is liable.—Bibbs v. Davis, Case No. 18,235.

The wife cannot, as a general borrower of money, bind herself so as to render her separate property liable, no matter for what purpose the money may be afterwards applied.—Boyd v. Withers, Case No. 1,752.

In Wisconsin, a married woman, by simply indorsing a note, does not create a liability which can be enforced against her separate estate, nor one upon which a personal judgment will be rendered against her.—Flanders v. Abbey, Case No. 4,851.

In Texas, a wife cannot charge her separate estate by becoming surety on a bond given by her husband as assignee in bankruptcy.—In re McFaden, Case No. 8,785.

In equity a married woman may hold, control, and dispose of her separate property; and it may be subjected to the payment of debts contracted in respect to it.—In re Kinkead, Case No. 7,824.

Where a married woman who has a separate estate enters into a contract for its benefit, or for her exclusive benefit, it will be presumed that such contract was made upon the credit of her estate.—Williams v. King, Case No. 17,725.

A debt contracted for the purchase of property which goes into the actual or constructive possession of the purchaser is a debt contracted for the benefit of her estate.—Williams v. King, Case No. 17,725.

A wife having a separate estate in the hands of a trustee may bind the same for payment of her debts; and the court will appoint a receiver to collect the rents and profits.—Simms v. Scott, Case No. 12,871.

A married woman, under the Alabama married woman's law, cannot mortgage her separate estate, however acquired or held, for her husband's debts.—Mitchell v. Lippincott, Case No. 9,665.

A married woman is not bound by a false declaration made in a mortgage executed by her to the effect that the mortgaged property was community property.—Reid v. Rochereau, Case No. 11,669.

A mortgagee of a wife's property to secure the husband's debt, who enters and takes the rents without her consent, is liable to her for use and occupation.—Semple v. Bank of British Columbia, Case No. 12,660.

§ 8. —— Conveyances.

In Oregon the conveyance by a married woman alone, or in pursuance of a power executed by her, is void.—Elliott v. Teal, Case No. 4,396.

In Massachusetts a feme covert may convey her estate by deed, joining with her husband, as fully as the same could be conveyed in England by a fine or recovery.—Durant v. Ritchie, Case No. 4,190.

A deed by the wife, joined in by her husband, when duly executed and acknowledged will convey her title.—Manchester v. Hough, Case No. 9,005.

The payment of part of the purchase money of land, the property of a feme covert, in her presence, cannot prejudice her right to claim the land after the termination of the coverture.—Delancey v. McKeen, Case No. 3,749.

A deed of a married woman void when acknowledged, by reason of containing blanks, cannot be ratified except by a reacknowledgment.—Drury v. Foster, Case No. 4,096.

§ 9. Actions—By husband or wife or both.

A bill in equity will lie by a feme covert to recover money held to her separate use.—Hunt v. Danforth, Case No. 6,887.

The wife, unless she be entitled to a sole and separate estate, can bring no suit, without the union of her husband, in relation to her property or interests.—McKnight v. McKnight, Case No. 8,867a.

A married woman may sue in Illinois for personal injuries without joining her husband.—Seymour v. Chicago, B. & Q. Ry. Co., Case No. 12,685.

In Arkansas, in 1828, the wife could not join in an action for an injury to her property, though acquired by her personal labor and exertions, or by gift, though she lived apart from her husband.—Moores v. Carter, Case No. 9,782a.

A court of equity will sustain the bill of a married woman, suing by her next friend, to recover a legacy bequeathed to her, where the husband has transferred all his marital rights in the legacy to his wife.—Gallego v. Chevallie, Case No. 5,200.

Property belonging to the wife may be recovered for in an action brought by the husband, where it was given to him by her.—Myers v. Cottrill, Case No. 9,985.

A husband, who has conveyed all his estate to a trustee for the sole and separate use of his wife, may join with her in an action of trespass quare clausum fregit, and in law would be entitled to the damages recovered.—Fraser v. Hunter, Case No. 5,063.

In trover by husband and wife for a conversion of the wife's goods before marriage, the declaration must conclude ad damna ipsorum.—Semmes v. Sherburne, Case No. 12,655.

In an action by husband and wife, a plea in bar setting up pendency of another action between the same parties is not supported by evidence of a suit by the wife alone prior to marriage.—Maupin v. Pic, Case No. 9,309.

On a bill by husband and wife to recover property of the wife, the court will direct a settlement on the wife unless satisfied, upon a separate examination of the wife, that it is voluntarily waived.—Ward v. Amory, Case No. 17,146.

§ 10. —— Against husband or wife or both.

Under the Connecticut married woman's act of 1872, a married woman may be sued at law for a cause of action on which she would previously have been liable in equity.—Williams v. King, Case No. 17,725.

An action cannot be maintained against the husband for the debt of the wife, after her death, upon an express promise made in her lifetime without consideration.—Callan v. Kennedy, Case No. 2,319.

Trover will not lie against a husband and wife for a conversion to her use only.—Hollenback v. Miller, Case No. 6,609.

To give jurisdiction against married women, liability must appear affirmatively.—Albree v. Johnson, Case No. 146.

A bill will not lie against a feme sole to compel her to make an acknowledgment of a deed made by her and her husband in his lifetime, where it appears that the sale was made without her consent, and that she received no part of the purchase money.—Providence v. Manchester, Case No. 11,450.

Where husband and wife are codefendants, service upon the husband alone is sufficient.—Robinson v. Cathcart, Case No. 11,946.

Judgment by default against a married woman may be corrected by writ of error coram

nobis (coverture being a question of fact) or by motion on affidavit.—Albree v. Johnson, Case No. 146.

A duebill made to a wife during coverture for a consideration accruing during the coverture is not admissible to support a declaration which avers that the duebill was made dum sola.—Smith v. Clarke, Case No. 13,028.

§ 11. Community property.

Where a married woman took a deed in her own name for property purchased with a separate paraphernal fund and with community funds, *held*, that the property belonged to the community, and the wife became the creditor of the community for the amount invested by her.—Reid v. Rochereau, Case No. 11,669.

§ 12. Separation.

An agreement of separation, under which the husband transferred property to trustees to pay the income to the wife upon condition that she relinquish her claims of dower, is enforceable in equity.—Walker v. Beal, Case No. 17,065.

A provision for the continuance of the agreement should the parties subsequently elect to cohabit does not render it invalid, nor is it suspended while they live together.—Walker v. Beal, Case No. 17,065.

Acceptance by the wife of the provisions made for her in the husband's will is not inconsistent with her claim under the agreement of separation.—Walker v. Beal, Case No. 17,065.

§ 13. Abandonment.

Where a husband voluntarily abandoned his wife and neglected to provide for her, she may dispose of any property she may have subsequently acquired in such manner as she may please.—Hines v. Gordon, Case No. 18,302.

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IDEM SONANS.

See "Names," § 2.

ILLEGITIMATE CHILDREN.

See "Bastards."

IMMIGRATION.

Regulation, see "Aliens," § 6.

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," §§ 6–9.

IMPANELING JURY.

See "Jury," § 28.

IMPEACHMENT.

Of witness, see "Witnesses," §§ 73–83.

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See "Account Stated"; "Assumpsit, Action of"; "Covenants," § 1; "Money Received"; "Use and Occupation"; "Work and Labor."

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IMPROVEMENTS.

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By bona fide purchasers, see "Vendor and Purchaser," § 31.
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On premises demised, see "Landlord and Tenant," § 5.
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INCOMPETENT PERSONS.

See "Insane Persons."

INCORPORATION.

See "Corporations," §§ 1–9; Municipal Corporations," § 1; "Railroads," § 4.

INCUMBRANCES.

Covenants against, see "Covenants," § 4.
On homesteads, see "Homestead," § 6.
On property of intestate, see "Descent and Distribution," § 4.

INDEMNITY.

§ 1, Validity. § 2, Action on contract.

See, also, "Guaranty"; "Insurance"; "Principal and Surety."

§ 1. Validity.

A bond executed in Michigan, to indemnify a person for signing a note in another state, which is void under the laws of that state, is also void.—Hayden v. Davis, Case No. 6,259.

§ 2. Action on contract.

A breach alleged in the terms of the bond is sufficient.—Berger v. Williams, Case No. 1,341.

In an action on an indemnifying bond, the declaration must show that plaintiff has been damnified, and a general averment of loss is not sufficient.—Coe v. Rankin, Case No. 2,943.

A set-off of notes subsequently acquired by the surety cannot be pleaded as an off-set against the creditor's demand.—Bergen v. Williams, Case No. 1,340.

A judgment obtained by the obligee of a bond of indemnity against the debtor is conclusive on the surety, except in case of fraud or mistake.—Bergen v. Williams, Cases Nos. 1,340, 1,341.

Under an agreement by the seller of a slave to make good the damages sustained if the purchaser would defend a suit against the seller to recover the slave, *held*, where defendant was defeated, that the purchaser was entitled to recover as damages the value of the slave at the time of recovery, and not the present value.—Sanders v. Hamilton, Case No. 12,294.

INDEPENDENT CONTRACTORS.

See "Master and Servant," § 9.

INDIANS.

§ 1, Who are Indians. § 2, Status in general. § 3, Officers of Indian affairs. § 4, Lands. § 5, Personal property. § 6, Contracts. § 7, Criminal responsibility in general. § 8, Actions. § 9, Admission to citizenship. § 10, Jurisdiction and government of Indian country and reservations in general. § 11, Regulation of intercourse with Indians. § 12, Selling or furnishing liquors. § 13, Introducing liquors into Indian country. § 14, Crimes in Indian country or reservation. § 15, Criminal prosecutions under laws relating to Indians.

§ 1. Who are Indians.

A white man, who, at a mature age, is adopted into an Indian tribe, is not an "Indian," within the exception of Act June 30, 1834, § 25, of jurisdiction of "crimes committed by one Indian against the person or property of another Indian."—United States v. Rogers, Case No. 16,187.

A white man may incorporate himself with an Indian tribe, be adopted by it, and become a member of it, so as to be included within the effect of a pardon of offenses committed by citizens of the tribe.—United States v. Ragsdale, Case No. 16,113.

The child must partake of the condition of the mother, and where the mother is a white woman, and the father an Indian, the child will be deemed of the white race.—United States v. Sanders, Case No. 16,220.

§ 2. Status in general.

The Indian nations are treated as sovereign communities possessing the right of free deliberation and action, but owing a qualified subjection to the United States.—Ex parte Reynolds, Case No. 11,719.

An Indian born in Minnesota is prima facie not a member of an Oregon tribe, though he may become such by adoption.—United States v. Wirt, Case No. 16,745.

§ 3. Officers of Indian affairs.

An Indian agent appointed for Oregon under Act June 5, 1850, § 4, being also a person charged or trusted with the disbursement of money and property, might be required to give bond for more than $2,000. Act June 30, 1834, §§ 4, 8.—United States v. Humason, Case No. 15,420.

An Indian agent has a right to an allowance in addition to a salary as fixed by Act April 20, 1818, for such services or expenditures as are authorized by a general usage of the war department.—United States v. Duval, Case No. 15,015.

Expenditures made by an Indian agent for the benefit of the Indians, and on a tract of land reserved and held by themselves, are not to be charged to the United States.—United States v. Duval, Case No. 15,015.

The commissioner of Indian affairs may remove from an Indian reservation all persons found thereon without authority of law, or whose presence may be detrimental to the peace and welfare of the Indians.—United States v. Crook, Case No. 14,891.

Construction of Act Feb. 18, 1873, § 6, abolishing Indian superintendencies.—United States v. Wirt, Case No. 16,745.

§ 4. Lands.

An Indian treaty, which cedes lands within certain boundaries, reserving certain parts, does in no respect change, as to such parts, the original right, unless they are referred to therein as grants.—Godfrey v. Beardsley, Case No. 5,497.

The treaty between the United States and the Pottawatomie tribe of Indians of November 15, 1861, does not amount to a grant in præsenti.—Goodfellow v. Muckey, Case No. 5,537.

Grants and reservations claimed under Indian treaties are strictly construed against the grantee or beneficiary.—Goodfellow v. Muckey, Case No. 5,537.

The treaty-making power of the United States can make a sale or grant of land to an Indian tribe without an act of congress.—United States v. Reese, Case No. 16,137.

The title of the Cherokee tribe to their lands is a base, qualified, or determinable fee, without the right of reversion, but only a possibility of reversion, in the United States.—United States v. Reese, Case No. 16,137.

Indians had a right to receive grants of land under the Mexican laws.—United States v. Sunol, Case No. 16,421.

The patents to Wyandot Indians under the treaty of January 31, 1855, conveyed to the head of the family the land in fee.—Hicks v. Butrick, Case No. 6,458.

Construction of treaties of March 17, 1842, and January 31, 1855, with Wyandot Indians.—Gray v. Coffman, Case No. 5,714.

The laws of the state of Kansas have no application to the mode of alienation of lands granted to the Miami Indians, so long as the title remains in the patentees.—Mungosah v. Steinbrook, Case No. 9,924.

A will of the right to a "float" under the treaty of 1855, made and executed according to the laws of the tribe, and proved and allowed by the proper tribunal of the tribe, is valid, and will be respected by the civil courts.—Gray v. Coffman, Case No. 5,714.

Relation of the Wyandot Indians to the civil laws of the territory of Kansas, in respect to the disposition of property before and after the treaty of 1855, considered.—Gray v. Coffman, Case No. 5,714.

Lands reserved to individual Indians can only be conveyed with permission of the president; and permission once given cannot be revoked by his successor, so as to affect rights of third persons.—Godfrey v. Beardsley, Case No. 5,497.

The fee in unsold lands is either in the federal or state governments. The Indians have only a right of use, which, however, cannot be devested, except by purchase or war.—Godfrey v. Beardsley, Case No. 5,497; Goodfellow v. Muckey, Id. 5,537.

The Indians on the Oneida reservation have the right to cut and use the timber thereon, and to sell sufficient to support themselves and families.—United States v. Foster, Case No. 15,141.

A state court has no jurisdiction over a partition suit in relation to lands of the Shawnee Indians, which have never been conveyed with the approval of the secretary of the interior.—Ex parte Forbes, Case No. 4,921.

Lands reserved to Indians by treaty, but with restrictions against conveying them except with the consent of the president of the United States, descend according to the laws of the state, and may be subjected to payment of debts.—Lowry v. Weaver, Case No. 8,584.

"Cattle," as used in Act June 30, 1833, § 9, prohibiting pasturing Indian lands with "horses, mules, or cattle," includes sheep.—United States v. Mattock, Case No. 15,744.

The penalties imposed by that section may be recovered by indictment. The government is not limited to an information or action of debt.—United States v. Mattock, Case No. 15,744.

Where land is set apart by the president for the use of Indians, whites who go upon the reservation to fish do so "contrary to law," within Rev. St. § 2147.—United States v. Sturgeon, Case No. 16,413.

Titles to lands derived from Indians, see "Public Lands," § 104.

§ 5. Personal property.

Without the assent of the general government, the state probate courts cannot administer upon the property or credits of Indians who were members of a tribe which maintained toward the United States its tribal relation.—United States v. Payne, Case No. 16,014.

§ 6. Contracts.

Indians living in a state and doing business as merchants are responsible by the laws of the state for the payment of their debts.—Lowry v. Weaver, Case No. 8,584.

§ 7. Criminal responsibility in general.

Indians belonging to a tribe maintaining a tribal organization on a reservation within the limits of a state are amenable to the state laws for offenses off the reservation, and within the limits of the state.—United States v. Sa-Coo-Da-Cot, Case No. 16,212.

§ 8. Actions.

Indians residing in the United States, and maintaining tribal relations, are not "foreign citizens or subjects," within Const. art. 3, § 2, giving jurisdiction to the federal courts.—Karrahoo v. Adams, Case No. 7,614.

An Indian may abandon his tribe, and, for purposes of jurisdiction, become a citizen of the United States.—Ex parte Kenyon, Case No. 7,720.

Members of an Indian tribe, who scatter themselves among the citizens of the United States, will be held equally therewith subject to the jurisdiction of the federal courts.—Ex parte Reynolds, Case No. 11,719.

Jurisdiction of actions by, see "Courts," § 57.

§ 9. Admission to citizenship.

The right of expatriation is a natural, inherent, and inalienable right, and extends to the Indians as well as to white persons.—United States v. Crook, Case No. 14,891.

Indians born of a tribe which has ceased to maintain its tribal integrity, who are subject to local taxation, are citizens of the United States and of the state of their residence, and possess the right to vote in national elections.—United States v. Elm, Case No. 15,048.

See, also, "Citizens," § 1.

§ 10. Jurisdiction and government of Indian country and reservations in general.

The Indian country is within the jurisdiction of the United States, and congress may extend all laws within the constitutional limits of municipal legislation over the same.—United States v. Tobacco Factory, Case No. 16,528.

The act admitting the state into the Union withdraws all such territory from the federal jurisdiction, except territory of Indians having treaties with the United States, which provide that without their consent such territory shall not be subjected to state jurisdiction.—United States v. Ward, Case No. 16,639.

Indian territory not protected by such a treaty is subject to state jurisdiction.—United States v. Ward, Case No. 16,639.

Indian country is not within exclusive jurisdiction of United States under treaties with Indian tribes securing local self-government.—Anonymous, Case No. 447.

Congress has constitutional power to pass laws punishing Indians for crimes and offenses committed against the United States.—United States v. Cha-To-Kah-Na-Pe-Sha, Case No. 14,789a.

Where the Indians occupy a territory of very limited extent within a state surrounded by a white population, and it becomes impracticable to enforce a law prohibiting intercourse, federal jurisdiction will cease.—United States v. Cisna, Case No. 14,795.

The military power may be employed to effect the removal of a person from an Indian reservation in a proper case, but the person thus removed cannot be held by the military authorities.—United States v. Crook, Case No. 14,891.

Indians at peace with the government cannot be arrested and held for the purpose of removing them to and confining them on a reservation in the Indian Territory.—United States v. Crook, Case No. 14,891.

The act of 1817, which assumes to exercise a general jurisdiction over Indian countries within a state, is unconstitutional, and of no effect.—United States v. Bailey, Case No. 14,495.

See, also, post, § 15.

§ 11. Regulation of intercourse with Indians.

The power of congress to regulate commerce with the Indians does not necessarily cease on their being included within the limits of a state.—United States v. Cisna, Case No. 14,795.

Under the power to regulate commerce with the Indian tribes, congress has power to prohibit all intercourse with them except under license.—United States v. Cisna, Case No. 14,795.

Under the general power of congress to regulate commerce with the Indian tribes, it cannot exercise a general jurisdiction over an Indian territory within a state.—United States v. Bailey, Case No. 14,495.

The statutes extending the laws regulating intercourse with the Indian tribes over the tribes in Utah, Nevada then being a part of Utah, do not make Nevada Indian country.—United States v. Leathers, Case No. 15,581.

There is no law in the United States requiring persons to be licensed to trade in Alaska, even with the Indians.—Waters v. Campbell, Case No. 17,264.

Alaska is not "Indian country," in the technical sense of that phrase, but only so far as the introduction and disposition of spirituous liquors is concerned, and, subject to this restraint, it is open to occupation and trade generally.—Waters v. Campbell, Case No. 17,264.

The repealing clause of Rev. St. § 1954, did not repeal the provision of Act March 3, 1873, extending sections 20 and 21 of the Indian intercourse act over Alaska, it being local in character.—Waters v. Campbell, Case No. 17,264.

§ 12. Selling or furnishing liquors.

All Indians born and resident in Oregon are prima facie members of some Oregon tribe, and come within the protection of the statute in re-

lation to the sale of spirituous liquors to Indians. —United States v. Wirt, Case No. 16,745.

Act June 5, 1850, § 5, making the territory of Oregon Indian country so far as the disposition of spirituous liquors to Indians is concerned, *held* not repealed by Rev. St. § 5596.—United States v. Winslow, Case No. 16,742.

Rev. St. § 2139, was only intended to prohibit the selling, giving, or bartering of spirituous liquors or wine to an Indian in the Indian country. —United States v. Downing, Case No. 14,991.

The Indian need not be under the actual control or immediate personal superintendence of an Indian agent, to make the sale of liquor to him an offense under Act May 15, 1864, if the tribe to which he belonged is under the charge of such agent, and he maintains his tribal relation. —United States v. Flynn, Case No. 15,124.

Congress has the power to prohibit the traffic of spirituous liquors between the Indian tribes, or members thereof, within as well as without the limits of the state.—United States v. Shaw-Mux, Case No. 16,268.

An Indian may be punished for disposing of spirituous liquors to another Indian, under Act March 15, 1864.—United States v. Shaw-Mux, Case No. 16,268.

§ 13. Introducing liquors into Indian country.

The "Indian country," within the meaning of Act June 30, 1834, declaring it a crime to introduce spirituous liquors therein, is only that portion of the United States which has been declared to be such by act of congress.—United States v. Seveloff, Case No. 16,252.

Such act was not extended, propria vigore, over the territory of Alaska, upon its cession to the United States.—United States v. Seveloff, Case No. 16,252.

Such act as amended March 15, 1864, was not extended over Alaska by Act July 27, 1868, extending the laws "relating to customs, commerce and navigation" over that territory.—United States v. Seveloff, Case No. 16,252.

The territory of Alaska, under Act March 3, 1873, became, as to the introduction of liquors, "Indian country," and the military force of the United States may be employed for the arrest of persons violating the Indian intercourse act of 1834.—In re Carr, Case No. 2,432.

The tract called "Pyramid Lake Indian Reservation" has been legally reserved for the use of the Pah Utes and other Indians residing thereon, and is "Indian country," within the meaning of Rev. St. §§ 2133, 2139.—United States v. Leathers, Case No. 15,581.

§ 14. Crimes in Indian country or reservations.

Robbery committed in the Indian country is not punishable with death, but as larceny. Act 1790, § 8; Act 1834, § 5.—Anonymous, Case No. 447.

Congress cannot punish for an offense within the Indian territory in a state which has no relation to the Indians, and which cannot affect their commerce.—United States v. Bailey, Case No. 14,495.

See, also, ante, §§ 12, 13.

§ 15. Criminal prosecutions under laws relating to Indians.

A crime committed in the Indian country west of Arkansas is not triable in the district court. —United States v. Ta-Wan-Ga-Ca, Case No. 16,435.

Assault with intent to kill, or an assault and battery, when committed in the Indian country, is not punishable in the federal courts.—United States v. Terrel, Case No. 16,453.

The fact that land lying in a state, of which the fee is in the United States, is set apart as an Indian reservation, is not enough to give the federal courts jurisdiction over a murder committed on the reservation.—Ex parte Sloan, Case No. 12,944.

The crime of murder, charged against a white man for killing another white man in an Indian country, within a state, cannot be punished within the courts of the United States.—United States v. Bailey, Case No. 14,495.

The federal courts have jurisdiction, under Act June 30, 1834, of offenses against the laws of the United States committed on Indian reservations in Kansas.—United States v. Ward, Case No. 16,639.

The federal circuit court has no jurisdiction, under the act of 1834, to punish offenses committed by one Indian against the person or property of another Indian.—United States v. Sanders, Case No. 16,220.

Alaska is not "Indian country," within the meaning of the acts of congress; and the district court for Alaska, consequently, has jurisdiction to try an Indian for an offense committed there against another Indian.—United States v. Kie, Case No. 15,528a..

Previous to the passage of Act June 17, 1844, the federal courts had no jurisdiction to hear, try, and punish offenses committed in the Indian country west of Arkansas, and such act was not retrospective.—United States v. Starr, Case No. 16,379; Same v. Ivy, Id. 15,451.

Act March 3, 1851, transferring the Indian Territory to the Western district of Arkansas, did not deprive the court where an indictment was pending of the right to try and determine it.—United States v. Dawson, Case No. 14,933.

In an indictment under Rev. St. § 2139, for disposing of spirituous liquors to an Indian, it must be alleged that defendant is not an Indian in the Indian country.—United States v. Winslow, Case No. 16,742.

A person arrested by military force for the violation of Act June 30, 1854, §§ 20, 21, is not a military prisoner, subject to the articles of war, but a citizen charged with a nonmilitary crime, and must be removed for trial by the civil authorities within five days from his arrest or discharge, and his detention thereafter under any circumstances is unlawful. — Waters v. Campbell, Case No. 17,265; In re Carr, Id. 2,432.

See, also, ante, § 10.

INDICTMENT AND INFORMATION.

§ 1, When indictment or information lies, and necessity therefor. § 2, Finding and filing of indictment or presentment. § 3, Formal requisites of indictment—Alleging jurisdiction of grand jury. § 4, —— Conclusion. § 5, —— Name and signature of prosecutor. § 6, Formal requisites of an information. § 7, Requisites and sufficiency of accusation—Statement of offense in general. § 8, —— Matter of evidence. § 9, —— Statutory offenses. § 10, —— Time and place. § 11, —— Description of persons. § 12, —— Description of property. § 13, —— Allegation of intent. § 14, —— Written or printed instrument. § 15, —— Surplusage. § 16, —— Inconsistent and alternative allegations and repugnancy. § 17, Joinder of parties and offenses. § 18, Election. § 19, Motion to quash—Grounds. § 20, —— Time of making. § 21, —— Discretion of court. § 22, —— Proceedings. § 23, Demurrer. § 24, Amendment and withdrawal. § 25, Variance. § 26, Conviction of offense included in charge. § 27, Waiver of defects and objections.

See, also, "Criminal Law"; "Grand Jury."
Pleas in abatement, see "Criminal Law," § 45.
Remission, see "Criminal Law," § 43.
Service of copy, see "Criminal Law," § 83.

For particular offenses.

See "Assault and Battery," § 3; "Common Scold"; "Conspiracy," § 6; "Counterfeiting," §§ 8, 9; "Disorderly House," § 2; "Embezzlement," § 3; "False Pretenses," § 3; "Forgery," § 7; "Fraud," § 11; "Gaming," § 4; "Homicide," § 5; "Kidnapping," § 2; "Larceny," §§ 4–8; "Libel and Slander," § 25; "Neutrality Laws," § 17; "Obstructing Justice," § 4; "Perjury," § 7; "Rape," § 2; "Receiving Stolen Goods," § 2; "Riot," § 4; "Robbery," § 2; "Treason," § 16.

Against bankruptcy laws, see "Bankruptcy," § 678.
—— customs laws, see "Customs Duties," § 126.
—— election laws, see "Elections," § 11.
—— internal revenue laws, see "Internal Revenue," § 102.
—— laws relating to intoxicating liquors, see "Intoxicating Liquors," § 3.
—— postal laws, see "Post Office," §§ 22–28.
By seamen, see "Seamen," § 181.
Cutting or removing timber from public lands, see "Public Lands," § 9.
Engaging in slave trade, see "Slaves," § 4.

§ 1. When indictment or information lies, and necessity therefor.

Where a statute has prescribed the mode of prosecution, no other can be sustained.—United States v. Pickering, Case No. 16,042; Same v. Rounsavel, Id. 16,199.

Where the statute prescribes a particular mode of enforcing payment of a penalty, an indictment will not lie.—United States v. Ellis, Case No. 15,046; Same v. Gadsby, Id. 15,180.

Where an offense is made punishable by imprisonment, but the statute provides no mode of prosecution, an indictment will lie.—United States v. Malebran, Case No. 15,711.

Where an act is declared unlawful, and a penalty prescribed, but no remedy specially provided, an offender may be proceeded against either by indictment or by an action of debt.—United States v. Bougher, Case No. 14,627.

A prosecution for misapplying the funds of a national bank by its cashier must be by indictment.—United States v. Hade, Case No. 15,274.

The proceeding by criminal information being comparatively unknown in the federal courts, the court declines to issue a warrant of arrest on an information for the offense of selling spirituous liquor to an Indian.—United States v. Joe, Case No. 15,478.

An offense against the laws of the United States, which is not capital or infamous, but is merely a misdemeanor, may be prosecuted by an information.—United States v. Ebert, Case No. 15,019; Same v. Maxwell, Id. 15,750; Same v. Shepard, Id. 16,273; Same v. Waller, Id. 16,634;

The limitation in the fifth amendment, "when in actual service in time of war or public danger," refers only to the militia, and does not apply to the regular land and naval forces. In respect to the latter, the power of congress is irrespective of the actual condition of the country, and the same in time of peace as in time of war or public danger.—United States v. Mackenzie, Case No. 18,313.

Rev. St. § 1361, providing for the punishment by court-martial for offenses committed during confinement under sentences of court-martial, is not in conflict with Const. Amend. art. 5.—Ex parte Wildman, Case No. 17,653a.

§ 2. Finding and filing of indictment or presentment.

Where a grand jury consists of 15 jurors, a finding by 12 cannot be invalidated by the fact that 1 of the 15 was absent.—United States v. Wilson, Case No. 16,737.

The presence of one disqualified person upon the panel of a grand jury vitiates the indictment found by it.—United States v. Hammond, Case No. 15,294.

Irregularities in the summoning of grand jurors do not entitle a party indicted, as matter of law, to avoid the indictment.—United States v. Tallman, Case No. 16,429; Same v. Pike, Id.

Where the record shows that the grand jury found the indictment on their oaths, the intendment and legal effect and presumption is that it was found on proper evidence, with due deliberation, and by the concurrence of 12 of their number.—United States v. Wilson, Case No. 16,737.

The fact that a grand juror had on a previous summons attended the court as a juror, within two years, does not constitute such a disqualification (Rev. St. § 812) as will render bad an indictment found by the grand jury of which he is a member.—United States v. Reeves, Case No. 16,139.

In Mississippi it is not necessary that the minutes of the court should show the finding of the indictment, where the party is not under arrest, or on recognizance.—United States v. Davis, Case No. 14,928.

The court cannot revise the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint.—United States v. Reed, Case No. 16,134.

It will, however, inquire into the competency of evidence, whether oral or documentary, and into the manner of authenticating the latter.—United States v. Reed, Case No. 16,134.

The court has no power to inquire into the mode in which the examination of witnesses was conducted before the grand jury, for the purpose of invalidating an indictment.—United States v. Reed, Case No. 16,134.

The indorsement of the name of a witness by the grand jury on the presentment is prima facie evidence that it was made upon his testimony.—Virginia v. Gordon, Case No. 16,961.

The court may order an indictment to be sent to the grand jury without a previous presentment for the same offense.—United States v. Madden, Case No. 15,705.

When a presentment for a misdemeanor is found by the grand jury without the name of a prosecutor, the court will order an indictment to be sent to the grand jury upon the suggestion of the prosecuting attorney.—United States v. Dulany, Case No. 14,999.

The finding of a grand jury need not be read in open court, but it is sufficient if the bill be handed to the clerk in open court, and the entry made by him on the record.—United States v. Butler, Case No. 14,700.

§ 3. Formal requisites of indictment—Alleging jurisdiction of grand jury.

The designation "foreman" is sufficient to show that the person to whose name it was appended was foreman of the grand jury.—United States v. Plumer, Case No. 16,056.

An indictment for murder on the high seas is sufficient although it describe the grand jury as "jurors of the United States."—United States v. Williams, Case No. 16,707.

An indictment need not allege that the grand jury was duly organized, and that 12 concurred in the finding.—United States v. Laws, Case No. 15,579.

§ 4. —— Conclusion.

In an indictment under Act April 5, 1866, c. 24, § 2, it is not necessary to aver that the offense is not punishable by any law of congress, and is punishable by the state laws; and a conclusion "against the form of the statute" is correct.—United States v. Wright, Case No. 16,774.

An indictment alleging a statute offense in the words of the act is not vitiated by a conclusion which calls the offense by a wrong name.—United States v. Elliot, Case No. 15,044.

A conclusion against the form of the statute (in the singular) is sufficient in all cases where the offense is distinctly within more than one independent statute.—United States v. Gibert, Case No. 15,204.

A conclusion against the form of the statutes (in the plural) is good even if the offense be punishable by a single statute only.—United States v. Gibert, Case No. 15,204.

A conclusion of an indictment founded on a statute, "contrary to the true intent and meaning of the act of congress of the United States in such case made and provided," is good.—United States v. Smith, Case No. 16,338.

An indictment must conclude "against the government of the United States."—United States v. Boling, Case No. 14,621.

An indictment in the territory of Arkansas must conclude "against the peace and dignity of the United States."—United States v. Lemmons, Case No. 15,591a.

§ 5. —— Name and signature of prosecutor.

Defendant will not be compelled to plead until the prosecutor's name is indorsed on the indictment.—United States v. Carr, Case No. 14,729.

At common law, the name of the prosecutor need not be written at the foot of the indictment.—United States v. Mundell, Case No. 15,834.

The name of a prosecutor must be written at the foot of an indictment for a misdemeanor under the Virginia law.—United States v. Shackelford, Case No. 16,261.

The signature of a district attorney is no part of an indictment, and is only necessary as evidence to the court that he is prosecuting the offender conformably to his statutory duty.—United States v. McAvoy, Case No. 15,654.

§ 6. Formal requisites of an information.

The sworn assistant of the district attorney may sign the latter's name to an information.—United States v. Nagle, Case No. 15,852.

It is not necessary that an information shall show that defendant was held to answer the charge on complaint before a commissioner, or that the charge has been found true by a grand jury.—United States v. Moller, Case No. 15,794.

§ 7. Requisites and sufficiency of accusation—Statement of offense in general.

Where a statute prescribes a punishment for a common-law crime, the indictment must set forth the various ingredients of the crime which go to make up the offense at common law.—United States v. Crosby, Case No. 14,893.

Anything that forms part of the description of the crime is not a matter of form. Rev. St. § 1025.—United States v. Conant, Case No. 14,844.

An averment that the prisoner was tried and convicted of larceny, as by the record of the court doth appear, is not a sufficient averment of a second offense.—United States v. Thompson, Case No. 16,485.

§ 8. —— Matter of evidence.

The particulars constituting the offense are matters of evidence, and need not be pleaded.—United States v. O'Sullivan, Case No. 15,974.

§ 9. —— Statutory offenses.

It is generally sufficient to describe a statutory offense in the words of the statute.—United States v. Armstrong, Case No. 14,468; Same v. Ballard, Id. 14,506; Same v. Henry, Id. 15,350; Same v. Lancaster, Id. 15,556; Same v. O'Sullivan, Id. 15,974; Same v. White, Id. 16,674; Same v. Wilson, Id. 16,730.

In an indictment for such an offense it is sufficient if the offense be substantially set forth, though not in the precise words of the act.—Dewees' Case, Case No. 3,848; United States v. Bachelder, Id. 14,490.

In indictments for misdemeanors it is sufficient to lay the charge in the words of the act describing the offense, unless it appear that those words include cases not intended to be embraced within the laws, in which event the indictment must show the case to be one not thus excluded.—United States v. Pond, Case No. 16,067.

Where a criminal statute does not so define the acts constituting the offense as to give the offender information of the nature and cause of the accusation, an indictment which does not go beyond the words of the statute is defective.—United States v. Staton, Case No. 16,382.

An indictment for a statutory offense charging the same to have been committed "in contempt of the laws of the United States of America," without referring to the statute, is bad.—United States v. Andrews, Case No. 14,455.

The means employed to effect the commission of a statutory offense need not be set out in the information.—United States v. Ballard, Case No. 14,506.

The offense need not be called by its statutory name where it is set out in hæc verba.—Bargie v. United States, Case No. 18,229.

An indictment need not aver the existence or provisions of a public statute upon which the prosecution is founded.—United States v. Rhodes, Case No. 16,151.

An indictment for a statutory misdemeanor need not charge the offense with the particularity of time, place, and circumstance required for a felony or a common-law offense, as defendant has a remedy by application for a rule for specifications and particulars.—United States v. Schimer, Case No. 16,229.

Where an exception in an act does not occur in the enacting clause, it is not necessary to set it out or negative it in the indictment.—United States v. Schimer, Case No. 16,229.

An indictment in the words of the statute creating an offense *held* sufficient without the averment of the place, and the averment of place may be rejected as surplusage.—United States v. Vickery, Case No. 16,619.

§ 10. —— Time and place.

In an indictment for a crime committed on board of a vessel on the high seas by an alien, it is sufficient to allege that the vessel was owned by a citizen of the United States, without alleging otherwise the national character of the vessel.—United States v. Demarchi, Case No. 14,944.

Except in cases of treason, the indictment need not state the county in which the offense was committed; it is sufficient if it show that the court had jurisdiction.—United States v. Wilson, Case No. 16,730.

The caption of an indictment may be referred to, to show that the United States mentioned in the body of the indictment are the United States of America.—United States v. Boyden, Case No. 14,632.

A charge that a crime was committed "on the high seas, within the admiralty and maritime jurisdiction of the U. S., and out of the jurisdiction of any particular state," *held* a sufficient statement of the venue.—United States v. Gibert, Case No. 15,204; Same v. Plumer, Id. 16,056.

Where the offense is within the general jurisdiction of a court of the United States, it is not

necessary that the indictment should exclude, by descriptive terms, every possible exemption of defendant from the jurisdiction. — United States v. Demarchi, Case No. 14,944.

An indictment in the circuit court for an offense committed on land should show that it was committed in the district where the court sits.—United States v. Wood, Case No. 16,757.

In an indictment for an assault with a dangerous weapon on board a vessel, under Rev. St. § 5346, alleging the place as the harbor of Guantanamo, in the Island of Cuba, does not dispense with the allegation that the place was out of the jurisdiction of a state of the United States.—United States v. Anderson, Case No. 14,448.

A charge that the offense was committed on a day certain "and on divers other days" between that day and the finding of the bill by the grand jury will not vitiate an indictment.—United States v. Trobe, Case No. 16,541.

An indictment which alleges the time as "on or about" a certain day is void for uncertainty.—United States v. Crittenden, Case No. 14,890a; Same v. Winslow, Id. 16,742.

§ 11. —— Description of persons.

A person is sufficiently described in an indictment as "D. K. Olney Winter."—United States v. Winter, Case No. 16,743.

A person is properly described in an indictment by a given name used in the manner he has selected.—United States v. Winter, Case No. 16,743.

Where a statute inflicts a penalty on persons of a certain description only, it is necessary to aver all the facts requisite to show that defendant was of that description at the time of committing the act.—United States v. McCormick, Case No. 15,663.

The words "said Johnson," in a second count, indicate the Johnson mentioned and described in the first count, including his status or condition as therein stated, with reference to the charge made in the indictment.—United States v. Hendric, Case No. 15,346.

Query, whether an indictment will lie for assault and battery upon "a person unknown" without the addition "to the jurors."—United States v. Davis, Case No. 14,924.

§ 12. —— Description of property.

Money lawfully in the hands of an officer of the United States, and for which he is accountable, is money of the United States, and may be so charged in an indictment.—United States v. Watkins, Case No. 16,649.

§ 13. —— Allegation of intent.

An indictment charging an offense in the precise words of the statute creating it need not prefix to the charging words the word "unlawful," or any other word showing a wrongful intent.—United States v. Thompson, Case No. 16,490.

§ 14. —— Written or printed instrument.

An instrument may be set out by its legal effect; but, if words descriptive of the instrument are used, they must be proved.—United States v. Keen, Case No. 15,510.

§ 15. —— Surplusage.

Unnecessary words, not altering the nature of the charge, inserted by the grand jury, may be rejected as surplusage after verdict.—United States v. Larkin, Case No. 15,561.

No allegation, necessary or unnecessary, which is descriptive of what is legally essential to the charge, can be rejected as surplusage.—United States v. Howard, Case No. 15,403.

§ 16. —— Inconsistent and alternative allegations and repugnancy.

Where two allegations are sensible and consistent in the places where they occur, but are inconsistent with each other, neither can be rejected.—United States v. Dow, Case No. 14,990.

It is not charging an offense in the alternative where the language describes the same offense.—United States v. Potter, Case No. 16,078.

Use of the words "then and there," in different parts of an indictment, as rendering it bad for repugnancy. — United States v. Dow, Case No. 14,990.

§ 17. Joinder of parties and offenses.

Two or more persons charged with an offense in its nature several are not indictable jointly.—United States v. Kazinski, Case No. 15,508.

To sustain a joint indictment for the same offense, it must appear that the offense wholly arose from the joint acts of all the defendants.—United States v. McDonald, Case No. 15,667.

Where a statute makes one or more distinct acts, connected with the same transaction, indictable, they may be charged as one act.—United States v. Sander, Case No. 16,219.

Offenses of the same class may be included in the same indictment.—United States v. O'Callahan, Case No. 15,910; Same v. Fox, Id. 15,156.

Two or more counts for misdemeanor may be joined in one indictment.—United States v. Porter, Case No. 16,072.

A count for a misdemeanor and one for a felony cannot be joined in the same indictment.—United States v. Sharp, Case No. 16,265.

Separate indictments will lie for the larceny of several cows from the same place at the same time.—United States v. Goddard, Case No. 15,220.

It is not a misjoinder of offenses in different counts unless they belong to different families, or the judgments and punishments are inconsistent with each other.—United States v. Peterson, Case No. 16,037.

The doctrine of merger does not apply to misdemeanors; and an indictment for conspiracy to defraud the revenue is good, though it charge a complete offense, in addition to the conspiracy to commit it.—United States v. McDonald, Case No. 15,670.

Counts for conspiracy cannot be joined with counts for murder.—United States v. Scott, Case No. 16,241.

Riot and assault and battery may be joined in the same indictment.—United States v. McFarlane, Case No. 15,675.

A count for stealing and a count for receiving stolen goods may be contained in the same indictment.—United States v. Prior, Case No. 16,092.

Different offenses under Rev. St. §§ 5431, 5434, for which different punishments are prescribed, *held* properly charged in different counts, and joined in the same indictment, under section 1024.—United States v. Bennett, Case No. 14,572.

§ 18. Election.

In an indictment for a misdemeanor, several offenses may be joined in different counts, and the prosecution cannot be compelled to elect between them.—United States v. Devlin, Case No. 14,953; Same v. Dickinson, Id. 14,958.

Whether such offenses are properly joined can be determined only on a motion to quash or to compel an election.—United States v. Bennett, Case No. 14,572.

§ 19. Motion to quash—Grounds.

A motion to set aside or quash an indictment will not lie unless the objection appears upon

the face of the indictment.—United States v. Brown, Case No. 14,671.

A motion to quash an indictment is a proper mode of taking objections to it for defect of form or substance.—United States v. O'Sullivan, Case No. 15,974.

A defect pleadable only in abatement is not ground for quashing an indictment. — United States v. Pond, Case No. 16,067.

An indictment which fails to conclude "against the peace and dignity of the U. S." may be quashed.—United States v. Crittenden, Case No. 14,890a.

The indictment will not be quashed for want of a prosecutor's name if the witnesses were called for by the grand jury; contra where the witnesses were not sent to the grand jury by the court, and it did not appear that they were called for by the grand jury.—United States v. Lloyd, Case No. 15,616.

An indictment will be quashed as irregularly found, where the grand jury received testimony of a person not under oath.—United States v. Coolidge, Case No. 14,858.

An indictment will not be quashed because there was no previous information, hearing, and binding over.—United States v. Fuers, Case No. 15,174; Same v. Thompkins, Id. 16,483.

Where the accused shows that he has been prejudiced by irregularity or fraud in designating, summoning, and returning the grand jury, he has a remedy by motion to the court for relief.—United States v. Tallman, Case No. 16,429; Same v. Pike, Id.

An indictment for a misdemeanor will be quashed unless the name of the prosecutor is indorsed thereon as required by law, although defendant has given a recognizance.—United States v. Helriggle, Case No. 15,344; Same v. Hollinsberry, Id. 15,380.

Where a statute declaring an offense and its punishment is repealed without a provision saving pending prosecutions, an indictment previously found, but not yet tried, should be quashed on motion.—United States v. Finlay, Case No. 15,099.

A prisoner twice indicted for the same crime, who has never been arraigned under the first indictment, has no right to have it quashed before going to trial on the second.—United States v. Maloney, Case No. 15,713a.

An indictment will not be quashed because it appears upon the record that it was not found within two years after the offense was committed, as the defendant might have been a fugitive from justice.—United States v. White, Cases Nos. 16,675, 16,676.

The fact that an indictment has been quashed because of insufficient averments is no ground for quashing an information subsequently filed by the district attorney against the same person for the same offense.—United States v. Nagle, Case No. 15,852.

§ 20. —— Time of making.

A motion to quash for want of the name of a prosecutor is too late after verdict.—United States v. Lloyd, Case No. 15,616.

A motion to quash the indictment will not be heard until defendant has been taken.—United States v. Taylor, Case No. 16,437.

After the jury is sworn the court will not quash the indictment for a fatal variance, the prisoner having a right to a verdict.—United States v. Peacock, Case No. 16,019.

The court will not take notice of presentments by the grand jury on which the prosecuting attorney does not think proper to institute proceedings, and on this principle a motion to quash a presentment, after a nolle prosequi entered, will be overruled.—United States v. Hill, Case No. 15,364.

§ 21. —— Discretion of court.

It is discretionary with the court to quash an indictment, or to hold defendant to plead in abatement or demur.—United States v. Stowell, Case No. 16,409.

It is discretionary with the court whether it will quash an indictment for defect of form.—United States v. O'Sullivan, Case No. 15,974.

§ 22. —— Proceedings.

On a motion to quash an indictment for treason, *held*, that defendant's counsel would be required to file with the clerk a formal statement of the grounds upon which the motion was based.—Case of Davis, Case No. 3,621a.

An affidavit of defendant that he believed the grand jury acted upon incompetent or insufficient evidence in finding an indictment against him is not admissible on a motion to quash.—United States v. Brown, Case No. 14,671.

On a motion to quash an indictment on the ground that no evidence of defendant's guilt was adduced in support of an application for a warrant for his arrest, the court cannot inquire into the sufficiency of the evidence, but may quash the indictment, where none was given.—United States v. Shepard, Case No. 16,273.

In every case of a motion to the court for a cassetur, the facts on which it is grounded must be proved by affidavit.—United States v. Coolidge, Case No. 14,858.

A motion to quash an indictment may be heard on an agreed statement of facts without putting the defendant to plead the matters alleged as ground for the motion.—United States v. Tallman, Case No. 16,429; Same v. Pike, Id.

§ 23. Demurrer.

Where it appears upon the whole record upon an indictment for misdemeanor that the offense was committed more than two years before the indictment was found, defendant may avail himself of that defense by a general demurrer.—United States v. White, Case No. 16,678.

It is no ground for general demurrer to an indictment for a misdemeanor under Acts Va. Nov. 13, 1792, and Act 1795, p. 346, that the name of a prosecutor is not written at the foot of the indictment.—United States v. Sandford, Case No. 16,221.

On demurrer to a pleading in a criminal case, judgment is to be given against the party who has committed the first fault in pleading.—United States v. Lawrence, Case No. 15,573.

On demurrer to an indictment, where it is not suggested that defendant has any defense thereto, judgment absolute will be rendered against him on overruling the demurrer.—United States v. Quinn, Case No. 16,110.

§ 24. Amendment and withdrawal.

The caption or title is no part of the indictment, and may be amended after verdict as a clerical error.—United States v. Thompson, Case No. 16,490.

An information may be amended by filling up the blank of the date of the commission of the offense.—United States v. Evans, Case No. 15,063.

The court, as a condition of permitting defendant to withdraw his demurrer after argument, may require him to waive the right to move in arrest of judgment for any matter apparent upon the indictment.—United States v. Watkins, Case No. 16,649.

§ 25. Variance.

The proof must correspond with the averments, though the offense is stated with greater particularity than is required by law.—United

States v. Brown, Case No. 14,666; Same v. Porter, Id. 16,074.

A variance between the indictment and the evidence is immaterial if the substance of the matter be found.—United States v. Howard, Case No. 15,403.

Literal variances, which are not fatal, are those which do not make a word different in sense and grammar,—which leave the sound and sense in substance the same.—United States v. Hinman, Case No. 15,370; Same v. Mason, Id. 15,736.

An indictment for a crime committed on the high seas in the outer road off St. Domingo, on an American vessel, is supported by proving the offense to have been committed in the inner road, and in port.—United States v. Stevens, Case No. 16,394.

In case of misnomer, a variance is fatal only when there is a misnomer of one whose existence is essential to the offense charged.—United States v. Howard, Case No. 15,403.

In an indictment for committing an offense on shipboard under Act 1825, c. 276, §§ 22, 25, the particular ownership of the vessel is immaterial, and a misnomer of the owner is of no consequence.—United States v. Howard, Case No. 15,403.

Material matter, although alleged under a videlicet, is traversable, and must be proved as laid.—United States v. Burnham, Case No. 14,690.

A draft signed "Jos. Johnson" is not admissible under a count averring it to be signed "Joseph Johnson, President."—United States v. Keen, Case No. 15,510.

Mere surplusage will not vitiate an indictment and need not be proved.—United States v. Howard, Case No. 15,403.

A statement that defendant was a bookkeeper in a certain place *held* not equivalent to an averment that he was a clerk or servant employed therein.—United States v. Forrest, Case No. 15,131.

Unless the date stated in an indictment is of the essence of the crime, it need not be proved as alleged.—Johnson v. United States, Case No. 7,418; United States v. Blaisdell, Id. 14,608.

§ 26. Conviction of offense included in charge.

The defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment.—United States v. Carr, Case No. 14,732.

Upon an indictment at common law for an assault with intent to kill, defendant may be found guilty of a simple assault only.—United States v. Cropley, Case No. 14,892.

Upon an indictment for burglary the prisoner may be found guilty of larceny only.—United States v. Dixon, Case No. 14,968.

On an indictment for a felonious entry and taking of goods from a storehouse, *held*, that defendant might be found guilty of simple larceny.—United States v. Read, Case No. 16,126.

On a joint indictment against two or more for a statutory misdemeanor, defendants not personally present may be found guilty as principals in the second degree if they participated in the fraud.—United States v. Harries, Case No. 15,309.

§ 27. Waiver of defects and objections.

Pleading to an indictment in which a person is charged with having committed an act cannot be construed to waive a right which he would have possessed had he been charged with having advised the act.—United States v. Burr, Case No. 14,693.

INDORSEMENT.

Filling in or striking out indorsements on bill or note at trial, see "Bills and Notes," § 103.
Of bill of exchange or promissory note, see "Bills and Notes," §§ 28–44.
—— of lading, see "Shipping," § 140.

INFANTS.

§ 1, Property and conveyances. § 2, Contracts. § 3, Actions. § 4, Guardian ad litem.

See, also, "Adoption,"; "Apprentices"; "Guardian and Ward"; "Parent and Child."
Bankruptcy, see "Bankruptcy," § 9.
Custody and support on divorce of parents, see "Divorce," § 3.
Employment as seamen, see "Seamen," §§ 17, 66.
Enlistment of minors in army and navy, see "Army and Navy," § 5.

§ 1. Property and conveyances.

A conveyance of land by a minor is voidable, not void. Where he disaffirms on coming of age by conveying to another, the latter, though taking with notice of the prior deed, is entitled to a decree quieting his title, without restoring the consideration for the voidable conveyance.—Nettleton v. Morrison, Case No. 10,127.

A contract for the sale of infant's estate, made by a mere volunteer, is void, and cannot be ratified by a court of equity.—Livingston v. Jordan, Case No. 8,415.

§ 2. Contracts.

A minor partner is not liable on partnership contracts.—Sheafe v. Kimball, Case No. 12,729a.

A minor may recover wages as a seaman, under a contract made personally with him, if he has no parent, guardian, or master entitled to receive his earnings.—The Melissa, Case No. 9,400.

The contract of a minor is voidable at any time, but he can only recover the value of his services after an allowance to the owner for any injury sustained by reason of its avoidance.—The Hotspur, Case No. 6,720.

A contract by a minor to serve as a seaman with the assent of his father does not bind the minor or his father after he attained his majority.—Coffin v. Shaw, Case No. 2,951.

On a contract made with an infant for necessaries, plaintiff can only recover the value of the articles furnished. All other contracts are voidable.—Hyer v. Hyatt, Case No. 6,977.

Acknowledgment, after maturity, of a debt contracted in minority, is not sufficient, unless the promisor was aware that he was discharged from the debt because of minority.—McCormick v. Walker, Case No. 8,728.

Acknowledgment by defendant, when of full age, of a contract made by him while an infant, if made after suit brought, will not avail plaintiff.—Hyer v. Hyatt, Case No. 6,977.

§ 3. Actions.

Minor seamen over the age of 14 may sue in their own names for wages or salvage.—Brown v. The Henry Pratt, Case No. 2,010.

A guardian ad litem in such a case will not be admitted to sue in forma pauperis.—Brown v. The Henry Pratt, Case No. 2,010.

Quære: Whether the defense of libelant's infancy is available otherwise than by plea to his competency to sue in his own name.—The Melissa, Case No. 9,400.

Infancy cannot be given in evidence upon a plea of nil debet to an action of debt on a prom-

issory note in Virginia.—Young v. Bell, Case No. 18,152.

In covenant against two, if one pleads and shows infancy, nolle prosequi may be entered as to him, and judgment had against the other.—Kurtz v. Becker, Case No. 7,951.

An action for the personal injury of a minor must be in the name of the child, and the damages recovered will be for the use and benefit of the child, and not of the parent.—Plummer v. Webb, Case No. 11,234.

As parties to suits in admiralty, see "Admiralty," § 50.

§ 4. Guardian ad litem.

In a suit against an infant, notice should be served on him and the guardian ad litem appointed.—Carrington v. Brents, Case No. 2,446.

In an action by a minor to recover wages as seaman, the respondent is not entitled to require the appointment of a guardian ad litem or next friend for the libelant.—Wicks v. Ellis, Case No. 17,614.

A general guardian cannot voluntarily appear for minor defendants, but they must be served with process, and a guardian ad litem appointed for them, when brought into court.—Fitch v. Cornell, Case No. 4,834.

The court, on motion, will appoint a guardian ad litem for infant defendant.—Barclay v. Govers, Case No. 973.

A motion for the appointment of a guardian to an infant party must be in writing, and must state the name of the person proposed, and his consent to be appointed.—Rhinelander v. Sanford, Case No. 11,739.

Where infants are brought into court, a guardian ad litem may be appointed without a commission.—Reinhart v. Orme, Case No. 11,682.

The objection that notice was not served on infants on the appointment of a guardian ad litem cannot be taken collaterally.—Nelson v. Moon, Case No. 10,111.

The court may appoint a standing officer, and discharge him from all liability for costs, where the infant is unable to produce a responsible person as guardian ad litem.—Brown v. The Henry Pratt, Case No. 2,010.

A statute guardian cannot, except by authority of statute, represent his ward in court in a matter in which his interest is opposed to that of the ward.—Mathewson v. Sprague, Case No. 9,278.

Equity will not decree against infants without full proof, though their guardian ad litem confesses the ground of action.—Walton v. Coulson, Case No. 17,132.

Infants cannot be prejudiced by misstatements or omissions of their guardian in his answer, and equity will decree according to the facts of the case.—Lenox v. Notrebe, Case No. 8,246c.

A minor, suing by his prochein ami, will be protected against the acts of the latter done in bad faith.—The Etna, Case No. 4,542.

INFORMATION.

Criminal accusation, see "Indictment and Information."
Of forfeiture, see "Internal Revenue," § 83.

INFORMERS.

Share in forfeiture, see "Forfeitures," §§ 15–27; "War," § 21.
—— in penalties, see "Customs Duties," § 122; "Penalties," § 4.

INFRINGEMENT.

Of copyright, see "Copyrights," §§ 23–49.
Of patent, see "Patents," §§ 164–265.
Of trade-mark, see "Trade-Marks and Trade-Names," §§ 18–34.

INHERITANCE.

See "Descent and Distribution."

INJUNCTION.

I. NATURE AND GROUNDS IN GENERAL.

§ 1, Nature and form of remedy. § 2, Grounds for relief. § 3, Consent of parties. § 4, Proceedings at law as condition precedent.

II. SUBJECTS OF PROTECTION AND RELIEF.

§ 5, Actions and other legal proceedings. § 6, Protection of property. § 7, Contracts. § 8, Public officers and boards and municipalities. § 9, Personal rights.

III. ACTIONS FOR INJUNCTIONS.

§ 10, Parties and notice. § 11, Laches. § 12, Pleading. § 13, Incidental relief.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Nature, Grounds, and Proceedings to Procure.

§ 14, Nature of remedy. § 15, Grounds. § 16, Necessity of filing bill in equity. § 17, Bond or undertaking. § 18, Notice of application. § 19, Granting stay or restraining order. § 20, Hearing and evidence. § 21, Decision. § 22, Time of granting. § 23, Granting by judge in vacation.

(B) Continuing, Modifying, Vacating, or Dissolving.

§ 24, Continuing preliminary injunction. § 25, Effect of dismissal of bill. § 26, Dissolution on filing bond and liability in bond. § 27, Delay as ground of dissolution. § 28, Dissolution upon denial in answer. § 29, New matter in answer. § 30, Dissolution of an injunction granted "until answer." § 30a, Notice of motion to dissolve. § 31, Time of dissolving. § 32, Laches. § 33, Discretion of court. § 34, Decision.

V. VIOLATION AND PUNISHMENT.

§ 35, What constitutes a violation. § 36, Persons liable. § 37, Necessity and sufficiency of service of writ. § 38, Necessity of intent. § 39, Proceedings for punishment. § 40, Punishment. § 41, Release from operation of injunction.

Effect of removal of cause, see "Removal of Causes," § 47.
In actions by assignees in bankruptcy, see "Bankruptcy," § 365.
In foreclosure proceedings, see "Mortgages," § 37.
To preserve mining property, see "Mines and Minerals," § 10.

To restrain particular acts or proceedings.

Actions by and against bankrupt, see "Bankruptcy," §§ 508–512.
Collection of taxes, see "Internal Revenue," § 19; "Taxation," § 14.
Enforcement of liens, see "Bankruptcy," §§ 282, 284–286.
Foreclosure of mortgage, see "Mortgages," § 20.

Infringement of copyright, see "Copyrights," §§ 46, 47.
—— of patent, see "Patents," §§ 232–252.
—— of trade-mark, see "Trade-Marks and Trade-Names," §§ 32, 33.
Issue of bonds, see "Municipal Corporations," § 36.
Levy of execution, see "Execution," § 12.
Nuisances, see "Nuisances," § 3.
Obstruction of navigable waters, see "Navigable Waters," §§ 9, 15.
Proceedings of state court, see "Courts," § 113.
—— on judgment, see "Judgment," § 41.
Publication of manuscript, see "Literary Property," §§ 1, 5.
Transfer of property by bankrupt, see "Bankruptcy," §§ 147–153.
Waste, see "Waste," § 3.

I. NATURE AND GROUNDS IN GENERAL.

§ 1. Nature and form of remedy.

An injunction will not issue to restrain a completed act.—Baring v. Erdman, Case No. 981.

Act Pa. March 21, 1806, § 2, in relation to statutory remedies, does not affect the remedy by injunction.—Mason v. Boom Co., Case No. 9,232.

Equity may inquire into the motive of one seeking an injunction.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

It is no objection to the granting of an injunction that defendant acts under the authority of the law, if it is unconstitutional or he exceeds or abuses his power.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

But in such case it will only be granted when the right is clear.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

§ 2. Grounds for relief.

In the case of a lease of a railroad with guaranty of payment of rent by other interested roads, *held*, that equity would take jurisdiction of a bill to compel payment, and to restrain the guarantors from doing acts prejudicial to the rights of the lessors.—St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co, Cases Nos. 12,236, 12,237.

Equity will not interfere to prevent a threatened wrong unless the danger be imminent, and the injury is irremediable in any other form.—Spooner v. McConnell, Case No. 13,245.

The kind of injury impending, and the degree of its danger as a ground for an injunction considered.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

Equity has cognizance of a bill brought against the counties through which a railroad runs to restrain sales of its lands for taxes to prevent a multiplicity of suits and a cloud on title.—Union Pac. R. Co. v. McShane, Case No. 14,382.

Equity has jurisdiction to restrain an act as a nuisance where the injunction is necessary to prevent multiplicity of suits or suppress interminable or oppressive litigation.—Parker v. Winnipiseogee Lake Cotton & Woolen Mfg. Co., Case No. 10,752.

§ 3. Consent of parties.

An order for an injunction will not be made in an improper case, even on the consent of both parties to the suit, more especially where the rights of third parties may be concerned.—Whelpley v. Erie Ry. Co., Case No. 17,504.

§ 4. Proceedings at law as condition precedent.

The institution of an action at common law is not an indispensable prerequisite to a bill for an injunction.—United States v. Parrott, Case No. 15,998.

Where the right is plain, and the remedy at law inadequate, an injunction may be granted without a trial at law.—Cutting v. Gilbert, Case No. 3,519.

II. SUBJECTS OF PROTECTION AND RELIEF.

§ 5. Actions and other legal proceedings.

Injunction against the prosecution of an action at law denied, unless complainant would confess judgment in such action.—Mathews v. Douglass, Case No. 9,276. CONTRA, see Lawrence v. Bowman, Case No. 8,134.

Action at law not restrained where the allegations set up a defense proper for the consideration of a jury.—Day v. Goodyear, Case No. 3,678.

Where a cause is ready for trial, an injunction will not be granted so as to stay the trial.—Mutter v. Hamilton, Case No. 9,974.

Proceedings at law prior to the judgment may be enjoined.—Lawrence v. Bowman, Case No. 8,134.

Equity may enjoin an action at law, on promissory notes, where complainant shows a prima facie title, although he is not a party to the action at law.—Fisher v. Lord, Case No. 4,821.

Equity may enjoin an action at law, based upon a registered deed, against the grantee in a prior unregistered deed, with notice of which the registered deed was taken.—Lonsdale Co. v. Moies, Case No. 8,496.

A circular addressed to policy holders, stating that the company would not insist upon a forfeiture of policies for nonpayment of interest, is a waiver of a forfeiture, available in a court of law, and a suit will not lie to enjoin the company from setting up the forfeiture by way of defense in an action at law.—Robinson v. St. Louis Mut. Life Ins. Co., Case No. 11,964.

A suit may be brought in a federal court to establish a defense, resting upon equitable grounds, to an action at law brought in such court by a nonresident; and the suit at law may be restrained in the meantime.—Ely v. Elliott, Case No. 4,429a.

Equity will not enjoin defense of statute of limitations on the ground that the cause of action was originally good and valid.—Andrae v. Redfield, Case No. 367.

A threat to commence a suit in a state court on a city ordinance in conflict with a commercial regulation of congress is no ground for an injunction in the federal circuit court, as there is an adequate remedy at law by defense in the state court, and an ultimate review by writ of error in the supreme court of the United States.—Rogers v. Cincinnati, Case No. 12,008.

Injunction granted to restrain action on single bill by payee where the same was given under agreement that it should be paid in services which maker has always been ready to perform.—Ashton v. McKim, Case No. 584.

Under peculiar circumstances, the court refused to stay proceedings in an action on a stay bond given in a state court, unless defendant instituted a plenary auxiliary suit in equity to restrain the prosecution of the action, so that a review might be had.—Merchants' Nat. Bank v. Leland, Case No. 9,452.

An injunction to stay an ejectment suit until matters of equity can be examined will not be allowed unless judgment in the ejectment be entered.—Turner v. American Baptist Missionary Union, Case No. 14,251.

In the case of a defective execution of a valid power of sale of infant's lands, where the infant had received its full value, and had never offered to return it, *held*, that a bill in equity would lie to perpetually restrain the infant from

maintaining ejectment.—Segee v. Thomas, Case No. 12,633.

Relief will be granted where a tenant, pending ejectment, has acquired a title paramount, not available either as a defense, or after recovery, to sustain an action to regain possession. —Bright v. Boyd, Case No. 1,875.

An injunction to stay proceedings in 92 suits in ejectment, where the parties, etc., were the same in each suit, until one or more could be tried, denied, as a court of law could furnish adequate relief by a consolidation rule.—Peters v. Prevost, Case No. 11,032.

After a question of title to lands has thrice been decided by competent courts, a court of equity will enjoin further proceeding at law.—Craft v. Lathrop, Case No. 3,318.

Where a lessee under a lease renewable for terms aggregating 500 years had made valuable improvements, *held*, that an action for use and occupation would be stayed until the lessor had appointed an assessor to make valuation of the property for the purpose of ascertaining the rental, as required by the terms of the lease.—Tscheider v. Biddle, Case No. 14,210.

A corporation defendant in a suit in a federal court may be enjoined, pending the suit, from taking proceedings for a dissolution, or for the appointment of a receiver, or for the distribution of its assets. Act Sept. 24, 1789, § 14.—Fisk v. Union Pac. R. Co., Case No. 4,830.

Injunction will not be granted to restrain patentee from bringing suits on his patent before the patent is adjudged invalid.—Asbestos Felting Co. v. United States & Foreign Salamander Felting Co., Case No. 570.

§ 6. Protection of property.

Proceedings, whether connected with crime or not, which tend to the destruction of property, may be enjoined.—Louisiana State Lottery Co. v. Fitzpatrick, Case No. 8,541.

Equity will protect by injunction a statutory right, where the title of complainant is free from doubt.—Minturn v. Larue, Case No. 9,646.

An injunction will lie to restrain a trespass which causes an irreparable injury.—Chapman v. Toy Long, Case No. 2,610; United States v. Parrott, Id. 15,998.

Equity will not enjoin a threatened trespass to real estate, unless the trespass be one going to the destruction of the substance of the estate. —Le Roy v. Wright, Case No. 8,273.

An action by an individual abutting proprietor to restrain the construction of a street railway cannot be maintained without showing special damages.—Osborne v. Brooklyn City R. Co., Case No. 10,597.

An injunction may issue to restrain waste.— United States v. Parrott, Case No. 15,998.

An injunction will not be granted to restrain waste and trespass unless complainant show that there are no facts to warrant its denial.—Perry v. Parker, Case No. 11,010.

The occupation and the erection of buildings on land in dispute by one of two rival claimants will not be enjoined before the title is judicially determined.—Le Roy v. Wright, Case No. 8,273.

An important function of equity is to prevent threatened wrongs to property, and it has jurisdiction of a bill by bondholders to enjoin railroad commissioners from putting in force a statute alleged to be unconstitutional, and injurious to their rights.—Bondholders v. Railroad Com'rs, Case No. 1,625.

See, also, "Waste," § 3.

§ 7. Contracts.

Violation of a lawful contract may be enjoined, though it is of such a nature that specific performance cannot be enforced.—Singer Sewing-Mach. Co. v. Union Button-Hole & Embroidery Co., Case No. 12,904.

Violation of an existing lawful contract may be enjoined, although it is terminable at the option of one of the parties alone, unless this makes the whole contract inequitable.—Singer Sewing-Mach. Co. v. Union Button-Hole & Embroidery Co., Case No. 12,904.

A contemplated change of gauge in the track which will prevent a railroad performing its agreement with a connecting line for through transportation, under which the lines were built, will be enjoined.—Columbus, P. & I. R. Co. v. Indianapolis & B. R. Co., Case No. 3,047.

Where the joint interest of parties to a contract, in its subject-matter, has not yet commenced, the court will not enjoin acts of some of the parties, at the instance of others.—Sloo v. Law, Case No. 12,956.

One who has broken a mutual covenant cannot enjoin the other parties from violating the covenant.—Clum v. Brewer, Case No. 2,910.

Where the defense to a promissory note is fraud, the proper order is to restrain its negotiation and permit the parties to proceed at law.—Mason v. Jones, Case No. 9,240.

§ 8. Public officers and boards and municipalities.

A trespass by an officer of the Freedmen's Bureau, in the levying of an execution upon personal property, cannot be enjoined by a court of equity.—Herron v. Runkle, Case No. 6,428.

The federal circuit court has jurisdiction of a bill by nonresident creditors to restrain railroad commissioners from actions injurious to their rights, before such officers have taken positive action.—Piek v. Chicago & N. W. Ry. Co., Case No. 11,138.

Nonresident taxpayer cannot sue to enjoin issue of railroad aid bonds, unless he has an interest not common to the community.—Adams v. Douglas County, Case No. 52.

A proceeding to collect by distress the penalty provided for selling lottery tickets without having paid the tax will be enjoined.—Bornio v. Stockdale, Case No. 1,662.

State officers proceeding under penal laws will be enjoined from interfering with the agents of a corporation for acts done by them in the exercise of rights conferred by a charter which is not subject to repeal.—Louisiana State Lottery Co. v. Fitzpatrick, Case No. 8,541.

§ 9. Personal rights.

The right set up by a person as a citizen of the United States to navigate navigable waters, as an abstract right, is one which equity cannot protect from violation.—Spooner v. McConnell, Case No. 13,245.

Publication of a libel injurious to plaintiff's business will be enjoined only when it appears that the statement is malicious as well as false. —Celluloid Mfg. Co. v. Goodyear Dental Vulcanite Co., Case No. 2,543.

III. ACTIONS FOR INJUNCTIONS.

§ 10. Parties and notice.

On a bill by the owner to enjoin ejectment, the tenant in possession must be named as co-complainant.—Hyde v. Folger, Case No. 6,971.

A person may be enjoined from doing an act as proxy for a shareholder, although his principal is not joined as a party.—Brown v. Pacific Mail S. S. Co., Case No. 2,025.

Notice of the application need not be given. —Love v. Fendall's Trustees, Case No. 8,547; Perry v. Parker, Id. 11,010.

The notice required (Act March, 1793, § 5) of an application for an injunction may be waived by an appearance.—Marsh v. Bennett, Case No. 9,110.

The fact that some defendants had not been served will not prevent issuance of injunction against those served.—Brown v. Pacific Mail S. S. Co., Case No. 2,025.

§ 11. Laches.

A delay to file a bill to restrain ejectment until the day preceding that set for the trial, where there was a change of counsel, *held* not such laches as would prevent the court entertaining the bill.—Lawrence v. Bowman, Case No. 8,134.

§ 12. Pleading.

The application should contain a description of the property sought to be protected, and appropriate allegations of the danger or loss impending.—Blackburn v. Stannard, Case No. 1,468.

It is not indispensable that a bill for an injunction should contain a prayer for discovery.—Lawrence v. Bowman, Case No. 8,134.

An injunction to prevent the removal of a colored person who has petitioned for freedom will not be granted upon a mere statement of plaintiff's apprehension.—Jenny v. Crase, Case No. 7,285.

Allegations upon information and belief merely, unsupported by other proof, are not sufficient to sustain an injunction.—In re Bloss, Case No. 1,562.

A demurrer to a bill praying an injunction must be decided before a motion for the injunction can be heard.—Ketchum v. Driggs, Case No. 7,735.

That a defendant is in contempt in a suit against himself and another will not prevent him from filing an answer in another suit against himself only, though relating to the same matter.—Mason v. Jones, Case No. 9,239.

Matter of avoidance in an answer responsive to the bill on a motion for an injunction is treated as the affidavit of defendant. On the trial it must be proved.—Tobin v. Walkinshaw, Case No. 14,068.

Where the amount in dispute is great, and the inability of the party to respond is greatly disproportioned to such amount, such insolvency is a proper subject for an allegation in the bill.—United States v. Parrott, Case No. 15,998.

The amendment of a bill upon which an injunction has been granted before answer filed will not affect the injunction granted on the original bill.—Read v. Consequa, Case No. 11,606.

Where an injunction is granted on a bill to stay proceedings in a suit at law commenced by a foreigner, the court will not permit the answer to be filed by his attorney, upon whom the subpœna was served.—Read v. Consequa, Case No. 11,606.

Affidavits may, after answer, be read by the plaintiff to support the injunction, as well as by the defendant to repel it; and this, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer.—Poor v. Carleton, Case No. 11,272.

§ 13. Incidental relief.

By the practice of the Third circuit, no money penalty is inserted in an injunction.—Low v. Hauel, Case No. 8,560.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) NATURE, GROUNDS, AND PROCEEDINGS TO PROCURE.

§ 14. Nature of remedy.

The purpose of a preliminary injunction is to preserve the existing state of things until the rights of the parties can be fairly investigated, and it will not be granted when such preservation is of no importance.—American Nicholson Pavement Co. v. Elizabeth, Case No. 312.

A preliminary injunction will be granted in a restrictive form, although obedience should require the performance of substantive acts.—Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., Case No. 2,990.

§ 15. Grounds.

Where complainant's equity is not clear, a preliminary injunction should not be granted unless the damage is irreparable.—Canfield v. State Nat. Bank, Case No. 2,382.

Where the injury threatened is of a character not easily remedied, if the injunction be refused, and there is no denial that the act charged is contemplated, a temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted.—United States v. Duluth, Case No. 15,001.

An injunction will not be granted, or a receiver appointed, where it is not apparent that the ultimate determination of the suit in favor of the plaintiff is reasonably probable.—Wilkinson v. Dobbie, Case No. 17,670.

A preliminary injunction will not be granted to restrain a railroad company from continuing, as ultra vires, a business competing with complainant.—Camblos v. Philadelphia & R. R. Co., Case No. 2,331.

Where a suit in equity is merely for the enforcement of a legal right, and there is any disputable question upon the merits, it is not a proper case for a preliminary injunction.—Murtagh v. Philadelphia, Case No. 9,969.

A temporary writ will be granted where, without it, great injury may happen to the complainant, and no injury can result from it to the defendant.—Pullan v. Cincinnati & C. Air-Line R. Co., Case No. 11,461.

A temporary injunction will not be granted to restrain the construction of a dike in the plan of improvement of a river directed by the secretary of war under an appropriation of congress.—Schuyler Steam Towboat Line v. Newton, Case No. 12,496.

§ 16. Necessity of filing bill in equity.

An injunction will be refused when there has been a failure to file a bill in equity, as there is, in such a case, nothing upon which a motion for an injunction can rest.—Wilson v. Childs, Case No. 17,796.

§ 17. Bond or undertaking.

The remedy for enforcement of an injunction bond is an action thereon. A court of equity cannot order the obligors to pay the damages sustained by reason of the injunction.—Merryfield v. Jones, Case No. 9,486.

Where an injunction has been dissolved, and afterwards reinstated, and is still pending, no suit can be maintained on the injunction bond as for a breach of it.—Bentley v. Joslin, Case No. 18,232.

An action will not lie in the federal court upon a bond conditioned to pay all damages awarded upon final hearing or upon dissolution of the injunction, where no damages are awarded upon such final hearing or dissolution, though action might be maintained on such a bond in the state court.—Deakin v. Lea, Case No. 3,696.

§ 18. Notice of application.

A temporary injunction cannot be issued by a federal court, except on reasonable notice to the adverse party.—Mowrey v. Indianapolis & C. R. Co., Case No. 9,891; Wilson v. Stolley, Id. 17,839; Wynn v. Wilson, Id. 18,116.

The provision of the judiciary act of 1793 requiring reasonable notice of a motion for a pre-

liminary injuncton is repealed by Act June 22, 1874.—Yuengling v. Johnson, Case No. 18,195.

Notice to a corporation at its office of application for injunction is notice to the directors, but not to stockholders who are not directors. —Brown v. Pacific Mail S. S. Co., Case No. 2,025.

A defendant whose affidavit is used to oppose the application cannot set up want of sufficient notice.—Brown v. Pacific Mail S. S. Co., Case No. 2,025.

Notice, previous to motion for an injunction, required by Act March 2, 1793, § 5, may be waived by appearance and filing answer.—Bradley v. Reed, Case No. 1,785.

§ 19. Granting stay or restraining order.

On the filing of a bill the court may grant a stay order pending motion for an injunction.—Fanshawe v. Tracy, Case No. 4,643.

At the time of granting an order to show cause against a motion for a preliminary injunction, an immediate restraining order may be granted, to be in force until the decision of the motion, for the purpose of preventing irreparable injury to complainant. Rev. St. §§ 718, 4921.—Yuengling v. Johnson, Case No. 18,195.

§ 20. Hearing and evidence.

The defendant will be heard in opposition to the motion, and he is permitted to file his answer.—Wilson v. Stolley, Case No. 17,839.

Affidavits will be received in behalf of both parties on application for an injunction.—Wilson v. Stolley, Case No. 17,839.

A motion for an interlocutory injunction is heard on affidavits alone, without the right of cross-examination.—Day v. Boston Belting Co., Case No. 3,674.

An affidavit is not an indispensable prerequisite to the issuance of an injunction, but other proof may be accepted.—Schermehorn v. L'Espenasse, Case No. 12,454.

An affidavit made by defendant to oppose a motion for an injunction, which denies a material allegation of the bill, must be construed as an admission of all other allegations not controverted.—Brown v. Pacific Mail S. S. Co., Case No. 2,025.

To show waste, affidavits are admissible, on motion for a preliminary injunction, even after answer filed.—Bradley v. Reed, Case No. 1,785.

On motion for injunction, the affidavit of defendant is competent evidence against the oath of plaintiffs in the bill.—Baker v. Taylor, Case No. 782.

§ 21. Decision.

On motion for preliminary injunction, court will not decide fairly disputable questions of law and fact.—Bailey Wringing Mach. Co. v. Adams, Case No. 752; Baring v. Erdman, Id. 981.

Judges of federal courts will not follow the opinions of each other in deciding motions for preliminary injunctions.—Many v. Sizer, Case No. 9,057.

Where right to temporary injunction depends merely on the interpretation of a written instrument, the court should interpret it, and grant or refuse the injunction accordingly.—Clum v. Brewer, Case No. 2,909.

The court may take into consideration the existence of actual conflict or imminent danger of violent collision between two authorities, in determining the expediency of awarding the writ.—Crane v. McCoy, Case No. 3,354.

The court will not, except in a very clear case, decide that an act of the legislature is invalid, on a motion for a provisional injunction.—Lothrop v. Stedman, Case No. 8,519.

Decisions upon preliminary hearing are not conclusive either on court or parties in the subsequent disposition of the case by final decree. —Andrae v. Redfield, Case No. 367.

§ 22. Time of granting.

An injunction requiring a party to do a particular thing, as to surrender the possession of certain premises, is never allowed before final hearing.—Kamm v. Stark, Case No. 7,604.

An injunction will not be granted nor a receiver appointed pending a plea to the jurisdiction of the court, but an immediate hearing of the plea will be ordered.—Ewing v. Blight, Case No. 4,590. But see Fremont v. Merced Min. Co., Case No. 5,095.

Complainant cannot fix a time for hearing the motion for an injunction so far ahead as to embarrass defendant.—Walworth v. Cook County, Case No. 17,136.

§ 23. Granting by judge in vacation.

Injunctions are allowed to be issued by the district judge in vacation, under Act Feb. 13, 1807, but such writ expires at the commencement of the term next succeeding its allowance. —Gray v. Chicago, I. & N. R. Co., Case No. 5,713.

But the justices of the supreme court have power to grant injunctions in vacation which do not expire with the vacation.—Gray v. Chicago, I. & N. R. Co., Case No. 5,713.

(B) CONTINUING, MODIFYING, VACATING, OR DISSOLVING.

§ 24. Continuing preliminary injunction.

It is in the sound discretion of the court to continue an injunction, even after answer, where the nature and circumstances of a case require it, and where justice will be attained by that course.—Nelson v. Robinson, Case No. 10,114.

The continuance of an injunction after answer is in the discretion of the court.—Poor v. Carleton, Case No. 11,272.

Transactions set forth in a supplemental bill being of the same character as those set forth in the original bill, *held*, that an injunction previously issued should be extended to include them.—Parkhurst v. Kinsman, Case No. 10,760.

§ 25. Effect of dismissal of bill.

A provisional injunction granted on the filing of the bill falls with the dismissal of the bill.—Coleman v. Hudson River Bridge Co., Case No. 2,983.

§ 26. Dissolution on filing bond and liability on bond.

Rev. St. Nev. § 1182, giving authority to require security from plaintiff pending the litigation, or, in default, to dissolve any injunction in his favor, relates only to pending cases, not to cases already in judgment and closed.—Eureka Consol. Min. Co. v. Richmond Min. Co., Case No. 4,549.

§ 27. Delay as ground of dissolution.

A delay in the prosecution of a bill in equity is no ground of dissolving an injunction continued to the hearing, where defendant resides abroad, beyond the reach of the process of the court.—Read v. Consequa, Case No. 11,606.

An injunction will be dissolved where it appears that complainant has been guilty of intentional delay in prosecuting his cause.—Bradley v. Reed, Case No. 1,785.

Mere delay in the issuing of subpœna after an injunction has been granted is not a sufficient ground for dissolving it, where it happened

through inadvertence and mistake. — Schermehorn v. L'Espenasse, Case No. 12,454.

§ 28. Dissolution upon denial in answer.
In ordinary cases the injunction will be dissolved, of course, where the answer denies the whole merits.—Mittleburger v. Stanton, Case No. 9,676; Poor v. Carleton, Id. 11,272.

Denials and allegations upon information and belief only are ineffectual to move the court to dissolve a preliminary injunction.—Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., Case No. 2,990; Farmer v. Calvert Lithographing, etc., Co., Id. 4,651; Nelson v. Robinson, Id. 10,114; Poor v. Carleton, Id. 11,272; United States v. Parrott, Id. 15,998, 15,999; Same v. Samperyac, Id. 16,216a.

Such denial will not be deemed sufficient because the allegations of the pleadings are not sworn to from personal knowledge.—United States v. Parrott, Case No. 15,999.

An injunction will be dissolved on bill and answer where the charges are denied, though in part on information, where that part was corroborated by the bill.—Carter v. Carlisle, Case No. 2,474.

To entitle defendant to a dissolution of an injunction on the answer, the denial must be of facts, and not of conclusions.—United States v. Carlisle, Case No. 14,724.

In order to warrant the dissolution of an injunction on the coming in of the answer, there must be a positive denial of all the material facts. —Nelson v. Robinson, Case No. 10,114; Poor v. Carleton, Id. 11,272; United States v. Parrott, Id. 15,998.

An averment in the answer, not responsive to any allegation in the bill, is not per se evidence against complainant on a motion to dissolve an injunction.—Robinson v. Cathcart, Case No. 11,946.

The answer in chancery of a corporate body, under its common seal, denying the equity of the bill, is sufficient to warrant a denial of an injunction, or to dissolve it if granted.—Haight v. Morris Aqueduct, Case No. 5,902.

§ 29. New matter in answer.
On a motion to dissolve an injunction, matters set up by way of avoidance in the answer responsive to the bill should be deemed on such motion equivalent to an affidavit by defendant. —United States v. Parrott, Case No. 15,998.

§ 30. Dissolution of an injunction granted "until answer."
An injunction till answer will not be dissolved until all of the defendants who are interested have answered.—Robinson v. Cathcart, Case No. 11,946.

§ 30a. Notice of motion to dissolve.
Notice of a motion to dissolve an injunction must be given, unless the cause has been set down for dissolution, in a reasonable time before the motion is made.—Wilkins v. Jordan, Case No. 17,665.

A notice to dissolve an injunction must be given 10 days before the term. If given in term, a term's notice is required.—Stoddert v. Waters, Case No. 13,472.

The court, at an adjourned session, will not hear a motion to dissolve an injunction upon notice given after the first session of the term. —Burford v. Ringgold, Case No. 2,152.

§ 31. Time of dissolving.
Lack of jurisdiction is ground of vacating temporary injunction at any time.—Adams v. Douglas County, Case No. 52.

An injunction will be dissolved for want of equity in the bill, upon motion and notice, at any time.—Kidwell v. Masterson, Case No. 7,758.

If the answer be filed in term time, the court will hear a motion to dissolve the injunction at any time upon reasonable notice.—Caldwell v. Walters, Case No. 2,305.

Circuit and district judges may dissolve injunctions in vacation.—Adams v. Douglas County, Case No. 52.

§ 32. Laches.
A motion made after five years to dissolve an injunction absolutely, without an answer, will be denied.—Read v. Consequa, Case No. 11,606.

§ 33. Discretion of court.
In cases of irreparable mischief, the dissolution of an injunction rests in the sound discretion of the court, whether applied for before or after answer.—Poor v. Carleton, Case No. 11,272.

§ 34. Decision.
A motion to dissolve a preliminary injunction issued upon the bill, by consent, must be considered solely upon the questions raised by the answer.—Farmer v. Calvert Lithographing, etc., Co., Case No. 4,651.

V. VIOLATION AND PUNISHMENT.

See, also, "Patents," §§ 251, 252.

§ 35. What constitutes a violation.
Where an injunction restraining proceedings is served upon an attorney during the argument before the court, he will not be held guilty of a contempt in proceeding with the argument and handing up his papers, where he states to the court that he has been enjoined, and does nothing further.—In re South Side R. Co., Case No. 13,190.

A mortgagee of chattels, who has been enjoined from enforcing his mortgage, is guilty of contempt, where he replevies the chattels.—In re Feeny, Case No. 4,715.

§ 36. Persons liable.
The fact that the chief engineer of a steamboat owned by a foreign corporation is a mere servant of the corporation, and subject to the master's orders, is no defense against an attachment for violating an injunction, served upon him in a suit against the corporation, to which he was made a party.—Sickels v. Borden, Case No. 12,833.

A writ of injunction cannot be the foundation for an attachment against any person, except perhaps a defendant served with the bill of complaint, where it refers merely to the bill for a description of the thing enjoined.—Whipple v. Hutchinson, Case No. 17,517.

§ 37. Necessity and sufficiency of service of writ.
An injunction against a corporation is binding upon an officer upon whom it is served, or to whom it is known to exist.—Hatch v. Chicago, R. I. & P. R. Co., Case No. 6,204.

The members of the board of public works of a city are bound by an injunction against the city, of which they have notice, though it is not served upon them, and they are not parties to the suit.—Phillips v. Detroit, Case No. 11,101.

An injunction served upon a sheriff is effectual, though he is not named or described therein, except as "all other persons."—In re Lady Bryan Min. Co., Case No. 7,980.

One having knowledge of an injunction, and violating it, is guilty of contempt, although the same had not been served upon him.—In re Feeny, Case No. 4,715.

A motion for attachment for violation of an injunction will be denied where the question whether the writ was or was not served is left in doubt.—Whipple v. Hutchinson, Case No. 17,517.

Where the writ was not tested until six weeks after the order awarding it, and not served until

nearly a year afterwards, *held*, that a disobedience of the injunction should not be punished by attachment.—McCormick v. Jerome, Case No. 8,721.

§ 38. Necessity of intent.

Where a party acting under competent advice, and with no intention of disobeying the order of the court, violates an injunction, no fine will be imposed, but he will pay the costs of the application.—Carstaedt v. United States Corset Co., Case No. 2,468.

Trustees restrained from doing an act except in strict accordance with the statute prescribing their duties requiring the exercise of a discretion will not be punished for a contempt where they answer under oath that they have acted in good faith, and did not suppose that they were violating the statute.—Vose v. Internal Imp. Fund, Case No. 17,008.

§ 39. Proceedings for punishment.

The proper practice to punish for contempt in violating an injunction is by motion to commit, upon proper notice to the parties proceeded against.—Gray v. Chicago, I. & N. R. Co., Case No. 5,713; Worcester v. Truman, Id. 18,043.

The filing of a supplemental bill, for the purpose of bringing some of the defendants into contempt, is not a waiver of the rule nisi previously entered.—Fanshawe v. Tracy, Case No. 4,643.

A plaintiff, in moving for an attachment against a defendant for contempt in not obeying an injunction, must state in his affidavits the specific acts of omission or commission which constitute the alleged contempt.—Parkhurst v. Kinsman, Case No. 10,759.

The proper mode of proof on issues or interrogatories filed in contempt proceedings is by testimony taken orally before a master.—Parkhurst v. Kinsman, Case No. 10,759.

Interrogatories which defendant is required to answer must be limited to the particular offenses alleged, and must not inquire into matters not specifically charged, or those charged on information and belief and not established by direct evidence.—Parkhurst v. Kinsman, Case No. 10,759.

Upon an attachment for contempt in disobeying an injunction, evidence is not admissible to contradict the affidavit on which it was granted, nor will the court grant a rule to show cause.—Thornton v. Davis, Case No. 13,998.

If an injunction is broader than was intended by the order under which it was issued, defendant, on being served therewith, should take immediate measures to set it aside, and not wait until the hearing of a motion for attachment for violation thereof.—Sickels v. Borden, Case No. 12,833.

On motion for attachment for contempt in violating an injunction, the original decree cannot be impeached except for fraud or defect of jurisdiction as to the subject-matter.—Drury v. Ewing, Case No. 4,095.

The court will not issue an attachment upon a decree for payment of money, but will leave the complainant to his remedy by fieri facias, or ca. sa.—White v. Clarke, Case No. 17,541.

The attachment will not be quashed on account of a misnomer in the injunction, nor will the court receive a plea in abatement.—Thornton v. Davis, Case No. 13,998.

§ 40. Punishment.

The court may imprison for a contempt in violating its injunction.—Monroe v. Bradley, Case No. 9,713.

Where a mortgagee of chattels, who has been enjoined from enforcing his mortgage, violates the injunction, he will be subjected to a penalty equal to the expense occasioned the owner of the property.—In re Feeny, Case No. 4,715.

§ 41. Release from operation of injunction.

Parties guilty of a technical contempt in violating an injunction, who declare on oath that they were not aware of the violation, and submit to the direction of the court, will be allowed to purge the contempt by undoing or reversing their acts, when it is practical to do so.—Vose v. Reed, Case No. 17,011.

A party can only be relieved from the operation of an injunction absolutely prohibiting a specific act by the court granting the injunction. Subsequent legislative authority is ineffectual.—Muller v. Henry, Case No. 9,916.

INNKEEPERS.

§ 1, Who are innkeepers. § 2, Loss of or injury to property of guest.

Denial of civil rights, see "Civil Rights," § 3.

§ 1. Who are innkeepers.

Whether a house is an inn or a boarding house is determined by the right of the proprietor to select his guests.—Beall v. Beck, Case No. 1,161.

§ 2. Loss of or injury to property of guest.

The hotel keeper is relieved from his special common-law liability where a commercial traveler uses his room for the display of samples.—Myers v. Cottrill, Case No. 9,985.

The innkeeper, knowing that valuable goods are thus displayed, should use reasonable diligence to protect them.—Myers v. Cottrill, Case No. 9,985.

An innkeeper, in order to avail himself of the state statute as a defense, must show that he has literally complied with it.—Myers v. Cottrill, Case No. 9,985.

IN PAIS.

Estoppel, see "Estoppel," §§ 6–9.

IN PERSONAM.

Remedies in admiralty, see "Admiralty," §§ 37–49.

INQUEST.

For escheated lands, see "Escheat."
Of coroners, see "Coroners."
Of lunacy, see "Insane Persons," § 2.
To assess damages, see "Eminent Domain," § 8.

IN REM.

Judgment, see "Judgment," §§ 62, 64.
Remedies in admiralty, see "Admiralty," §§ 37–49.

INSANE PERSONS.

§ 1, Presumption of sanity. § 2, Inquisition. § 3, Guardianship. § 4, Property and conveyances. § 5, Contracts.

Bankruptcy, see "Bankruptcy," § 44.
Capacity to commit and responsibility for crime, see "Criminal Law," § 4; "Homicide," § 1.
Disposal of prisoner on acquittal on ground of insanity, see "Criminal Law," § 105.
Effect of temporary insanity, see "Contracts," § 2.
Evidence of insanity, see "Criminal Law," §§ 52, 77, 88.
Insanity as grounds of dismissal of action, see "Ejectment," § 8.

—— caused by intoxication, see "Homicide," § 1.
Testamentary capacity, see "Wills," §§ 3–5.

§ 1. Presumption of sanity.
The legal presumption is that every one is of sound mind, until the contrary is affirmatively proved.—Nimick v. Mutual Life Ins. Co., Case No. 10,266.

See, also, "Deeds," § 14.

§ 2. Inquisition.
The mode of ascertaining the lunacy is by a writ in nature of a writ de lunatico inquirendo. —Burke v. Wheaton, Case No. 2,164.

On an inquisition of insanity, counsel for the prisoner should open and close the case to the jury.—United States v. Lancaster, Case No. 15,555.

On an inquisition of insanity, the proof to establish insanity is upon the defendant; yet he should have the benefit of any reasonable doubt. —United States v. Lancaster, Case No. 15,555.

On an inquisition of insanity, on a motion for a new trial, after conviction of perjury, the question is the same as if raised when the prisoner was called to plead.—United States v. Lancaster, Case No. 15,555.

§ 3. Guardianship.
The court will appoint a committee in the District of Columbia to take care of the property of a person found lunatic in Maryland.—Burke v. Wheaton, Case No. 2,164.

The Rhode Island probate courts cannot appoint a guardian of a person on the ground that he is incapable of taking care of his estate, under the act of 1798, without notice to the party and an adjudication of the facts.—Smith v. Burlingame, Case No. 13,017.

§ 4. Property and conveyances.
As to the validity of a sale of lands by a guardian of a non compos tenant in common, joining in a deed with the cotenants.—Thomas v. Hatch, Case No. 13,899.

Sale of a lunatic's estate in Wisconsin.—Mohr v. Manierre, Case No. 9,695.

§ 5. Contracts.
In determining the ability of an alleged insane person to execute any particular act, the inquiry should first be what degree of mental capacity is essential to the proper execution of the act in question, and then whether the party possessed at the time such capacity.—Hall v. Unger, Case No. 5,949.

A formal gift by assignment of a policy while the insured was judicially declared insane *held* ratified by his declaration that he had given the policy, made after he was declared sane.—Quigley v. Mutual Life Ins. Co., Case No. 11,511.

A man may be mentally so deranged as to authorize relief against judgments obtained against him during such a state of mind, though he be not so absolutely insane as to avoid all his contracts.—Tabb v. Gist, Case No. 13,719.

INSOLVENCY.

§ 1, State insolvent laws—Constitutionality. § 2, —— Extraterritorial operation. § 3, —— Effect upon nonresidents. § 4, —— Effect given in United States courts. § 5, Proceedings for declaration of insolvency. § 6, Appointment of trustee. § 7, Assignment, and title of assignee or trustee. § 8, Attachment and other liens. § 9, Sale of property. § 10, Actions by assignee. § 11, Claims against estate. § 12, Rights and remedies of debtor. § 13, Discharge—Proceedings to obtain and in opposition. § 14, —— Setting aside and vacating. § 15, —— Operation and effect. § 16, —— Pleading.

See, also, "Assignments for Benefit of Creditors"; "Bankruptcy."
As ground of rescission of contract, see "Sales," § 14.
Definition of insolvency, see "Bankruptcy," § 215.
Effect of admissions by insolvent, see "Evidence," § 36.
Of corporations, see "Banks and Banking," § 7; "Corporations," §§ 63–67, 69.
Of decedent, see "Executors and Administrators," § 40.
Of fraudulent grantor, see "Fraudulent Conveyances," § 3.
Transfer of patent rights of insolvent, see "Patents," § 149.

§ 1. State insolvent laws—Constitutionality.
A state insolvent law, which discharged the debt and the person of the insolvent, *held* unconstitutional as to the debt, but not as to the person.—Glenn v. Humphreys, Case No. 5,480.

State insolvent laws are valid as to subsequent contracts between citizens or inhabitants of the state. The fact that the creditor is an alien is not material, if residing or domiciled in the state when the contract was made and the discharge granted.—Von Glahn v. Varrenne. Case No. 16,994.

§ 2. —— Extraterritorial operation.
A discharge under a state insolvent law will be held good in other states and in the federal courts, except as to contracts made or to be performed abroad.—Towne v. Smith, Case No. 14,115.

A discharge under the insolvent law of a state cannot operate to discharge contracts made and to be performed out of it.—Van Reimsdyk v. Kane, Case No. 16,871; Emory v. Greenough, Id. 4,471; Byrd v. Badger, Id. 2,265; Campbell v. Claudius, Id. 2,356; Banks v. Greenleaf, Id. 959.

Insolvent laws of a state have no effect beyond the limits thereof, and a discharge of a debtor under the insolvent law of Pennsylvania will not protect him from arrest by a citizen of New York for a debt payable in New York or to a citizen of that state.—Woodhull v. Wagner. Case No. 17,975.

The rule lex loci contractus does not apply to cases of discharge under insolvent laws.—Adams v. Storey, Case No. 66.

A discharge of a debt under the laws of the state where contracted is good everywhere.—Babcock v. Weston, Case No. 703.

A discharge under the insolvent law of one state bars an action for a debt contracted in another.—Wray v. Reily, Case No. 18,059.

A contract made in one state between parties residing therein is discharged by a discharge under an insolvent law of another state, into which the debtor removed, passed after the making of the contract.—Adams v. Storey, Case No. 66.

A discharge of defendant under an insolvent law of the state where the contract is made, after the bail bond has been assigned to plaintiff, will not release the surety.—Bobyshall v. Oppenheimer, Case No. 1,589.

A judgment resued in a state court of another state is barred by a discharge in insolvency in the state where originally obtained.—Brest v. Smith, Case No. 1,843.

An action will not lie on a judgment rendered in another state after a discharge under the insolvent law of that state, made prior to the contract on which the judgment was rendered. —Fairchild v. Shivers, Case No. 4,611.

A discharge under the insolvent law of a state as to a debt contracted out of the state will not

discharge the person of the debtor.—Riston v. Content, Case No. 11,862.

§ 3. —— Effect upon nonresidents.

A state insolvent law cannot discharge the obligation of any other contracts, made in the state than those which are made between the citizens of that state.—Springer v. Foster, Case No. 13,266.

A discharge under a state insolvent law is invalid against a creditor residing in another state, who did not voluntarily become a party to the proceedings.—Hale v. Baldwin, Case No. 5,913; Stevenson v. King, Id. 13,417; Worthington v. Jerome, Id. 18,054.

That the debt has passed into a judgment before the proceedings makes no difference.—Worthington v. Jerome, Case No. 18,054.

Nor does it make any difference that the indebtedness rests on a contract payable at a place within the state in which the insolvent proceedings take place.—Worthington v. Jerome, Case No. 18,054.

The discharge, under the insolvency laws of a state, of a citizen of the state does not bar an action against him by a citizen of another state upon a foreign contract.—Kendall v. Badger, Case No. 7,691.

A state insolvent law cannot discharge the obligation of a contract with a citizen of another state, though made and to be performed within the state.—Demeritt v. Exchange Bank, Case No. 3,780.

A discharge of the person and present estate, under the insolvent acts of Maryland, cannot be pleaded in bar of a suit in Massachusetts, so as to discharge the party from the common execution.—Hinkley v. Marean, Case No. 6,523.

A discharge in Pennsylvania does not bar a subsequent suit in Delaware for a debt previously due to a citizen of the latter state, and hence a plea of duress in a suit in Pennsylvania, upon notes given while under arrest in the Delaware suit, is bad.—Latapee v. Pecholier, Case No. 8,101.

Where the indorsee of a negotiable note not restricted on its face to be paid within the state lives out of the state, the note is not barred by a subsequent discharge of the maker in the state in which the note was made.—Towne v. Smith, Case No. 14,115.

A discharge in insolvency will bar a judgment obtained in a court of the state by a nonresident, and a judgment obtained thereon in a federal court of another state.—Davidson v. Smith, Case No. 3,608.

A discharge under the insolvent law of the District of Columbia (Act May 6, 1822) does not operate against a nonresident creditor not appearing.—Brook v. Brown, Case No. 1,931.

A nonresident creditor, bringing a suit within the District, is still entitled to the benefit given nonresident creditors. Act May 6, 1822.—Brook v. Brown, Case No. 1,931; Harrison v. Boyd, Id. 6,133; Same v. Gales, Id. 6,136; Hauptman v. Nelson, Id. 6,225.

A debtor who is out on bail is not in "confinement" at the instance of the creditor, within the meaning of Act May 6, 1822.—Brook v. Brown, Case No. 1,931.

§ 4. —— Effect given in United States courts.

A federal court will give to a discharge under the insolvent law of a state the same effect it has in the state where granted.—Channing v. Reiley, Case No. 2,596.

A discharge in Rhode Island will bar the remedy in the federal court as well as in the state court.—Shieffelin v. Wheaton, Case No. 12,783.

A person discharged under a state insolvent law in operation at the date of the process act of May 19, 1828, cannot be imprisoned under final process of the federal court for debts contracted prior to the filing of the petition.—In re Hopkins, Case No. 6,683.

A debtor committed under mesne process issuing out of the federal court cannot be lawfully discharged by an order of the state court made under an insolvent law of the state.—Sadlier v. Fallen, Case No. 12,209; Darst v. Duncan, Id. 3,581.

A discharge under a state insolvent law does not entitle a defendant, in the custody of the United States courts on mesne process, to be released on common bail.—Gill v. Jacobs, Case No. 5,426.

Neither under the act of 1867 (14 Stat. 543) nor the act of 1863 (12 Stat. 656) will a state insolvent law operate to release one imprisoned under process of a federal court in default of paying a fine in a misdemeanor case.—In re Laski, Case No. 8,098.

An attachment issued by the federal court under a state law adopted by congress in an action on a contract made with a citizen of another state is not dissolved by defendant's taking advantage of a subsequent insolvent law of the state.—Springer v. Foster, Case No. 13,266.

The insolvent law of Massachusetts, which prohibits imprisonment in certain cases is not a law for abolishing imprisonment for debt, or a law for allowing it, within Act Cong. Feb. 28, 1839, and therefore does not affect process out of the federal court.—Catherwood v. Gapete, Case No. 2,513.

§ 5. Proceedings for declaration of insolvency.

A prior application and conviction is no bar to a subsequent application for the benefit of the insolvent act for the District of Columbia on a subsequent execution.—Holtzman v. Plumsel, Case No. 6,650.

Petition under the insolvent act of the District of Columbia.—Crawford's Case, Case No. 3,365.

Upon proof of fraud, the court will refuse to permit the debtor to take the insolvent oath under the law of Virginia.—Camellos v. Reverez, Case No. 2,339.

Act May 6, 1822, for the relief of certain insolvent debtors, is not confined to nonresident debtors.—Cook v. Fenton, Case No. 3,156.

Construction of the insolvent laws of Massachusetts, and the effect of proceedings thereunder, determined.—Perry Mfg. Co. v. Brown, Case No. 11,015.

§ 6. Appointment of trustee.

Validity and effect of an order appointing a trustee to take possession of an insolvent's estate, made by a probate court pending an assignment for the benefit of creditors.—Southworth v. The A. E. Douglass, Case No. 13,195.

§ 7. Assignment, and title of assignee or trustee.

The common printed form of the deed from an insolvent debtor to his trustee under the insolvent act is sufficiently certain to convey to the trustee a title to slaves.—Watson v. Hall, Case No. 17,283.

A general assignment under the state insolvent law will pass the title to a patent, but not the right to a subsequent extended term.—Schaum v. Baker, Case No. 12,440.

A claim for compensation for wrongs done under Spanish authority, and provided for by treaty (8 Stat. 252), passed to the general assignee in insolvency.—United States v. Hunter, Case No. 15,426.

A conveyance executed under the Pennsylvania insolvent law of 1799 will not operate to bar an estate tail.—Willis v. Bucher, Case No. 17,769.

An agreement to pay one known to be insolvent a part of the purchase money of property held by an assignee in insolvency is void as to creditors.—McGuire v. Briscoe, Case No. 8,813a.

§ 8. Attachment and other liens.

The insolvent act of Massachusetts of 1838 does not dissolve an attachment in the courts of the United States under the antecedent state laws adopted by congress.—Springer v. Foster, Cases Nos. 13,265, 13,266.

A judgment lien, although there is no execution pending, is not destroyed by section 5 of the insolvent act of 1803.—Farmers' Bank v. Robbins, Case No. 4,660.

Whether the actual seizure of property of an insolvent under process of a federal court before his assignees under the state insolvent law take possession of it creates a valid lien,—quære.—Towne v. Smith, Case No. 14,115.

§ 9. Sale of property.

A state court acquiring possession and control of the insolvent debtor's property has power to dispose of it, and give a good title.—Burt v. Keyes, Case No. 2,212.

§ 10. Actions by assignee.

A trustee in insolvency may maintain a bill for relief against judgments confessed by the insolvent, on notes given upon usurious and gambling considerations.—Thomas v. Watson, Case No. 13,913.

In such suit defendant will not be relieved from stating the true consideration of the notes as prayed in the bill, on the ground that his answer might subject him to a penalty or forfeiture.—Thomas v. Watson, Case No. 13,913.

An assignee in insolvency in one state cannot avoid a conveyance of personalty in another state, good as against the insolvent, but invalid against creditors, under the laws of the latter state.—Betton v. Valentine, Case No. 1,370.

§ 11. Claims against estate.

In Rhode Island, commissioners of deceased insolvents have not jurisdiction of merely equitable claims.—Hunt v. Danforth, Case No. 6,887.

The presentation to the commissioners of an insolvent estate, and the adjudication of a claim of which they have not jurisdiction, is not a bar to a suit thereon.—Hunt v. Danforth, Case No. 6,887.

§ 12. Rights and remedies of debtor.

An insolvent debtor, arrested for a debt due before his discharge, can only be relieved by the court, or a judge, before whom the process is returnable.—Frere v. Mudd, Case No. 5,107.

§ 13. Discharge—Proceedings to obtain and in opposition.

Upon the trial of an issue as to the right to a discharge, the debtor must produce his account books, if called for.—Ex parte Hadry, Case No. 5,895.

Upon the petition of a creditor of an insolvent debtor to deprive him of the benefit of the insolvent act, defendant may show that petitioner is not his creditor.—Mandeville v. Jamesson, Case No. 9,011.

On the trial of the issues upon allegations filed against an insolvent under Act March 3, 1803, the persons filing the same must show that they are creditors.—Newton's Case, Case No. 10,188.

Such allegations cannot be amended after the jury is sworn, by inserting the name of another creditor.—Newton's Case, Case No. 10,188.

Under the insolvent act for the District of Columbia (2 Stat. 237), a finding of fraud could only be justified when there was an intent to defraud creditors, who were such at the time of the conveyance and at the time of the trial.—Ex parte Knowles, Case No. 7,895.

A bona fide sale of property to pay preferred creditors is not fraudulent under said act.—Ex parte Knowles, Case No. 7,895.

A deed technically void as to creditors, because not followed by change of possession, is not evidence of fraud justifying a conviction under the act, if there was a real bona fide consideration.—Ex parte Knowles, Case No. 7,895.

On an issue of fraud under the act, the burden is upon the complaining creditors to show a fraudulent intent.—Ex parte Knowles, Case No. 7,895.

The insertion in the deed of a consideration less than the true one is not of itself a fraud, if the actual consideration was a fair one.—Ex parte Knowles, Case No. 7,895.

An insolvent obtaining a warrant of discharge by fraud is not discharged.—Slocum v. Simms, Case No. 12,935.

Discharge under Act 1774 *held* not valid, unless a copy of the justice's certificate be affixed at the door of the county clerk's office.—Mountz v. Jones, Case No. 9,889.

What allegations are sufficient to prevent a discharge under the insolvent act of the District of Columbia.—Eckle v. Fitzgerald, Case No. 4,267.

A debtor found guilty of having disposed of his property with intent to defraud his creditors will be denied the benefit of the act.—Donoghue's Case, Case No. 3,988.

Upon a verdict against the petitioner under the insolvent act of the District of Columbia he will not be ordered into close custody, if he is out upon a prison-bounds bond.—Eckle v. Fitzgerald, Case No. 4,267; McClean v. Plumsell, Id. 8,693.

§ 14. —— Setting aside and vacating.

Order of discharge rescinded on allegations filed and ex parte evidence in support thereof, where defendant failed to appear.—Hayman v. Moxley, Case No. 6,266.

A certificate of discharge in insolvency is not conclusive evidence that the discharge was duly obtained.—Hayton v. Wilkinson, Case No. 6,272.

Evidence that a discharge was fraudulently obtained cannot be admitted on a collateral motion.—Campbell v. Claudius, Case No. 2,356.

§ 15. —— Operation and effect.

The United States are not affected by discharges under state insolvent laws.—Glenn v. Humphreys, Case No. 5,480.

A discharge covers an immature debt.—Anderson's Case, Case No. 353.

A discharge in Rhode Island extends to debts and contracts not yet due.—Shieffelin v. Wheaton, Case No. 12,783.

A discharge under a state insolvent law *held* a bar to a debt of the master of a vessel for supplies sold on credit, there being no evidence of fraudulent design in omitting the debt from the schedule.—Cadmus v. Beman, Case No. 2,281.

A discharge is available against a creditor not named in the list of creditors filed with the insolvent's petition.—Lee v. Gamble, Case No. 8,189.

A discharge relieves the debtor from liability for costs of a suit pending at the time.—Law v. Scott, Case No. 8,129.

Costs accruing partly before and partly after the discharge are barred thereby.—Tenny v. Densley, Case No. 13,834.

The discharge will bar a ca. sa. for costs, on a judgment for costs, confessed after the discharge in an action pending at the time.—Emmerson v. Beale, Case No. 4,469.

A discharge from commitment on a ca. sa. under the insolvent act of June 24, 1812, is no discharge of the debt, and plaintiff may resort to his judgment lien.—Owen v. Glover, Case No. 10,630.

An attachment for rent not due is superseded by the tenant's discharge under the insolvent law of March 3, 1803, section 5.—Keene v. Jackson, Case No. 7,643.

Effect of discharge after arrest on a cap. ad resp. and before the return.—Stover v. Densley, Case No. 13,508.

Where the discharge does not affect the contract, but only exempts the insolvent from future imprisonment, a suit may be brought on the contract in another state according to the lex fori.—Titus v. Hobart, Case No. 14,063.

A discharge of the person under the insolvent law of a foreign country, where the contract was made, leaves the contract still in force.—Webster v. Massey, Case No. 17,336.

Plaintiff who has received a discharge in insolvency pending the action (Act Md. 1774, c. 28) is still competent to maintain it.—Ardrey v. Wadsworth, Case No. 512.

Plaintiff may maintain an action, though discharged as an insolvent debtor since the cause of action accrued.—Ridgway v. Pancost, Case No. 11,818.

A discharged insolvent debtor cannot sue in his own name on a cause of action accrued before his discharge; neither can his administrator.—Nevitt v. Maddox, Case No. 10,139.

See, also, ante, §§ 1–4.

§ 16. —— Pleading.

A discharge of the principal under a state insolvent law must be pleaded, to entitle bail to a release.—Hayton v. Wilkinson, Case No. 6,272.

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—— at trial, see "Trial," § 4.
Of flour and bread, see "Food."
Of mines, see "Mines and Minerals," § 11.
Of records, see "Records," § 4.
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Production of documents, see "Evidence," § 56; "Motions," § 1.
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In civil actions, see "Insurance," § 190; "New Trial," § 5; "Trial," §§ 16–20.
In criminal prosecutions, see "Criminal Law," §§ 94, 95; "Homicide," § 9.

INSURANCE.

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I. CONTROL AND REGULATION IN GENERAL.

§ 1. Foreign companies.

Failure of a foreign insurance company and its agent to comply with the laws of the state in which the assured resides does not avoid a policy made and issued at the home office of the company.—Lamb v. Bowser, Case No. 8,008.

The fund deposited by a foreign insurance company as required by the Mississippi statutes is intended for the protection of domestic policy holders, and is to be refunded on its withdrawal from business, so far as it is not charged with unpaid losses and premiums due such holders.—Firemen's Ins. Co. v. Hemingway, Case No. 4,797.

Such company, on withdrawing from business within the state, may assign such fund to a company succeeding to its business.—Firemen's Ins. Co. v. Hemingway, Case No. 4,797.

A foreign insurance company may sue in a federal court, regardless of state statutes forbidding such companies to resort thereto.—Metropolitan Life Ins. Co. v. Harper, Case No. 9,505.

II. INSURANCE COMPANIES.

See, also, post, § 196.

§ 2. Stock companies—Stock and stockholders.

An insurance company has no right to divide its risks and capital into classes, and restrict the liability upon stock notes to the class in which they are placed.—Fitzpatrick v. Troy Ins. Co., Case No. 4,844.

A resolution, passed by the directors, releasing the stockholders from unpaid balances upon the stock, in accordance with which the certificates of stock were stamped "Nonassessable," is not binding upon parties who insured in the company without knowledge of its existence.—Upton v. Hansbrough, Case No. 16,801; Same v. Jackson, Id. 16,802.

A stockholder in an insurance company rendered insolvent by a fire cannot escape liability on a demand note given for stock, by giving, in payment of his note, a certificate of indebtedness on an adjusted policy.—Jenkins v. Armour, Case No. 7,260.

Interest will run on such note from the date of demand by the assignee or of the exchange of the certificate for the note.—Jenkins v. Armour, Case No. 7,260.

Change in charter, from "life and accident" insurance company to "fire, marine, and inland insurance," discharges nonassenting subscribers to stock.—Ashton v. Burbank, Case No. 582.

§ 3. —— Authority of officers.

A verbal agreement by a general officer of a company, which accepted part of a risk, to guaranty insurance made by other companies substituted by him for the balance of the risk, *held* not enforceable.—Constant v. Allegheny Ins. Co., Case No. 3,136.

Agents, see post, §§ 5, 6.

§ 4. —— Franchises and powers.

Insurance companies have power to take, hold, and negotiate negotiable paper in the conduct of their business.—Alexander v. Horner, Case No. 169.

Insurance companies created by the laws of other states do not contravene the public policy of Illinois by investing their assets in mortgages upon real estate within that state.—Hards v. Connecticut Mut. Life Ins. Co., Case No. 6,055.

The acceptance of mortgages by life companies in Nebraska in 1872 as security for loans was not illegal.—Moore v. Union Mut. Life Ins. Co., Case No. 9,777.

III. INSURANCE AGENTS AND BROKERS.

See, also, post, §§ 12, 90, 91, 153.

§ 5. Agency for insurer.

The appointment of a fire insurance agent and the extent of his agency may, in the absence of a written appointment, be proved by evidence of his acts and the company's recognition thereof.—Nicoll v. American Ins. Co., Case No. 10,259.

The agency of one representing an insurance company, authorized to receive premiums and renew policies, becomes unlawful when the insured and the insurer become public enemies.—Tait v. New York Life Ins. Co., Case No. 13,726.

The liability of the general agent of a company for balance due from his subagents *held* not removed by the act of the company in receiving balances from subagents after removal of the general agent.—National Fire & Marine Ins. Co. v. Lester, Case No. 10,043.

An action will not lie on the bond of an agent of a foreign insurance company for failing to pay over premiums collected after the company had failed to comply with the state law by obtaining a renewal of its certificate.—Madison Mut. Ins. Co. v. Ecker, Case No. 8,937.

In Indiana it is not essential to the validity of the bond of the agent of a foreign insurance company that he should have previously filed in the circuit court the papers required by the state statute.—United States Life Ins. Co. v. Adams, Case No. 16,792.

A person who is the general agent of an insurance company under a state statute requiring the appointment of such an agent for the service of process on foreign companies is not necessarily the general agent of the company as to the execution of contracts with the company.—Whitcomb v. Phœnix Mut. Life Ins. Co., Case No. 17,530.

Where an insurance agent is furnished with blank policies which he is authorized to fill up and deliver and make binding until canceled, his authority to make this larger completed contract includes an authority to make a preliminary executory contract to enter into it.—Weeks v. Lycoming Fire Ins. Co., Case No. 17,353.

The recital in the policy that the agents have no power to waive any of its provisions, one of which is that the policy shall be void on nonpayment of premiums when due, does not refer to the first premium recited in the policy as paid.—Miller v. Brooklyn Life Ins. Co., Case No. 9,564.

Where the insurer contracts by and through the solicitor of insurance, a clause in the policy declaring that persons acting as solicitors are agents of the insured and not of the insurer, is invalid.—Bassell v. American Fire Ins. Co., Case No. 1,094.

The local agent of a foreign company, who has power to effect insurance and collect premiums, is presumptively authorized to make a verbal contract to renew a risk, and to give time for payment of the premium.—Taylor v. Germania Ins. Co., Case No. 13,793.

If either party must suffer by the fault of an insurance agent, it must be his principal.—Nicoll v. American Ins. Co., Case No. 10,259.

The insurance company is not responsible for the act of its regular agent in instituting criminal proceedings against an insured suspected of setting the insured property on fire, unless his act was authorized or ratified by it.—Nor-

man v. Insurance Co. of North America, Case No. 10,299.

Contract of insurance company with agent construed in relation to right to discontinue the agency, and the right of the agent to commissions on future premiums.—Mutual Benefit Life Ins. Co. v. Charles, Case No. 9,975.

§ 6. Agency for applicant.

A covenant by the lessee to pay the cost of insurance, in addition to the rent, confers no authority upon him to insure for the benefit of the lessor.—Hidden v. Slater Mut. Fire Ins. Co., Case No. 6,463.

Under an order to insure a given sum, agent cannot insure to cover premium in same policy with that to cover value.—Barton v. Anthony, Case No. 1,084.

Knowledge of loss before insurance by one who was not the agent of the insured for any purpose connected with the insurance is not notice to the insured.—Clement v. Phœnix Ins. Co., Case No. 2,881.

IV. INSURABLE INTEREST.

See, also, post, §§ 35-38, 177.

§ 7. Marine insurance.

The owner of a vessel, who has contracted to sell her for a certain sum, and to make title, has an insurable interest to the extent of the value of the vessel.—Stuart v. Columbian Ins. Co., Case No. 13,554.

One for whom a vessel was built, and who had entire possession and a bond for conveyance on payment of a specified sum, *held* to have had an insurable interest in the freight, and to be truly represented as owner, although the register was in the builder's name.—Simmes v. Marine Ins. Co., Case No. 12,862.

The right of the master of a vessel to primage is an insurable interest.—Pedrick v. Fisher, Case No. 10,900.

By a policy on vessel and cargo, a person having a lien for advances or a special ownership and possession may protect his interest in the vessel and cargo to the extent of his advances and lien.—Seamans v. Loring, Case No. 12,583.

Quære as to the validity of an insurance by seamen of their shares in the proceeds of an adventure, where the shares are in the nature of wages, though given in lieu thereof.—Hancox v. Fishing Ins. Co., Case No. 6,013.

A surety for the payment of value of cargo in case of its condemnation, having possession of the same for his indemnity, has an insurable interest, the particular circumstances of which he need not communicate to the insurer.—Russel v. Union Ins. Co., Case No. 12,146.

An interest does not cease to be insurable in the progress of the voyage simply because it is subject to contingencies, or has not at the moment anything corporeal or tangible to which it is attached.—Hancox v. Fishing Ins. Co., Case No. 6,013.

Master who, to prevent loss, buys in cargo at a public sale after abandonment, does not become owner so as to have an insurable interest.—Barker v. Marine Ins. Co., Case No. 992.

§ 8. Fire insurance.

A lien, or an interest in the nature of a lien, though the debtor may be pursued personally, is an insurable interest.—Hancox v. Fishing Ins. Co., Case No. 6,013.

Trustee appointed in place of one named in will, who declines to serve, has insurable interest.—Babson v. Thomaston Mut. Fire Ins. Co., Case No. 704.

One in possession of the property of another, to whom he advanced a portion of the purchase money, and who holds a power of attorney authorizing him to sell, has an insurable interest.—Brugger v. State Inv. Ins. Co., Case No. 2,051.

A factor has an insurable interest in goods on which he has a lien for advances.—Russel v. Union Ins. Co., Case No. 12,146.

§ 9. Life insurance.

A married sister, in no way dependent upon her brother for support, and not his creditor, has an insurable interest in his life.—France v. Ætna Life Ins. Co., Case No. 5,027.

A life policy, taken for the benefit of and assigned to a person who has no insurable interest in the risk, is void.—Swick v. Home Ins. Co., Case No. 13,692.

V. THE CONTRACT IN GENERAL.

See, also, post, §§ 178, 192.

Effect of custom or usage on contract, see "Customs and Usages."

(A) NATURE, REQUISITES, AND VALIDITY.

§ 10. What law governs.

An application for insurance, accepted at the home office in Illinois, whither it had been sent, with a note and money constituting the premium, by an agent in Indiana, *held* to be an Illinois contract.—Lamb v. Bowser, Case No. 8,008.

Where a policy of insurance is written at the home office of the insurance company, and transmitted to an agent in another state, who had authority to receive applications for policies and payment of premiums, and through whom losses were paid, the contract is governed by the laws of the state of the domicile of the company.—Wright v. Sun Mut. Ins. Co., Case No. 18,095; Same v. Orient Mut. Ins. Co., Id.

An insurance policy obtained in New York by a citizen of Massachusetts and subsequently assigned to his wife, who assigned it to a third party, is governed, as between the original parties, by the New York law; but as to the wife's power to assign, by the Massachusetts law.—Newcomb v. Mutual Life Ins. Co., Case No. 10,147.

Where the contract of insurance is complete on the execution of the policy in the home office of the company, and not until then, the contract is governed by the law of the place of the home office, whether the policy be delivered first to the agent or the insured.—Shattuck v. Mutual Life Ins. Co., Case No. 12,715.

A policy issued at the home office of the company, where the premiums and loss are made payable upon an application of a citizen of another state received through its local agent, who had no authority to contract, is governed by the law of the state of the company's domicile.—Desmazes v. Mutual Ben. Life Ins. Co., Case No. 3,821.

A policy issued by a foreign insurance company through a general agent in the state, who acts purely in a ministerial capacity, *held* not a contract governed by the law of such state.—Whitcomb v. Phœnix Mut. Life Ins. Co., Case No. 17,530.

Construction of valued policy as to place where goods were to be taken on board.—Gardner v. Columbian Ins. Co., Case No. 5,224.

A contract of insurance, made on a voyage which is opposed to the common, statute, or maritime laws of the country where it is effected, is void.—Craig v. United States, Case No. 3,340.

The Massachusetts nonforfeiture acts are not applicable to contracts made without the state by foreign corporations doing business within the state.—Desmazes v. Mutual Ben. Life Ins. Co., Case No. 3,821.

It is not an ingredient of the contract of insurance that it shall be enforced conformably to the law of the place where it was executed.—Griswold v. Union Mut. Ins. Co., Case No. 5,840.

§ 11. Existence and condition of subject-matter.

Insurance made between parties ignorant of a loss is valid, where the policy has been completed though not delivered.—Kohne v. Insurance Co. of North America, Case No. 7,920.

The omission of the master to telegraph the loss of a vessel *held* not to vitiate the policy.—Folsom v. Mercantile Mut. Ins. Co., Case No. 4,902.

The neglect of the insured's agent to give notice of the loss of the property before the insurance was effected will not vitiate the policy, where he had nothing to do in effecting the insurance.—Patton v. Janney, Case No. 10,836.

The omission of the master to communicate the loss of the vessel, where willful and with a fraudulent design to enable the owner to make insurance, will not render void a policy thereafter obtained by the owner, who acted with entire good faith.—Ruggles v. General Interest Ins. Co., Case No. 12,119.

See, also, post, § 179.

§ 12. Powers of agents.

The mistakes of the local agent of the company in preparing the application are prima facie chargeable to the company.—Brugger v. State Inv. Ins. Co., Case No. 2,051.

An agent who procures insurance with knowledge of the underwriters that he is acting as such is entitled to a policy insuring him as agent, or for whom it concerns.—Oliver v. Mutual Commercial Marine Ins. Co., Case No. 10,498.

§ 13. Validity of oral contracts.

A parol agreement for insurance must include the subject of insurance, the time, amount, and premium.—Weeks v. Lycoming Fire Ins. Co., Case No. 17,353.

Where, under the circumstances, the policy would have been binding if one had issued, the agreement to insure will be binding.—Weeks v. Lycoming Fire Ins. Co., Case No. 17,353.

A parol acceptance of a written proposal for insurance, admitted by the answer, is a binding contract for insurance, in the absence of any statute requiring such contract to be in writing.—Union Mut. Ins. Co. v. Commercial Mut. Marine Ins. Co., Case No. 14,372.

A parol contract of insurance is not merged in a policy issued, which does not conform thereto.—Humphry v. Hartford Fire Ins. Co., Case No. 6,875.

The charter provisions that "all the conditions of policies issued by the company shall be printed or written on the face thereof," and that certain officers "shall sign the policies" made by order of the directors, does not prevent the making of an oral contract, or liability upon an implied contract.—Henning v. United States Ins. Co., Case No. 6,366.

A parol agreement as to the terms on which a policy shall be issued, made by a general officer of the company, will be enforced after a loss, though the charter provides that all contracts shall be in writing under seal.—Constant v. Allegheny Ins. Co., Case No. 3,136.

Otherwise as to a mere collateral agreement which does not involve the execution of a policy.—Constant v. Allegheny Ins. Co., Case No. 3,136.

Local agent of foreign insurance company has power to bind company by parol contract to renew policy with one having no knowledge of restrictions on his authority.—Baubie v. Ætna Ins. Co., Case No. 1,111.

A written policy cannot be extended to other risks than those named, by an averment that it was so understood, construed, and intended by the parties; but there may be a new parol contract, covering such different risks.—Henning v. United States Ins. Co., Case No. 6,366.

§ 14. Binding slips or memoranda.

Unrestricted authority to negotiate a contract of insurance by issuing a policy includes authority to make a valid preliminary contract for such issue.—Humphry v. Hartford Fire Ins. Co., Case No. 6,875.

§ 15. Delivery and acceptance of policy.

The contract is not complete until the policy is delivered to and accepted by the insured.—Lee v. Guardian Life Ins. Co., Case No. 8,190.

When the policy provided that it should take effect when countersigned by a certain agent, a delivery by him will render the contract valid without such countersigning.—Whitcomb v. Phœnix Mut. Life Ins. Co., Case No. 17,530.

§ 16. Papers accompanying policy.

Conditions annexed to a policy are made a part thereof by a clause in the body of the policy declaring it to be made and accepted with reference to them.—Cray v. Hartford Fire Ins. Co.. Case No. 3,374.

The conditions annexed to the policy, in order to bind insured, must be brought to his attention at or before the time of the contract of insurance.—Bassell v. American Fire Ins. Co., Case No. 1,094.

See, also, post, § 22.

§ 17. Payment of premiums or dues.

The sending of the policy to the insured, with directions as to executing the premium notes, and a statement that the cash premium would be called for, *held* a waiver of payment as a condition of the policy becoming binding.—Miller v. Brooklyn Life Ins. Co., Case No. 9,564.

Policy *held* to take effect from its delivery, though premium was not paid, notwithstanding its condition to the contrary, where the agent was personally liable to the company.—Frankle v. Pennsylvania Fire Ins. Co., Case No. 5,052a.

The policy becomes a binding contract from the time it is assented to by the assured, provided he pays the premium within the time as agreed by the agent; and a change in condition in health thereafter need not be disclosed.—De Camp v. New Jersey Mut. Life Ins. Co., Case No. 3,719.

Acknowledgment of receipt of premium does not estop the company from denying payment, as between the company and the party for whose benefit the policy is executed.—Miller v. Brooklyn Life Ins. Co., Case No. 9,564.

Charging insurance brokers with a premium due, though not paid, renders company liable, notwithstanding condition that policy shall not be in force until premium is actually paid.—Bang v. Farmville Ins. & Banking Co., Case No. 838.

A stranger, who procures an application upon which a policy is issued and delivered to him, to be delivered to the insured upon payment of the premium, becomes a special agent to receive the premium and deliver the policy.—De Camp v. New Jersey Mut. Life Ins. Co., Case No. 3,719.

The receipt of the premium by the duly-constituted agent on delivery of the policy binds the company, though the policy is not countersigned by him.—Camden Consol. Oil Co. v. Ohio Ins. Co., Case No. 2,337b.

An insurance broker, who has placed the risk, and to whom the company delivers the policy for delivery to the assured, binds the company

by accepting payment of the premium, though he never turns it over.—Cahill v. Andes Ins. Co., Case No. 2,289.

The receipt of a premium by the agent binds the company, though the agent convert it, and the policy is never issued.—Ide v. Phœnix Ins. Co., Case No. 7,001.

See, also, post, §§ 29–34.

§ 18. Validity.

A policy is void, as founded on mutual mistake, where the owner and insurer understood certain terms of representation to be used in totally different senses.—Hazard v. New England Marine Ins. Co., Case No. 6,282.

A policy of insurance by a New York company on the life of a citizen of Alabama, made in 1858, not unlawful, as continuing to insure the life of an alien enemy; it appearing that the insured was a neutral, passive, noncombatant enemy, who remained such in fact.—Hamilton v. Mutual Life Ins. Co., Case No. 5,986.

If the contemplated trade be contrary to the laws of the country or the laws of nations, a policy upon the ship or cargo is void.—Gray v. Sims, Case No. 5,729.

Valued policy void where the underwriter is designedly misled by insured intending a wager policy.—Alsop v. Commercial Ins. Co., Case No. 262.

Valued policy on profits not a wager policy unless so intended by both parties.—Alsop v. Commercial Ins. Co., Case No. 262.

§ 19. Reformation.

A policy of insurance will be reformed so as to conform to the order or agreement under which it was executed.—Hogan v. Delaware Ins. Co., Case No. 6,582.

Correspondence *held* not to justify reformation of policy.—Hearn v. New England Mut. Marine Ins. Co., Case No. 6,302.

A mutual mistake in the policy will be corrected, even after loss, where it can be shown from the application or by oral testimony.—Brugger v. State Inv. Ins. Co., Case No. 2,051.

The insured is entitled to have the policy reformed so as to secure the protection which the correspondence between the parties shows that the insured intended, and the insurer knew to be his understanding.—Hearn v. Equitable Safety Ins. Co., Case No. 6,300.

If a party fails, through mistake, to obtain such a policy as he is entitled to by an existing valid contract, equity will relieve, though the mistake arose from ignorance of law.—Oliver v. Mutual Commercial Marine Ins. Co., Case No. 10,498.

See, also, post, §§ 39–43.

(B) CONSTRUCTION AND OPERATION.

§ 20. General rules of construction.

General rules for the construction of policies laid down by Betts, J.—Henshaw v. Mutual Safety Ins. Co., Case No. 6,387.

The rule that words of exception in any instrument are to be construed most strongly against the party for whose benefit they are intended applies to policies of insurance.—Palmer v. Warren Ins. Co., Case No. 10,698.

But this rule of interpretation is subservient to another,—"Verba intentioni, non e contra, debent inservire."—Palmer v. Warren Ins. Co., Case No. 10,698.

Stipulations in a policy not required by or conforming to the state statutes, *held* should be disregarded.—Thompson v. Liverpool & L. & G. Ins. Co., Case No. 13,966.

The words used in a policy will be construed in their ordinary and commonly received meaning where there is nothing to show that they were intended to be understood in a special sense.—Ripley v. Railway Pass. Assur. Co., Case No. 11,854.

Policies are to be construed for indemnity of the assured and the advancement of trade.—Mauger v. Holyoke Mut. Fire Ins. Co., Case No. 9,305.

In the case of vague and inconsistent provisions, the court adopted a construction previously put upon similar policies by the insurer, as against its contention in this case.—Dutcher v. Brooklyn Life Ins. Co., Case No. 4,202.

§ 21. Printed and written portions.

In the case of contradiction, the written words in a policy will control the printed one.—Hernandez v. Sun Mut. Ins. Co., Case No. 6,415; Coster v. Phœnix Ins. Co., Id. 3,264.

Such construction of the policy should be adopted as will allow both printed and written clauses to be available.—Seton v. Delaware Ins. Co., Case No. 12,675.

The printed words insuring against loss of the goods, "or any part thereof," do not control the printed words in the memorandum clause, "Free from average, unless general."—Hernandez v. Sun Mut. Ins. Co., Case No. 6,415.

An intention on the part of the company to deceive cannot be presumed from the fact that some portions of the policy are printed in smaller type than other portions, the former being referred to in the latter.—Whitehouse v. Travelers' Ins. Co., Case No. 17,566.

§ 22. Construing together policy and accompanying papers.

The order for insurance will be considered as containing the contract, where it is materially departed from in the policy; but it can only be resorted to so far as it varies from the policy.—Delaware Ins. Co. v. Hogan, Case No. 3,765.

A statement that the applicant is in good health means that he is free from any apparent sensible disease or the symptoms thereof, and that he is unconscious of any derangement or functions by which health could be tested.—Conver v. Phœnix Mut. Life Ins. Co., Case No. 3,143.

§ 23. Effect of usage.

The usage of vessels engaged in the trade in question is not admissible in the interpretation of a contract of insurance which is not ambiguous.—Hearn v. New England Mut. Marine Ins. Co., Case No. 6,302.

The usage of trade must be taken into consideration in the construction of policies.—Hancox v. Fishing Ins. Co., Case No. 6,013.

§ 24. Parties.

A policy, made out for a certain person "or whom it may concern," without any warranty or representation of national character, will cover the interest of any person who has authorized the insurance.—Seamans v. Loring, Case No. 12,583.

§ 25. Property covered.

Under a policy insuring persons against loss on certain merchandise, "their own, or held by them in trust or on commission," *held*, that the insurance was on the goods, and not on the interest of the insurers, and parol evidence was inadmissible to show a different intent.—Robbins v. Firemen's Fund Ins. Co., Case No. 11,881.

A policy upon "outfits" and upon "catchings" substituted for the outfits in a whaling voyage protects the "blubber" when on deck.—Rogers v. Mechanics' Ins. Co., Case No. 12,016.

A policy on lithographic presses in a certain building, there being two presses then there, *held* not to cover a press subsequently put in, so as to make double insurance, within the meaning of a policy specifically insuring the latter press.—

Mauger v. Holyoke Mut. Fire Ins. Co.; Case No. 9,305.

"Blacksmith and carriage maker's stock, manufactured and in process of manufacture," embraces unmanufactured or raw stock.—Spratley v. Hartford Ins. Co., Case No. 13,256.

§ 26. Amount of insurance.

A policy on goods on board a vessel for a voyage out and return, "$12,000 valued," must be considered an open policy for the return voyage.—McKim v. Phœnix Ins. Co., Case No. 8,862.

A policy enumerating certain articles, with figures indicating dollars placed opposite to each, does not constitute a valued policy.—Luce v. Springfield Fire & Marine Ins. Co., Case No. 8,589.

§ 27. Commencement of risk.

The policy attaches as soon as the voyage commences, where the insured has then an inchoate right to freight under a contract, although the cargo is not taken in.—Hart v. Delaware Ins. Co., Case No. 6,150.

Construction of policy "at and from" a certain port, as to the time when it attaches.—Seamans v. Loring, Case No. 12,583.

Where freight is insured in a valued policy, the right to indemnity attaches if any part of the cargo is shipped.—Hart v. Delaware Ins. Co., Case No. 6,150.

If, in a policy "at and from," the assured unreasonably delay to commence the risk or the voyage, the underwriter is discharged.—Seamans v. Loring, Case No. 12,583.

§ 28. Term and duration of risk.

Where the risk is to terminate, at the end of the voyage, after the vessel has been "moored 24 hours in safety," a mere anchoring in the usual anchorage grounds, for temporary purposes, does not end the risk.—Meigs v. Sun Mut. Ins. Co., Case No. 9,396.

A policy on a vessel for a voyage to a certain port and 24 hours after anchoring in safety is not terminated by lying at anchor at the anchorage ground outside the harbor, and there, according to custom, partially discharging into lighters, in order to pass the bar.—Simpson v. Pacific Mut. Ins. Co., Case No. 12,886.

An insurance on outfits in a whaling voyage does not terminate pro tanto with their consumption or distribution, but attaches to the proceeds of the adventure.—Hancox v. Fishing Ins. Co., Case No. 6,013.

The words in a policy for a year: "Excluding during the term all ports or places in * * * from July 15 to October 15, 1839,"—*held* a suspension of the risk during such time as the vessel should be at the excepted ports.—Palmer v. Warren Ins. Co., Case No. 10,698.

The terms, "to port in Cuba, and at and thence to port of advice," do not give the right to go to a second port in Cuba to load.—Hearn v. Equitable Safety Ins. Co., Case No. 6,299; Same v. New England Mut. Marine Ins. Co., Id. 6,301.

A policy insuring freight on a steamboat and barge against total loss "at and from St. Louis to New Orleans," covers freight on additions to the cargo made during the voyage.—Stillwell v. Home Ins. Co., Case No. 13,450.

Where in such case the barge was sunk, and her cargo transferred to the steamboat, and no other barge could be procured to carry cargo previously engaged at intermediate ports, *held*, that the policy covered all freight which would have been earned but for the loss of the barge.—Stillwell v. Home Ins. Co., Case No. 13,450.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

See, also, post, §§ 95, 197.

§ 29. Amount of premiums.

Construction of policy "in port and at sea, and at all times and places, for the space of six calendar months," as to amount of premium due.—Pollock v. Donaldson, Case No. 11,254.

§ 30. Reduction of premiums by dividends.

A dividend due a policy holder should be applied to the payment of his premium, upon his request, if such has been the practice of the company.—Manhattan Life Ins. Co. v. Hoelzle, Case No. 9,025.

§ 31. Payment of premiums.

Where a mutual insurance company was authorized to insure for premiums "to be paid in cash, as insurance companies not mutual are accustomed to do," the company could accept a note for such premium instead of cash.—Carey v. Nagle, Case No. 2,403.

The receipt of payment of the last premium authorizes the inference of payment of prior premiums.—Dutton v. New York Life Ins. Co., Case No. 4,211.

Act of agent in accepting responsibility of another for premium *held* to be ratified.—Bennett v. Maryland Fire Ins. Co., Case No. 1,321.

The policy of insurance is not alone sufficient proof of payment of the first premium.—Millick v. Peterson, Case No. 9,601.

Where the insured and the insurer mutually credited each other on account, and at the end of every month struck a balance, it is equivalent to payment of premium sufficient to keep the policy alive.—Marsh v. Northwestern Nat. Ins. Co., Case No. 9,118.

Premium not required by policy to be paid in money may be paid by act of agent in accepting responsibility of third person.—Bennett v. Maryland Fire Ins. Co., Case No. 1,321.

See, also, ante, § 17.

§ 32. Premium or deposit notes.

A premium note to an insurance company, payable "at such times as the directors may require," is rendered due and payable when the directors have properly required the money to be paid.—Gaytes v. Hibbard, Case No. 5,287.

A premium note made payable to the insurance company, "or the treasurer for the time being," is a good note to the company.—Gaytes v. Hibbard, Case No. 5,287.

It is a good defense to a premium note that it was given to an agent in a state with the laws of which, respecting foreign insurance companies, the company had not complied.—Lamb v. Lamb, Case No. 8,018.

A note given a foreign insurance company for premiums cannot be enforced by the company after it has failed to comply with the state law by obtaining a renewal of its certificate.—Madison Mut. Ins. Co. v. Ecker, Case No. 8,937.

§ 33. Levy and collection of assessment.

The company is under no obligation to give notice when a life premium is about falling due, though it has been its practice to give such notice.—Morey v. New York Life Ins. Co., Case No. 9,795.

A promise by the agent to give such notice is not binding on the company unless he was authorized to make it.—Morey v. New York Life Ins. Co., Case No. 9,795.

Where losses were to be paid by assessments upon policy holders, who were at liberty to pay or not, as they elected, the collection of such assessments cannot be enforced.—In re Protection Life Ins. Co., Case No. 11,444.

§ 34. Refunding or recovery of premiums or assessments paid.

Fraud in obtaining insurance is a good defense to an action for a return of the premium.—Schwartz v. United States Ins. Co., Case No. 12,505.

Where no cargo was taken in, and the voyage insured was not commenced, there is no contract, and the insured may recover back the premium paid.—Scriba v. Insurance Co. of North America, Case No. 12,560.

Where the vessel was not seaworthy when the risk insured commenced, the insured may recover back the premium paid.—Scriba v. Insurance Co. of North America, Case No. 12,560.

VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.

See, also, post, § 171.

Assignment in bankruptcy, see "Bankruptcy," § 192.

§ 35. Right of assured to assign in general.

The assignment of a life policy to secure a bona fide loan thereon is valid.—In re Sawyer, Case No. 12,393.

A conveyance which equity will treat as a mortgage does not terminate the interest of the assured.—Holbrook v. American Ins. Co., Case No. 6,589.

§ 36. Right of beneficiary to assign life policy.

An assignment by the assured and his wife of a life policy payable to the wife "or assigns," by its terms absolute, but intended as collateral security to the assignee for premiums he should pay on the policy, is not invalid under the laws of New York.—Robinson v. Mutual Ben. Life Ins. Co., Case No. 11,961.

§ 37. Consent of beneficiary and insurer to assignment by insured.

An agreement by the widow of the insured and beneficiary under the policy, with an assignee thereof, to receive a certain sum in satisfaction of her interest, *held* a ratification of his authority to collect the amount from the insurer.—Robinson v. Mutual Ben. Life Ins. Co., Case No. 11,961.

Acceptance from a mortgagee of the renewal premium is a ratification of an assignment of the policy to him without the insurer's consent.—Bilson v. Manufacturers' Ins. Co., Case No. 1,410.

§ 38. Rights and liabilities of assignee.

After assignment of fire policy to mortgagee with consent of insurer, a mistake in renewal, of which mortgagee was ignorant, will not avoid the insurance.—Akin v. Liverpool & L. & G. Ins. Co., Case No. 121.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

See, also, ante, § 19; post, § 94.

§ 39. Right of insurer to cancel.

Circumstances stated under which a policy will be canceled even after a loss has occurred.—North American Ins. Co. v. Whipple, Case No. 10,315.

A bill in equity will lie for the cancellation of a policy, payable to a third person, on the life of a person who has become so far intemperate as to impair his health, where, by the terms of the policy, it was to become void on such contingency.—Connecticut Mut. Life Ins. Co. v. Home Ins. Co., Case No. 3,107.

§ 40. Notice to cancel.

A notice of cancellation of a policy need not be formal. Mere conveyance by acts or words of knowledge of cancellation is sufficient.—Grace v. American Cent. Ins. Co., Case No. 5,649.

Insurance broker, who procured insurance, *held*, under terms of policy, to be agent of insured to accept notice of cancellation.—Grace v. American Cent. Ins. Co., Case No. 5,648.

§ 41. Effect of cancellation.

A firm paying a draft for a cargo of grain on the faith of an insurance policy, indorsed to them by the shipper, is not affected by his mistake in ordering the policy canceled, although he was to share in the profit or loss on each cargo.—Marsh v. Northwestern Nat. Ins. Co., Case No. 9,118.

The insurer is liable to the legal holder of the policy, though the person procuring it by mistake ordered it canceled.—Marsh v. Northwestern Nat. Ins. Co., Case No. 9,118.

§ 42. Right of insured to surrender in general.

Construction of stipulation providing for a right to surrender at any time on payment of customary short rates.—In re Independence Ins. Co., Case No. 7,015.

§ 43. Effect of surrender.

The issuance of a new policy without any new consideration, merely for the purpose of substituting a different beneficiary, will not authorize the company to change the conditions by making the representations warranties.—Klaiber v. Illinois Benev. Masonic Soc., Case No. 7,863a.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

See, also, post, §§ 180, 181, 198.

(A) GROUNDS IN GENERAL.

§ 44. Misrepresentation.

Mere expression of opinion does not constitute material misrepresentation.—Clason v. Smith, Case No. 2,868.

Statements in application *held* to be representations, and not warranties, although application referred to the policy and contained a warranty, where no specific and distinct reference was made thereto in the policy.—Conover v. Massachusetts Mut. Life Ins. Co., Case No. 3,121.

The insured is bound by the representations made in the application signed by him or his agent, though written out by the insurer's agent, unless it appear that the answers were not truthfully written out, and the statements were not assented to.—Murphrey v. Old Dominion Ins. Co., Case No. 9,945.

A misrepresentation, to avoid the policy, must have been in relation to a material fact that would have probably induced the insurer to decline the risk.—Holloman v. Life Ins. Co., Case No. 6,623.

Where the application stipulates that the answers are fair and true, and that it shall be the basis of the contract, and any untrue or fraudulent answers shall avoid the policy, such answers are declarations and representations, and the burden is on the company to show them false.—Sinclair v. Phœnix Mut. Life Ins. Co., Case No. 12,896.

It is only an honest effort to obtain full disclosure and a communication of all facts obtained that will relieve assured from a charge of misrepresentation or concealment.—Biays v. Union Ins. Co., Case No. 1,383.

The distinction pointed out between untruthful answers to specific questions and the mere

failure to make full answers.—Swick v. Home Ins. Co., Case No. 13,692.

The best test of a material variation in the representations is that it increases the risk so as to require a larger premium.—Nicoll v. American Ins. Co., Case No. 10,259.

The Missouri statute of March 23, 1874, declaring immaterial any misrepresentations made in procuring life insurance, unless the matter misrepresented actually contributed to the contingency on which the policy became payable, comprehends all statements, whether technical representations or warranties.—Lovell v. Alliance Life Ins. Co., Case No. 8,552.

Act Mo. March 23, 1874, in relation to misrepresentations in obtaining policies of life insurance, extends to all policies delivered in the state after the act went into effect, and irrespective of provisions of the policy.—White v. Connecticut Mut. Life Ins. Co., Case No. 17,545.

Materiality of representations as to neutrality, where premium is sufficient to cover belligerent risk.—Buck v. Chesapeake Ins. Co., Case No. 2,078.

Omissions or misrepresentations of facts material to the risk in an application will avoid the policy where the agent had no knowledge of the premises.—Roth v. City Ins. Co., Case No. 12,084.

Where a life insurance policy contains a condition that if the statements in the application shall be found in any respect untrue it shall be void, untrue answers to specific questions avoid the policy, although relating to matters not materially affecting the risk, and not made with a view to deceive the company.—Wilkinson v. Union Mut. Life Ins. Co., Case No. 17,676; Trefz v. Knickerbocker Life Ins. Co., Id. 14,166; Holabird v. Atlantic Mut. Life Ins. Co., Id. 6,587.

If the statements made in an application which becomes part of the policy be untrue in a material respect at the time they are made, the policy is void, whether they be regarded as warranties or material representations.—De Camp v. New Jersey Mut. Life Ins. Co., Case No. 3,719.

The insured is not entitled to recover if he was in apprehension of incendiarism at the time of taking out a policy, but stated that he was not.—Whittle v. Farmville Ins. Co., Case No. 17,603.

A misrepresentation of a material fact is fatal, though made by an agent without the knowledge of the principal.—Carpenter v. American Ins. Co., Case No. 2,428.

False representation, to avoid policy, must be material, either in relation to rate of premium or as offering false inducement to risk.—Clason v. Smith, Case No. 2,868.

If the insured grossly exaggerates the value of his property at the time of taking out his policy, he is not entitled to recover.—Whittle v. Farmville Ins. Co., Case No. 17,603.

See, also, post, §§ 66, 150, 151.

§ 45. Concealment.

It is the duty of the assured to disclose all facts material to the risk.—Kohne v. Insurance Co. of North America, Case No. 7,920.

The underwriters cannot object that a certain act was concealed, when it was done in the usual course of trade.—Calbreath v. Gracy, Case No. 2,296.

The rule requiring all matters material to the risk, known to the assured, to be disclosed, does not apply where the concealment is as to a matter covered by a warranty, express or implied.—Bulkley v. Protection Ins. Co., Case No. 2,118.

Otherwise, however, as to misrepresentations as to material facts, whether in answer to questions, or voluntary.—Bulkley v. Protection Ins. Co., Case No. 2,118.

Where material facts are suppressed in representations made a part of the policy, the insurance is avoided.—Clark v. Manufacturers' Ins. Co., Case No. 2,829.

A concealment of facts material to the risk within the knowledge of the insured, and which the insurer is not bound to know, vitiates the policy.—Vale v. Phœnix Ins. Co., Case No. 16,811.

On insurance on goods on a voyage to Charleston, lost or not lost, general knowledge of underwriters of severe gales on the coast of Carolina will not relieve the insured from the duty of communicating a letter giving particulars of a hurricane.—Moses v. Delaware Ins. Co., Case No. 9,872.

The underwriter is presumed to be acquainted with public transactions, foreign laws, and ordinances, the course of nature and of trade, but the insurer is bound to disclose all facts within his private knowledge which may be material to the risk.—Kohne v. Insurance Co. of North America, Case No. 7,922.

§ 46. False swearing in obtaining insurance.

False swearing by the assured in preliminary proofs or in an examination under oath required by the policy in any material matter, with intent to mislead, avoids the policy, but honest mistakes do not have this effect.—Wiede v. Insurance Co. of North America, Case No. 17,617; Same v. International Ins. Co., Id.; Same v. Home Ins. Co., Id.

See, also, post, § 66.

§ 47. Breach of warranty.

Material statements in the answers of the applicant are considered as warranties, where the policy contains a clause declaring that the application forms a part of the policy.—Eddy Street Iron Foundry v. Hampden Stock & Mutual Fire Ins. Co., Case No. 4,277.

Representations are made warranties by a declaration in the policy that the application is to be considered a part thereof, and that the policy is issued on the faith of the representations and shall be void if they are untrue.—Lee v. Guardian Life Ins. Co., Case No. 8,190.

Where answers are responsive to direct questions asked by the insurer, they are to be regarded as warranties; where not so responsive, but volunteered, they should be construed to be mere representations.—Buell v. Connecticut Mut. Life Ins. Co., Case No. 2,104.

The different kinds of warranties, affirmative and promissory, express and implied, discussed.—Cady v. Imperial Ins. Co., Case No. 2,283.

Untrue warranties avoid a policy, regardless of their materiality; otherwise as to mere representations.—Buell v. Connecticut Mut. Life Ins. Co., Case No. 2,104.

§ 48. Condition precedent.

All warranties, whether express or implied, constitute a condition precedent, and performance must be proved.—Craig v. United States Ins. Co., Case No. 3,340.

(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.

See, also, post, §§ 68–88.

§ 49. Marine insurance—Description of vessel.

Everything which concerns the state of the vessel at any particular period of her voyoge is material to the risk.—Coles v. Marine Ins. Co., Case No. 2,988.

The assured need not communicate the age of the vessel, or where she was built.—Popleston v. Kitchen, Case No. 11,278.

The meaning of the representation, "coppered ship," in the application, is to be understood according to the ordinary sense and usage of such terms in the place where the insurance is made.—Hazard v. New England Marine Ins. Co., Case No. 6,282.

Upon a valued policy, a misrepresentation as to the age and size of the vessel will not avoid the policy.—Straas v. Marine Ins. Co., Case No. 13,518.

A misrepresentation as to the size and age of the vessel, though material to the risk, is no defense to an action upon a valued policy.—Hodgson v. Marine Ins. Co., Case No. 6,567.

§ 50. —— Seaworthiness.

In a time policy on a vessel in her home port when made, seaworthiness at the time of sailing is an implied warranty.—Rouse v. Insurance Co., Case No. 12,089.

There is no implied warranty of seaworthiness in antedated time policies.—Jones v. Insurance Co., Case No. 7,470.

Seaworthiness is such a state as is competent to resist the ordinary action of winds and waves in the voyage for which the vessel is insured.—Bullard v. Roger Williams Ins. Co., Case No. 2,122.

Heavy cross seas are not the ordinary action of the sea, within the meaning of this rule, however common they may be in the voyage insured.—Bullard v. Roger Williams Ins. Co., Case No. 2,122.

Unseaworthiness when insured, good defense.—Adderly v. American Mut. Ins. Co., Case No. 75.

§ 51. —— Loading of vessel.

The stipulation, "outward cargo of coal not to exceed registered tonnage," *held* not a material misrepresentation, where the policy provided for indemnity though the cargo exceeded the registered tonnage.—Hearn v. Equitable Safety Ins. Co., Case No. 6,300.

A statement that the vessel would take her register tonnage of coal *held* not a material misrepresentation, where she in fact carried more than that quantity.—Hearn v. Equitable Safety Ins. Co., Case No. 6,300.

§ 52. —— Voyage and destination.

A representation as to the destination of the ship, if true at the time, and not fraudulently made, does not avoid the policy, although the destination be afterwards changed.—Hubbard v. Coolidge, Case No. 6,816.

A misrepresentation as to the port whence the voyage commenced *held* immaterial, the risk being no greater.—Kohne v. Insurance Co. of North America, Case No. 7,920.

Where the policy authorizes the vessel to stop at a particular port, the assured need not disclose that the vessel will call there.—Hubbard v. Coolidge, Case No. 6,816.

Upon an open policy from St. Thomas to Havana, *held*, that it was unnecessary to disclose the fact that the ship had sailed from Alexandria to Buenos Ayres, and thence to St. Thomas.—Simmes v. Marine Ins. Co., Case No. 12,862.

§ 53. —— Time of sailing.

A misrepresentation as to time of sailing, if material to the risk, avoids the policy.—Baxter v. New England Ins. Co., Case No. 1,127.

It is a material concealment not to exhibit, at the time the contract of insurance is made, a letter communicating the time when the voyage insured commenced, where the vessel is then out of time.—Johnson v. Phœnix Ins. Co., Case No. 7,405.

§ 54. —— Character of voyage and port regulations.

Instructions to the master of a vessel which violate the English admiralty rules, although such rules are against the law of nations, must be communicated to the underwriter.—Sperry v. Delaware Ins. Co., Case No. 13,236.

That a cargo brought from Laguira to Charleston in 1799, and then carried on a voyage to Spain, was not actually landed at Charleston, was a fact material to the risk, which the insured was bound to disclose, in view of the British regulations in respect to the colonial trade of enemies.—Kohne v. Insurance Co. of North America, Case No. 7,922.

Traders in belligerent country cannot recover on policy made with warranty of neutrality, where belligerent character not disclosed.—Bauduy v. Union Ins. Co., Case No. 1,112.

The assured is not bound to anticipate and disclose every possible ground of suspicion which may weigh with belligerent cruisers; but he must disclose circumstances under which belligerent courts are in the habit of condemning, though against right.—Marshall v. Union Ins. Co., Case No. 9,133.

If regulations of a belligerent, with respect to neutrals engaging in colonial trade, are known only to the insurer, he must ask for information as to the facts; if known only to the insured, he must disclose them.—Kohne v. Insurance Co. of North America, Case No. 7,920.

Concealment by the assured of the fact that part of the cargo is such as would be condemned by belligerent courts vitiates the whole policy.—Marshall v. Union Ins. Co., Case No. 9,133.

§ 55. —— Valuation.

A bona fide overvaluation not made with intent to mislead or defraud will not avoid a valued policy, and underwriter is estopped to consider the actual value where he has agreed to the value as stated.—Alsop v. Commercial Ins. Co., Case No. 262.

§ 56. Use of building.

The policy is void where the property insured represented as an oil warehouse is in fact an oil refinery, whose risk is essentially greater.—Camden Consol. Oil Co. v. Ohio Ins. Co., Case No. 2,337b.

§ 57. Description of goods.

The policy is binding where the property is properly represented, although the insurer is mistaken as to the extent of its liability to fire.—Camden Consol. Oil Co. v. Ohio Ins. Co., Case No. 2,337b.

A mistake in the marks of goods insured *held* not material where the intention was apparent.—Ruan v. Gardner, Case No. 12,100.

§ 58. Value.

A provision that "if the insured shall cause the property to be insured for more than its value, the policy shall be void," only avoids the policy in case of intentional overvaluation or fraudulent concealment.—Field v. Insurance Co. of North America, Case No. 4,767.

Overvaluation and misrepresentation of the value of the subject-matter of insurance, although they afford no conclusive proof of fraud, afford a very strong presumption thereof.—Ocean Ins. Co. v. Fields, Case No. 10,406.

Fraud in the valuation of the property insured will vitiate the policy.—Howell v. Hartford Fire Ins. Co., Case No. 6,780.

§ 59. Title or interest of insured.

Interest at the time of the loss *held* sufficient to entitle the insured to recover, although he had no interest at the commencement of the

risk.—Henshaw v. Mutual Safety Ins. Co., Case No. 6,387.

Representations in the application, by the beneficiaries of an estate, that they are absolute owners of the property, will vitiate the policy, when such representations are made warranties.—Murphrey v. Old Dominion Ins. Co., Case No. 9,945.

Where the person in whose name a building is insured, described as "his," held the legal title only as trustee for a purchaser under a void mechanic's lien sale, *held*, that he could not recover for a loss where the policy provided that the insured's interest, if not absolute, must be expressed in the policy.—Porter v. Ætna Ins. Co., Case No. 11,286.

The interest of a tenant in a wooden building which his lease gives him a right to remove is an absolute interest, within the meaning of an application for insurance.—Nichols v. Farmers' Mut. Ins. Co., Case No. 10,242.

Oath to ownership made in good faith, not falsified by naked legal title being in another. —American Basket Co. v. Farmville Ins. Co., Case No. 290.

Naked legal title in another does not vitiate policy conditioned that insured should be "entire, unqualified owner."—American Basket Co. v. Farmville Ins. Co., Case No. 290.

Owner must disclose the fact that property insured has been sold under a mortgage.—Geib v. Enterprise Co., Case No. 5,297.

§ 60. Incumbrances.

False statements by the assured in the application respecting the existence of a mortgage on the property insured *held* to avoid the policy.—Geib v. International Ins. Co., Case No. 5,298.

§ 61. Special circumstances affecting risks.

The concealment of incendiary threats, made so long prior to the insurance as not to increase the hazard, will not avoid the policy.—Thompson v. Liverpool & L. & G. Ins. Co., Case No. 13,966.

§ 62. Other insurance.

The insured need not disclose prior insurance. —Murray v. Insurance Co. of Pennsylvania, Case No. 9,961.

Prior insurance to the full value of the property exonerates the insurer in a subsequent policy, under the usual clause as to prior insurance, though the prior policies are subsequently canceled before the risk is commenced.—Seamans v. Loring, Case No. 12,583.

(C) MATTERS RELATING TO PERSON INSURED.

§ 63. Age, health, and physical condition.

Statement of age *held* not to import absolute accuracy.—France v. Ætna Life Ins. Co., Case No. 5,027.

Warranty in relation to "good health" and being "free from any symptoms of disease" construed.—Swick v. Home Ins. Co., Case No. 13,692.

Declarations in response to questions as to health are representations, and the burden of proving their falsity is on the insurer.—Conver v. Phœnix Mut. Life Ins. Co., Case No. 3,143.

Failure to disclose the fact that the insured is dangerously ill will avoid a renewal certificate, issued on payment of a premium 11 days after it is due, where prompt payment has not been waived.—Garber v. Globe Mut. Life Ins. Co., Case No. 5,214.

A declaration that the insured had not previously had a severe disease *held* not to include those ordinary diseases which yield readily to medical treatment, and do not tend to shorten life, such as a disease of the bowels, which lasted three weeks.—Holloman v. Life Ins. Co., Case No. 6,623.

The certificate of the examining physician of a life insurance company is evidence of its recitals, and is conclusive, unless his opinion was influenced by fraudulent representations or concealment of material facts.—Holloman v. Life Ins. Co., Case No. 6,623.

The examining physician is the agent of the insurer, and not of the insured, and the company cannot show that he was incompetent.—Holloman v. Life Ins. Co., Case No. 6,623.

"Throat disease," as used in an application, *held* not to include a temporary inflammation, completely cured at such time.—Eisner v. Guardian Mut. Life Ins. Co., Case No. 4,323.

A severe injury or a concussion of the brain from a fall on the head must be disclosed under the question, "Have you ever had any serious * * * personal injury?"—Snyder v. Mutual Life Ins. Co., Case No. 13,154.

Failure to make known slight temporary disturbances, not characterizing a dangerous disease, if not frequent and repeated, will not avoid the policy.—Conver v. Phœnix Mut. Life Ins. Co., Case No. 3,143.

Untruthful answers to material questions relating to health and habits, made warranties, will avoid a policy, though the matters misrepresented did not contribute to assured's death. —Conover v. Massachusetts Mut. Life Ins. Co., Case No. 3,121.

§ 64. Family history.

The question, "Have the person's parents, uncles, aunts, brothers, or sisters been afflicted with * * * or any other hereditary disease?" *held* to have been truthfully answered. —Gridley v. Northwestern Mut. Life Ins. Co., Case No. 5,808.

The fact that insured was 14 years old and at home at the time of the death of certain members of his family does not prove that he knew the cause of death.—Sinclair v. Phœnix Mut. Life Ins. Co., Case No. 12,896.

§ 65. Habits.

Warranty that the assured had never "been addicted to the excessive or intemperate use of any alcoholic stimulants," and does not "use habitually intoxicating drinks as a beverage," construed.—Swick v. Home Ins. Co., Case No. 13,692.

A representation in the application that the applicant is "sober and temperate" does not mean that he totally abstains from the use of intoxicating liquors, or that he may not have been drunk on some occasions. It means, rather, that he is temperate in the use of spirituous liquors,—not addicted to their excessive use.— Wolf v. Mutual Ben. Life Ins. Co., Case No. 17,925a.

X. FORFEITURE OF POLICY FOR BREACH OF WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(A) GROUNDS IN GENERAL.

§ 66. Promissory representations and warranties.

A material departure from the representations prevents recovery, although the fire was not caused by the departure.—Nicoll v. American Ins. Co., Case No. 10,259.

Warranties, unless strictly complied with, will invalidate the insurance, whether they are or are not material to the risk.—Eddy Street Iron

Foundry v. Hampden Stock & Mutual Fire Ins. Co., Case No. 4,277.

A statement in the application that there was being constructed a force pump, etc., is not a warranty.—Howell v. Hartford Fire Ins. Co., Case No. 6,780.

A warranty in a policy of fire insurance will not be extended by construction to include anything not necessarily implied in its terms.—Sayles v. Northwestern Ins. Co., Case No. 12,422.

See, also, ante, §§ 44, 46.

§ 67. Conditions subsequent.

Conditions are to be construed strictly against those for whose benefits they are intended, when they impose burdens on the other party.—Catlin v. Springfield Fire Ins. Co., Case No. 2,522.

(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.

See, also, ante, §§ 49–62.

§ 68. Marine insurance—Repairs.

The necessity of repairs, in the course of the voyage, on account of mere wear and tear, does not impair the original warranty of seaworthiness.—Donnell v. Columbian Ins. Co., Case No. 3,987.

§ 69. —— Loading and change of cargo.

The act of an American consul in whose hands a vessel is placed by the crew, after the death of all the officers at sea, in changing her cargo so as to lighten her, is not chargeable to the insured, and is no defense to the policy, unless the vessel was actually overloaded.—Winthrop v. Union Ins. Co., Case No. 17,901.

A warranty in a policy of insurance that the ship shall not load more than her registered tonnage, means that cargo shall not be carried beyond that amount.—Great Western Ins. Co. v. Thwing, Case No. 5,738.

Necessary and proper dunnage is no part of the loading within this warranty, though it is carried on freight.—Great Western Ins. Co. v. Thwing, Case No. 5,738.

§ 70. —— Voyage.

Construction of time policy in relation to destination and voyage.—Stuart v. Columbian Ins. Co., Case No. 13,554.

§ 71. —— Deviation or other change of voyage in general.

What will be deemed a deviation from the voyage insured, and under what circumstances a vessel may proceed to a port out of her direct course, and for what causes she may remain at such port.—Coles v. Marine Ins. Co., Case No. 2,988.

The smallest deviation without justifiable necessity discharges the underwriters, though the loss is not an immediate consequence.—Martin v. Delaware Ins. Co., Case No. 9,161.

Where a vessel comes to anchor off the port of destination when she might have gone directly in, it is a deviation discharging the insurers.—West v. Columbian Ins. Co., Case No. 17,421.

If deviation was not within purposes, and for objects, authorized by usage, the insured cannot recover.—Bentaloe v. Pratt, Case No. 1,330.

Liberty to touch at a place does not justify trading, and trading would be a deviation avoiding the policy.—United States v. The Paul Shearman, Case No. 16,012.

A vessel cannot go out of her course to supply a want of men existing before the commencement of the voyage insured.—Cruder v. Pennsylvania Ins. Co., Case No. 3,452; Same v. Philadelphia Ins. Co., Id. 3,453.

Where the circumstances are not decisive as to the motives of the master, he will be given the benefit of a favorable construction.—Crocker v. Jackson, Case No. 3,398.

A stoppage or deviation to save property, but not to save life, will discharge the insurer.—Bond v. The Cora, Case No. 1,621.

A policy describing a voyage as from A. to B., "or" C., and at and from thence to D., does not authorize touching at both B. and C.—Bulkley v. Protection Ins. Co., Case No. 2,118.

A departure from the voyage named will not be a deviation, if shown to be a usage of the trade.—Bulkley v. Protection Ins. Co., Case No. 2,118.

A vessel capturing a hostile vessel in self-defense may take possession, and man out the prize.—Haven v. Holland, Case No. 6,229.

§ 72. —— When deviation excusable.

A reasonable stop at Santos to avoid enemy's cruisers on a voyage from Guadaloupe to France on the Atlantic *held* excusable.—Goyon v. Pleasants, Case No. 5,647.

A deviation for water, where the necessity really and fairly existed, and a sufficient quantity was originally taken on board, and the port at which the vessel puts in is the nearest, is justifiable.—Wood v. Pleasants, Case No. 17,961.

A deviation, under the direction of the master and last remaining officer when dying, in order to place the vessel in charge of the American consul, is excusable.—Winthrop v. Union Ins. Co., Case No. 17,901.

The same rule applies to the appointment of a British master by the American consul which increased the risk, making the vessel a good prize had she been taken by a French cruiser.—Winthrop v. Union Ins. Co., Case No. 17,901.

A vessel armed and insured as a letter of marque has no right to cruise at large for prizes, but she may chase and capture hostile vessels coming in sight in the course of her voyage.—Haven v. Holland, Case No. 6,229.

A vessel, whether armed or not, has the right to attack or chase an enemy ship in self-defense.—Haven v. Holland, Case No. 6,229.

A stoppage to save lives in jeopardy or property in extraordinary hazard is not a deviation.—The Boston, Case No. 1,673.

A departure by a vessel from her course, to ascertain if those on board another vessel in apparent distress need relief, and a delay to afford such relief, though the motive of saving property also influenced the master, is not a deviation.—Crocker v. Jackson, Case No. 3,398.

Otherwise as to a departure or delay merely to save property.—Crocker v. Jackson, Case No. 3,398.

§ 73. —— Illegality of voyage and neutrality.

If the voyage, as originally insured, be valid, any subsequent illegality in the course of the voyage will not affect the policy as to property not tainted with such illegality.—Clark v. Protection Ins. Co., Case No. 2,832.

A policy on a vessel is not rendered void because the ship took on board a chain cable smuggled by another vessel.—Clark v. Protection Ins. Co., Case No. 2,832.

A warranty against illicit or prohibited trading refers to the municipal laws of the country where the trade is to be carried on, which laws foreigners going there are bound to know and observe.—Smith v. Delaware Ins. Co., Case No. 13,035.

Such warranty amounts to a stipulation that the trade shall be lawful so as to protect the insured property, and shall not become unlawful by the misconduct or neglect of the insured.—Smith v. Delaware Ins. Co., Case No. 13,035.

That a vessel seized in foreign waters on the ground of illicit trade was seized before she arrived at her destination, and before she had opportunity to actually engage in trade, does not show that a warranty against illicit or prohibited trade was not broken.—Smith v. Delaware Ins. Co., Case No. 13,035.

In respect to insurance, the effect of neutrals engaging in colonial trade, contrary to the British regulations, is the same, whether such regulations are consistent with international law or not.—Kohne v. Insurance Co. of North America, Case No. 7,920.

Sailing under a British license during the war between the United States and England is illegal. Craig v. United States Ins. Co., Case No. 3,340.

Upon an open policy from St. Thomas to Havana, it is no objection to a recovery of the freight that the vessel had been chartered at Buenos Ayres (then in revolt against Spain) by Danish subjects resident at St. Thomas, for a voyage from Buenos Ayres to Havana, with leave to stop at St. Thomas, where she did stop, change her papers, and take a new bill of lading, without unlading the cargo.—Simmes v. Marine Ins. Co., Case No. 12,862.

Warranty of American property *held* to extend to all cargo put on board on which policy is to attach.—Bayard v. Massachusetts Fire & Marine Ins. Co., Case No. 1,133.

A warranty of neutrality is broken by any act of commission or of omission which jeopardizes the claim to a neutral character, whether by the owner, or by his agents.—Calbreath v. Gracy, Case No. 2,296.

The warranty of neutrality implies that the property is neutral in fact, and shall be so documented as to prove its neutrality, which shall not be compromised by any act of the insured or his agents.—Schwartz v. Insurance Co. of North America, Case No. 12,504.

The stipulation in a policy as to the place where proof is to be made in support of the warranty of neutrality is not affected by the sentence of a foreign court.—Sperry v. Delaware Ins. Co., Case No. 13,236.

The register of a vessel is the only document which need be on board in time of universal peace, in compliance with warranty of national character.—Catlett v. Pacific Ins. Co., Case No. 2,517.

The insurance is forfeited where the risk is varied or increased by conduct inconsistent with the duties of neutrality.—Schwartz v. Insurance Co. of North America, Case No. 12,504.

Liability to forfeiture for smuggling does not avoid the insurance.—Clark v. Protection Ins. Co., Case No. 2,832.

The conduct of the master in not delivering a letter of instructions when captured, though imprudent, *held*, would not prevent a recovery by the insured.—Sperry v. Delaware Ins. Co., Case No. 13,236.

§ 74. Fire insurance—Change of condition and machinery or use of building.

The substitution of a horizontal for an upright boiler in a woolen mill, and the building of a structure to cover the projecting end, and a brick chimney and fireplace, where thereby auxiliary motive power was obtained, *held* not to render the policy void.—James v. Lycoming Ins. Co., Case No. 7,182.

Repairs necessary to remedy defects endangering the safety of the insured property may be made, and new machinery substituted for old, where the risk is not increased.—James v. Lycoming Ins. Co., Case No. 7,182.

The policy is not avoided by an alteration in the building which does not increase the risk, where there are no express provisions against alterations.—Dorn v. Germania Ins. Co., Case No. 4,005.

A recital in a policy that the premises insured are "to be occupied hereafter as a tavern, and privileged as such," is not a warranty that the house should be constantly occupied as a tavern.—Catlin v. Springfield Fire Ins. Co., Case No. 2,522.

Where a material change is made in the mode of using property insured, and no notice is given at the time or before the renewal, old and new policies are void.—Clark v. Manufacturers' Ins. Co., Case No. 2,829.

§ 75. —— Building becoming vacant.

A vacancy, while the owner was endeavoring to procure a tenant, *held* not within the condition rendering the policy void where the premises become vacant or unoccupied, and so remain without consent of the company.—Kelley v. Home Ins. Co., Case No. 7,658.

§ 76. —— Keeping of prohibited articles.

The storing or selling of an inconsiderable quantity of saltpetre is not within prohibition of storing or vending. But a keg of saltpetre is a considerable quantity.—Bayly v. London & L. Ins. Co., Case No. 1,145.

Keeping saltpetre on hand to cure meat is not within prohibition of storing or vending it.—Bayly v. London & L. Ins. Co., Case No. 1,145.

§ 77. —— Removal of goods.

There can be no recovery for a loss by fire of the insured property while in a building other than the one described in the contract.—Eddy Street Iron Foundry v. Hampden Stock & Mutual Fire Ins. Co., Case No. 4,277.

§ 78. —— Change of title or interest.

A condition avoiding the policy on the sale of conveyance of the property without the consent of the company is not broken by the sale of an interest therein.—Scanlon v. Union Fire Ins. Co., Case No. 12,436.

Effect of giving a mortgage upon policy conditioned that insured shall keep "entire, unqualified" ownership.—American Basket Co. v. Farmville Ins. Co., Case No. 290.

A conveyance of the fee by the mortgagor to the mortgagee will avoid a policy to the mortgagor, though the insurer previously consented to an assignment of the policy.—Bilson v. Manufacturers' Ins. Co., Case No. 1,410.

A conveyance from fraudulent grantees of a bankrupt to the trustee of his estate will avoid a policy issued in their names, but made payable to him as trustee, if made without the consent of the insurer, as provided in the policy.—Dean v. Equitable Fire Ins. Co., Case No. 3,705.

A deed from the insured, where there is no evidence that it has been recorded or delivered, or possession taken under it, is not admissible to sustain the defense of a change in title or possession.—Humphry v. Hartford Fire Ins. Co., Case No. 6,874.

The consent of the insurer to a change of ownership in the insured property must be evidenced in the manner provided in the contract.—Bates v. Equitable Fire & Marine Ins. Co., Case No. 1,101.

A consent to an indorsement on a policy, "payable in the case of loss to" a third person, is not a consent to change of ownership to such person, where such change was not known at the time.—Bates v. Equitable Fire & Marine Ins. Co., Case No. 1,101.

Quære, where the assured had property in the goods insured at the time of the insurance, whether a subsequent change of interest, before or after loss, would affect his right to recover.—Hancox v. Fishing Ins. Co., Case No. 6,013.

An adjudication of bankruptcy terminates the interest of a bankrupt in a policy, and it is void unless assigned to the assignee.—In re Carow, Case No. 2,426.

§ 79. —— Precautions against loss.

Stipulations in a policy on a mill that the forcing pump should be kept in good working order, and water-casks and buckets kept in each room, are not warranties, and a substantial compliance is sufficient.—Cady v. Imperial Ins. Co., Case No. 2,283.

A warranty that the force pump shall be at all times ready for use does not include a warranty that a peril insured against shall not disable it.—Sayles v. Northwestern Ins. Co., Case No. 12,422.

A warranty of a force pump in a mill at all times ready for use includes a warranty of power to work it, but not any particular kind of power.—Sayles v. Northwestern Ins. Co., Case No. 12,422.

§ 80. —— Additional insurance.

Construction of clauses in fire policy respecting subsequent insurance and termination of interest.—Holbrook v. American Ins. Co., Case No. 6,589.

The right of a mortgagee whose interest has been insured under a policy payable to him as mortgagee *held* not affected by other insurance obtained by the mortgagor without his knowledge.—Johnson v. North British & Mercantile Ins. Co., Case No. 7,400.

Insurance made by a mortgagee at the expense of the mortgagor is subsequent insurance by the mortgagor.—Holbrook v. American Ins. Co., Case No. 6,589.

Whether policy on part of goods previously insured avoids first policy in toto under condition against additional insurance, quære.—Allison v. Phœnix Ins. Co., Case No. 252.

A second policy invalid by reason of misrepresentations as to prior insurance does not violate condition in first policy against additional insurance.—Allison v. Phœnix Ins. Co., Case No. 252.

Subsequent insurance in other companies, in contravention of the terms of a policy, will, if it so provides, avoid the same.—Geib v. International Ins. Co., Case No. 5,298.

§ 81. Default as ground of forfeiture in general.

Condition that policy shall cease and all premiums be forfeited if interest on premium notes not paid annually in advance is valid.—Anderson v. St. Louis Mut. Life Ins. Co., Case No. 362.

A provision for the forfeiture of a life policy on failure to pay interest on premium notes is valid and not in conflict with another clause declaring the policy nonforfeitable for failure to pay any premium after the first.—Nettleton v. St. Louis Life Ins. Co., Case No. 10,128.

A course of business to pay interest on premium notes in cash, and apply dividends earned to the principal, will control the rule of law as to application of payment, even though it results in forfeiture of the policy.—Anderson v. St. Louis Mut. Life Ins. Co., Case No. 362.

The equitable value of Northern policies of Southern holders, which lapsed during the Civil War by default in paying the annual premium, is to be determined by the jury or chancellor; and a verdict founded upon competent testimony, not grossly excessive, will not be set aside.—Davis v. New York Life Ins. Co., Case No. 3,644.

Where, in the case of a failure to pay an annual premium, the insured failed to demand a paid-up policy, or to apply for a reissue, and pass a new medical examination, *held*, that there could be no recovery in the case of his death.—Schumacher v. Manhattan Life Ins. Co., Case No. 12,490.

Equity will not relieve against a forfeiture of life insurance incurred by nonpayment of premiums on the day stipulated.—Anderson v. St. Louis Mut. Life Ins. Co., Case No. 362.

§ 82. Statutory provisions against forfeiture.

The assured by taking advantage, after failure to pay premiums, of an alternative provision in a policy, by receiving dividends thereunder, waives the provisions of the nonforfeiture statutes.—Desmazes v. Mutual Ben. Life Ins. Co., Case No. 3,821.

§ 83. Notice of time for payment.

The failure of the company, when not fraudulent, to give notice to the assured that a premium or premium note was about falling due, as customary, will not save the policy from a forfeiture provided therein for failure to pay the premium or premium notes.—Thompson v. Knickerbocker Life Ins. Co., Case No. 13,964.

No notice by the company is necessary to render the policy void.—Thompson v. Knickerbocker Life Ins. Co., Case No. 13,964.

A custom of the company to allow 30 days' grace cannot affect the rights of the parties under the contract.—Thompson v. Knickerbocker Life Ins. Co., Case No. 13,964.

If the excuse be a want of sufficient notice to pay an assessment, plaintiff must prove the insufficiency.—Eaton v. Supreme Lodge K. of H., Case No. 4,259a.

§ 84. Extension of time for payment.

The fact that the agent was in the habit of giving extensions of time to pay renewal premiums will not prevent the policy expiring, under its provisions, on nonpayment of the premium at the time when due.—Macumber v. St. Louis Life Ins. Co., Case No. 8,929. But see Garber v. Globe Mut. Life Ins. Co., Case No. 5,214.

§ 85. Sufficiency of payment or tender to prevent forfeiture—In general.

Where, by the terms of the policy, the premium is payable half in cash and half in note, a notice that the entire premium must be paid in cash will excuse formal tender of the premium.—Hight v. Continental Life Ins. Co., Case No. 6,478a.

A policy lapses by failure to pay a premium in advance as it becomes due unless the course of dealing between the agent and the insured has been such as to induce a belief that the premium has been paid by the exchange of individual accounts between such persons.—Winindger v. Globe Mut. Life Ins. Co., Case No. 17,874.

The refusal of the company when applied to by the insured, on the return of peace, to recognize the policy or receive the premiums, relieves him from the necessity of paying premiums subsequently accruing.—Hamilton v. Mutual Life Ins. Co., Case No. 5,986.

A reply to a letter asking a continuance of insurance suspended during the Civil War that the policy is forfeited dispenses with tender of premiums.—Bird v. Penn Mut. Life Ins. Co., Case No. 1,430.

A premium note, when negotiable, is entitled to grace as other commercial paper, and a tender of interest within the days of grace will prevent a forfeiture for nonpayment of interest at maturity.—Jarman v. St. Louis Mut. Life Ins. Co., Case No. 7,221.

Where a premium note is not paid at maturity, and the policy provides that it shall be void while it remains overdue, and, after dishonor of the note, the vessel strands, and the master pays the note, and a gale comes up and the vessel is lost, the insurer is not liable.—Cardwell v. Republic Fire Ins. Co., Case No. 2,396.

Where payment of the premium was to be made on the first day of the succeeding month, which fell on Sunday, *held*, that an offer to pay made on Monday was sufficient, though the building burned on Sunday.—Taylor v. Germania Ins. Co., Case No. 13,793.

It is no defense to an action of covenant on a policy that the premium has been perpetually enjoined.—Hodgson v. Marine Ins. Co., Case No. 6,567.

§ 86. —— To agent or broker.

A tender of the premium to an agent of the company is sufficient to prevent a forfeiture, where he has been in the habit of receiving the premiums without objection of the company, though the policy requires payment at the principal office.—Morey v. New York Life Ins. Co., Case No. 9,795.

The insurer is bound by the receipt of a premium, paid in good faith after forfeiture, by one who had for many years represented the company in doing all such business as usually devolves upon a local agent.—Dutton v. New York Life Ins. Co., Case No. 4,211.

Such receipt is binding, although the policy provides that the only evidence of payment shall be receipts signed by the president or actuary.—Dutton v. New York Life Ins. Co., Case No. 4,211.

§ 87. Excuses for nonpayment.

A contract of life insurance, entered into by a Northern insurance company with a resident of a Southern state before the Rebellion, which provides that it shall be void on the nonpayment of premiums, is not suspended by the war, though the performance of the condition is made impossible, or the contract made illegal by the war; and a court of equity cannot relieve the party from a forfeiture.—Tait v. New York Life Ins. Co., Case No. 13,726.

It seems that equity will relieve against a forfeiture from inability to pay premiums caused by the Civil War, and reinstate the insurance on payment of all premiums, with interest.—Bird v. Penn Mut. Life Ins. Co., Case No. 1,430.

A policy of insurance by a New York company on the life of a citizen of Alabama is suspended, and not dissolved, during the continuance of the Civil War, and the rights thereunder may be enforced on the return of peace.—Hamilton v. Mutual Life Ins. Co., Case No. 5,986; Hancock v. New York Life Ins. Co., Id. 6,011.

§ 88. Rights of insured after default.

Under Act Mass. 1861, c. 186, *held*, that a paid-up policy proportioned to the premiums paid could be obtained after forfeiture of the policy by failure to pay a premium.—Winchell v. John Hancock Mut. Life Ins. Co., Case No. 17,866.

The right of an insured to a paid-up policy under the policy and Act Mass. 1861, c. 186, is a property right which survives to his representatives.—Winchell v. John Hancock Mut. Life Ins. Co., Case No. 17,866.

The insurer, on electing to discontinue, *held* entitled to a paid-up policy, without first paying a premium note given by him.—Dutcher v. Brooklyn Life Ins. Co., Case No. 4,202.

A request for a paid-up policy, made to an agent who had received the premiums, but was not employed by the company, *held* sufficient, where the company did not at once repudiate his actions.—Morrison v. American Popular Life Ins. Co., Case No. 9,841.

Where an insured is entitled to a paid-up policy, the insurer cannot object to signing a written policy tendered by him because not its printed blank, unless it tenders a policy made on such blank.—Watts v. Phœnix Mut. Life Ins. Co., Case No. 17,294.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

See, also, post, § 152.
Waiver of forfeiture, see "Injunction," § 5.

§ 89. Application of doctrines of estoppel and waiver.

Forfeitures provided for in policies are for the benefit of the insurer, and may be waived by it.—Young v. Mutual Life Ins. Co., Case No. 18,168.

The insurer, claiming a forfeiture of a policy, for noncompliance with certain conditions, is bound by the reasons assigned at the time.—Cahill v. Andes Ins. Co., Case No. 2,289.

A waiver of abandonment by the first insurer does not affect the relations of the insured with a second insurer.—McKim v. Phœnix Ins. Co., Case No. 8,862.

A waiver of a deviation, made upon a misstatement of fact, is unavailing.—Glidden v. Manufacturers' Ins. Co., Case No. 5,482.

§ 90. Liability of insurer to estoppel by acts and conduct of agents.

Where true answers are given to the questions in the application, the company will be estopped to take advantage of the mistakes and omissions of its local agent in reducing the answers to writing.—Wilkinson v. Union Mut. Life Ins. Co., Case No. 17,676.

Where acts and conduct on the part of the local agent who wrote the application and issued the policy will estop the company to set up the existence of a mortgage to defeat the action.—Geib v. International Ins. Co., Case No. 5,298.

The company *held* estopped to deny liability as against one who purchased policy after death of insured, relying upon the representations of its agent.—France v. Ætna Life Ins. Co., Case No. 5,027.

§ 91. Powers of officers or agents respecting waiver.

The waiver of conditions is within the apparent scope of authority of an agent of a foreign company who made the contract.—Davey v. Glens Falls Ins. Co., Case No. 3,590.

Such agent may by his acts waive the condition requiring indorsement on the policy of consent to nonoccupancy.—Davey v. Glens Falls Ins. Co., Case No. 3,590.

But mere knowledge and failure to cancel a policy, or inform the company, does not amount to waiver.—Davey v. Glens Falls Ins. Co., Case No. 3,590.

A mere local agent employed to solicit applications has no power, unless specially authorized, to waive conditions in the policy.—Lee v. Guardian Life Ins. Co., Case No. 8,190.

Agreement of insurance solicitor to carry the insurance *held* not a waiver of condition requiring payment of premium to validate renewal.—Hambleton v. Home Ins. Co., Case No. 5,972.

The insurance solicitor has no authority, simply from the nature of his business, to bind the company to a waiver of payment of the premium.—Hambleton v. Home Ins. Co., Case No. 5,972.

§ 92. Knowledge of or notice to insurer, officers, or agents.

A policy cannot be avoided under its terms because the exact interest of the insured in the property is not shown, where the company's agent knew the actual condition of the title, and neglected to make the proper note in the policy.—Field v. Insurance Co. of North America, Case No. 4,767.

Misrepresentations do not avoid the policy where the company's agent makes the survey and

the representation of the property to be insured, being as well acquainted with its situation as the insured.—Roth v. City Ins. Co., Case No. 12,084.

The insured is bound by untrue answers knowingly made, and the company may set them up in defense, though its agent had knowledge of their untruth from other sources.—Sparrow v. Mutual Ben. Life Ins. Co., Case No. 13,214.

Where the insurance agent knew that a mill was not in use as such when the contract was made, its continuance in such state is not a breach of a condition that the policy shall be void if the mill shall cease to be operated as such.—Humphry v. Hartford Fire Ins. Co., Case No. 6,875.

Disclosure of facts relating to title *held* waived where company's agent knew the facts, and filled in blanks for illiterate assured.—Geib v. Enterprise Co., Case No. 5,297.

The applicant is not bound to communicate intelligence known to the insurer, nor the expectations, opinions, or speculations of such party, based upon facts known to the insurer.—Folsom v. Mercantile Mut. Ins. Co., Case No. 4,902.

Any specially inflammable or hazardous condition due to the presence of flour dust must be presumed to be known to the insurers of a flour mill, if incident to the business.—Washburn v. Western Ins. Co., Case No. 17,216.

§ 93. Implied waiver.

A statement by the agent, on delivering a policy, that there was no hurry about paying the premium, is not a waiver of a condition requiring the premium to be paid before the policy takes effect.—Davis v. Massachusetts Mut. Life Ins. Co., Case No. 3,642.

Certain circumstances *held* to amount in law to a waiver of the condition respecting the amount allowed to be insured in other companies.—Geib v. International Ins. Co., Case No. 5,298.

A waiver of the condition prohibiting residence within certain latitudinal limits cannot be inferred from a mere incidental conversation had on the street with the company's agent.—Lorie v. Connecticut Mut. Life Ins. Co., Case No. 8,509.

Insured, claiming waiver of terms of policy requiring premium to be paid to validate a renewal, must show special agreement, or one arising by necessary implication from the circumstances.—Hambleton v. Home Ins. Co., Case No. 5,972.

§ 94. Failure to cancel or rescind policy.

A forfeiture will be considered as waived where, subsequent to its accruing, the insurer, with knowledge of the acts, recognizes the contract as still subsisting, and manifests an intent not to take advantage of the forfeiture, and does no act prior to the death of the insurer indicating a purpose to claim it.—Young v. Mutual Life Ins. Co., Case No. 18,168.

§ 95. Collection, acceptance, and retention of premiums.

Breach of a condition as to place of residence is waived when, with knowledge thereof, premiums are accepted, and renewal certificates issued.—Garber v. Globe Mut. Life Ins. Co., Case No. 5,214.

The mere receipt of premiums while the insured resided within prohibited latitudinal limits cannot be taken as constructive notice to the company and a waiver of the prohibition.—Lorie v. Connecticut Mut. Life Ins. Co., Case No. 8,509.

The receipt and holding of the premium until requirements are complied with is no waiver where the money is returned on noncompliance with the requirements.—McGowan v. Charter Oak Life Ins. Co., Case No. 8,807.

The acceptance by a general agent of overdue premiums is a waiver of the forfeiture, where the insured has no notice of limitation upon his powers.—McGowan v. Charter Oak Life Ins. Co., Case No. 8,807.

But a notice in the policy and renewal certificates of limitations upon the agent's power is binding on the insured.—McGowan v. Charter Oak Life Ins. Co., Case No. 8,807.

A general agent, by charging himself with the payment of a premium in his account with the company, and giving credit to the insured, may waive the condition of the policy requiring payment in cash.—Jones v. Ætna Ins. Co., Case No. 7,453.

XII. RISKS AND CAUSES OF LOSS.

See, ante, §§ 27, 28.

(A) MARITIME INSURANCE.

§ 96. Marine risks and losses in general.

A policy insuring a vessel from a past date will cover a loss already accrued, of which neither party knew when the policy was issued, though it does not contain the words "lost or not lost."—Folsom v. Mercantile Mut. Ins. Co., Case No. 4,902.

The injury to the insured vessel must be traced to an extraordinary cause.—Coles v. Marine Ins. Co., Case No. 2,988.

Insurers take no risk with regard to the length, retardation, or interruption of a voyage if it be subsequently resumed, or be capable of being resumed.—Jordan v. Warren Ins. Co., Case No. 7,524.

Salvage paid to seamen in case of shipwreck is a charge on the property, and is to be borne by the underwriters where the vessel is abandoned to them.—The Two Catherines, Case No. 14,288.

§ 97. Perils of the sea.

A loss by the ebbing of the tide is a loss by the perils of the sea, if it be not mere wear and tear, but extraordinary in its nature or mode.—Potter v. Suffolk Ins. Co., Case No. 11,339.

Where a small boat is lost after a storm because the vessel was so disabled by the storm as to become unmanageable, the insurers are liable.—Potter v. Ocean Ins. Co., Case No. 11,335.

Loss of cattle by breaking fastenings in lightering from vessel in usual manner is within insurance against "perils of the seas" and "usual risk of lighterage."—Anthony v. Ætna Ins. Co., Case No. 486.

A loss of a ship, by worms, in an ocean where worms ordinarily assail and enter the bottoms of vessels, is not a peril of the sea, within the policy.—Hazard v. New England Marine Ins. Co., Case No. 6,282.

Injury to a vessel stoutly built and only two years old, on her taking ground at a wharf, *held* caused by perils of the sea.—Potter v. Suffolk Ins. Co., Case No. 11,339.

Damage to barley caused by vapor arising from other barley which was reached by sea water *held* not caused by "actual contact with sea water," within the terms of the policy.—Neidlinger v. Insurance Co. of North America, Case No. 10,086.

§ 98. Fire.

Where fire is one of the enumerated risks in a policy on a steamboat, etc., a loss by fire will charge the underwriters, though occasioned by the negligence of the officers or crew.—Waters v. Merchants' Louisville Ins. Co., Case No. 17,266.

§ 99. Arrests, restraints, and detentions.

Under the marginal words in a policy "warranted free from capture, seizure, or detention,"

the insurer is not liable for a loss caused by the capture and burning of the vessel by a duly-commissioned Confederate privateer.—Dole v. New England Mut. Marine Ins. Co., Case No. 3,966.

Underwriters not liable for loss by seizure at designated port for illicit trade not known at the time.—Andrews v. Essex Fire & Marine Ins. Co., Case No. 374.

A seizure made bona fide upon reasonable grounds, however unfounded in fact, *held* within the exception of a loss from seizure or detention on account of illicit or prohibited trade.—Bradstreet v. Neptune Ins. Co., Case No. 1,793.

Construction of exception in Boston policies with regard to seizure on account of illicit or prohibited trade.—Magoun v. New England Marine Ins. Co., Case No. 8,961.

In case of a capture, where the vessel is lost by fire or accident, or negligence of the captors before she is delivered up, the whole loss is attributable to the capture.—Magoun v. New England Marine Ins. Co., Case No. 8,961.

The capture and burning of a vessel by a duly-commissioned Confederate privateer is not a taking by pirates or assailing thieves.—Dole v. New England Mut. Marine Ins. Co., Case No. 3,966.

Indorsement on papers of warning by war ship not to proceed to any port in enemy's possession is not "an arrest, restraint, or detainment" which will justify abandonment of the voyage.—King v. Delaware Ins. Co., Case No. 7,788.

Where a vessel, still in the early stages of a voyage from Philadelphia to the Isle of France, was boarded by a British war ship, warned not to proceed, and falsely informed that the Isle of France was blockaded, *held* that she was not justified in thereupon abandoning the voyage, and claiming insurance on the freight.—King v. Delaware Ins. Co., Case No. 7,788.

§ 100. Barratry.

If the negligence be so gross as to authorize the presumption of fraud, which would constitute barratry, the underwriters are not liable unless the policy expressly insures against barratry.—Waters v. Merchants' Louisville Ins. Co., Case No. 17,266.

The attempt by the master of a vessel which was captured on the ground that a war had been, or was about to be, declared, who was left on board with the prize crew, to rescue the vessel, *held* good ground of condemnation, but not a barratry.—Dederer v. Delaware Ins. Co., Case No. 3,733.

§ 101. Collision and liability therefor.

A collision at sea, whether the result of accident or negligence, is a peril of the seas, within the meaning of insurance policies.—Hale v. Washington Ins. Co., Case No. 5,916.

A vessel injured in a collision put back to port, where her cargo of cotton was found so greatly damaged that it was sold, by the consent of master and shippers, and the vessel proceeded on a different voyage. *Held*, that insurers on the freight were not liable.—Jordan v. Warren Ins. Co., Case No. 7,524.

The underwriters are liable for the direct damage done to the insured ship by a collision, and also for the charge apportioned on such ship as her contributive share towards the common loss under the law of the country where the collision occurred, as a part of the partial loss occasioned by the collision, and not as general average.—Peters v. Warren Ins. Co., Cases Nos. 11,034, 11,035.

Under a policy covering "perils of the sea," the insured may recover damages paid by its vessel to another in consequence of a collision at sea caused by the negligence of the insured vessel.—Sherwood v. General Mut. Ins. Co., Case No. 12,776.

Such policy covers also costs and expenses incurred in a suit brought to recover such damages, as well as counsel fees paid beyond taxable cost.—Sherwood v. General Mut. Ins. Co., Case No. 12,776.

Where a loss by collision arises from the negligence of the master and crew, the master is personally responsible; but the ship also is primarily, although not exclusively, liable for the compensation, and the master having paid the amount of loss to the innocent vessel, it may be recovered from the underwriters of the offending vessel.—Hale v. Washington Ins. Co., Case No. 5,916.

§ 102. Stranding.

To constitute a stranding within a policy, the vessel must be on the strand under extraordinary circumstances.—Potter v. Suffolk Ins. Co., Case No. 11,339.

Underwriters are liable for a loss caused by grounding in a harbor, in the absence of proof of inherent weakness.—Potter v. Suffolk Ins. Co., Case No. 11,339.

There can be no recovery where stranding was due to want of care or skill of the master, or where, after the stranding, he failed to use all reasonable means to save the vessel.—Howland v. Marine Ins. Co., Case No. 6,798.

§ 103. Perils and liabilities not specifically mentioned.

A policy without warranty of neutrality covers belligerent risks.—Hodgson v. Marine Ins. Co., Case No. 6,567; Straas v. Same, Id. 13,518.

§ 104. Proximate cause of loss.

The maxim, "Causa proxima, non remota, spectatur," does not exclude incidental losses flowing as a legal or natural consequence from the direct injury or loss to the thing insured.—Peters v. Warren Ins. Co., Case No. 11,035.

A steamer, insured against loss or damage by fire, was damaged by a collision so that the water rose to her furnaces and forced the fire out and set her on fire, and after burning some time she sank. *Held*, that the insurers were liable only for such loss as naturally and necessarily resulted from the fire.—Norwich & N. Y. Transp. Co. v. Western Massachusetts Ins. Co., Case No. 10,363.

If the immediate cause of a loss is a peril insured against, it is no defense that it was remotely caused by the negligence of the master or crew.—Williams v. New England Ins. Co., Case No. 17,731; Same v. Suffolk Ins. Co., Id. 17,738.

When different causes concur in occasioning a loss, it must be attributed to the efficient predominating peril, whether or not it was in activity at the final consummation of the disaster.—Dole v. New England Mut. Marine Ins. Co., Case No. 3,966.

§ 105. Cause inherent in subject-matter insured.

An exception if the vessel should be condemned as unsound or rotten is not operative where the report of the surveyors states that many of her timbers were rotten, and adds other reasons for condemning her.—Watson v. Insurance Co. of North America, Case No. 17,284.

§ 106. Negligence of owners, master, or crew.

Mere carelessness or unskillfulness of the master and officers of a vessel, in the absence of positive misconduct, or an express stipulation in the policy, does not relieve the insurer from liability for a loss caused thereby.—Levi v. New Orleans Mut. Ins. Ass'n, Case No. 8,290.

A collision caused by negligence of the pilot is within the exception of loss caused "by the

negligence of those in charge of the boat."—Levi v. New Orleans Mut. Ins. Ass'n, Case No. 8,290.

The terms "carelessness," "unskillfulness," and "misconduct" defined.—Levi v. New Orleans Mut. Ins. Ass'n, Case No. 8,290.

There can be no recovery for a loss, caused by a leak discovered before sailing, if a prudent and discreet master of skill would have repaired same.—Adderly v. American Mut. Ins. Co., Case No. 75.

The insured cannot recover for a loss occasioned by his own wrongful act, or by that of any agent for whose conduct he is responsible.—Williams v. New England Ins. Co., Case No. 17,731.

An insured vessel was chartered by the government as a transport, but not to go to any place where there was not sufficient depth of water for her to go in safety, and was sent to Hatteras Inlet, and was lost in the rash and hazardous attempt to cross the bar, acting under orders of the military commander of the expedition. *Held*, that the insurers were not liable.—Williams v. New England Ins. Co., Case No. 17,731.

(B) INSURANCE OF PROPERTY.

§ 107. Limitations of risk as to place.
Where the property is not located as described, but in another building, there can be no recovery for its loss, and the policy will not be reformed.—Severance v. Continental Ins. Co., Case No. 12,680.

§ 108. Fire.
Policy against loss "by fire originating in any cause except design in the insured" covers loss where building is left vacant, and is burned by intruders.—Catlin v. Springfield Fire Ins. Co., Case No. 2,522.

Loss sustained by the removal of goods in imminent danger from fire is recoverable under a policy insuring them from loss or damage by fire while they "shall be and remain in" a certain building.—Holtzman v. Franklin Ins. Co., Case No. 6,649.

A loss by fire communicated from another building set on fire by Union forces, to prevent stores falling in the hands of attacking rebels, *held* not caused by an unlawful and rebellious attack on the city, within the meaning of a proviso.—Boon v. Ætna Ins. Co., Case No. 1,639.

The exception of loss by "explosions of any kind whatever within the premises" does not include the case of a destructive fire, followed shortly by an explosion which, together with the fire, completely destroyed the property.—Washburn v. Artisans' Ins. Co., Case No. 17,212; Same v. Pennsylvania Ins. Co., Id.; Same v. Union Fire Ins. Co., Id. 17,215; Same v. Western Ins. Co., Id. 17,216.

(C) LIFE INSURANCE.

§ 109. Death caused by intemperance.
Where death by suicide or impairment of health by intemperance are excepted under the policy, there can be no recovery where the mental condition under which the insured committed suicide was produced by intemperance.—Jarvis v. Connecticut Mut. Life Ins. Co., Case No. 7,226.

§ 110. Suicide.
"Die by his own hand," as used in policy, *held* equivalent to "suicide."—Moore v. Connecticut Mut. Life Ins. Co., Case No. 9,755.

The insurer is not liable where the insured, by reason of sickness, distress of mind, or a desire to provide for his family, takes his own life, in the exercise of his usual reasoning faculties.—Coverston v. Connecticut Mut. Life Ins. Co., Case No. 3,290.

A condition that the policy shall be void if the insured die by his own act or hand, whether sane or insane, is valid.—Snyder v. Mutual Life Ins. Co., Case No. 13,154; Chapman v. Republic Life Ins. Co., Id. 2,606.

The insurer is not liable in a case of suicide, unless the mind of deceased was so far deranged that he was incapable of using a rational judgment in regard to the acts of self-destruction.—Coverston v. Connecticut Mut. Life Ins. Co., Case No. 3,290.

The rules stated under which recovery may be had in a case of suicide.—Jarvis v. Connecticut Mut. Life Ins. Co., Case No. 7,226.

Under a policy conditioned to be void if assured should "die by his own hand," there can be no recovery, in case of suicide, if the assured was capable of understanding the physical nature and consequences of his act, as distinguished from its moral nature and quality.—Nimick v. Mutual Life Ins. Co., Case No. 10,266.

Insanity defined, which will excuse an act of self-destruction so as to render the insurer liable, notwithstanding a condition avoiding liability where the insured shall "die by his own hand."—Terry v. Life Ins. Co., Case No. 13,839.

Neither an act of suicide, nor an attempt nor a threat to commit suicide, creates a presumption of insanity that would be sufficient to justify a jury in finding a person insane; but such an act may be considered in connection with the previous demeanor and conduct of the person, as evidence of insanity.—Wolff v. Connecticut Mut. Life Ins. Co., Case No. 17,929.

If, however, his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of his act, or if he was impelled thereto by an insane impulse, which he had not the power to resist, the insurer is liable.—Wolf v. Mutual Benefit Life Ins. Co., Case No. 17,925a.

Under a policy conditioned to be void in case the insured should "die by his own hand," there is no liability if the insured kills himself while in the possession of his ordinary reasoning faculties, and from anger, pride, jealousy, or a desire to escape from the ills of life.—Wolf v. Mutual Benefit Life Ins. Co., Case No. 17,925a.

§ 111. Proximate cause of death.
If the rupture of a blood vessel necessarily resulted in the formation of abscesses and the accumulation of injurious substances in the lungs, from which death results, then the rupture was the proximate cause of death; otherwise, if an independent or latent disease was brought into activity by the injury.—McCarthy v. Travelers' Ins. Co., Case No. 8,682.

(D) ACCIDENT INSURANCE.

§ 112. What constitutes accident.
"Accident" includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event, and will include an assault made by persons who have waylaid the assured for purposes of robbery or otherwise.—Ripley v. Railway Pass. Assur. Co., Case No. 11,854.

Rupture of a blood vessel while exercising with Indian clubs is "accidental" if something unforeseen, some involuntary movement, concurred with the use of the clubs to produce the injury; otherwise, however, if the exercise was taken in the ordinary way, without the interference of unusual circumstances.—McCarthy v. Travelers' Ins. Co., Case No. 8,682.

§ 113. Risks of travel, railroads and other conveyances.
A policy limited to accidents "while actually traveling in a public conveyance," and in compliance with all the rules and regulations of the

carrier, covers an accident while getting on or off a train, either at an intermediate station or at the destination.—Tooley v. Railway Pass. Assur. Co., Case No. 14,098.

Under such policy, the assured is only bound to observe such rules as a general traveler might be presumed and ought to know.—Tooley v. Railway Pass. Assur. Co., Case No. 14,098.

Where the policy specially excepted the hazard of standing, riding, or being upon the platform of a moving railway car, or of an injury incurred by the insured's own negligence, *held*, that there could be no recovery where the assured was killed by falling from the platform of a car when the train was in full motion.—Sawtelle v. Railway Pass. Assur. Co., Case No. 12,392.

Insurance against accident "while traveling by public or private conveyance" does not cover an accident occurring to the insured while journeying on foot along a public road.—Ripley v. Railway Pass. Assur. Co., Case No. 11,854.

§ 114. External, violent, accidental, and other means of injury.

The exception in a policy insuring against injuries effected by "violent and accidental means" of certain causes named does not broaden the policy so as to include injuries not effected through violent and accidental means.—Southard v. Railway Pass. Assur. Co., Case No. 13,182.

A rupture effected by jumping from cars, or by running, where there was no question of peril and no stumbling, slipping, or falling, is not caused by "violent and accidental means."—Southard v. Railway Pass. Assur. Co., Case No. 13,182.

Death from inadvertent taking of overdose of opium prescribed by physician is not caused by external, violent, and accidental means, but by medical treatment, within exception of accident policy.—Bayless v. Travelers' Ins. Co., Case No. 1,138.

§ 115. External and visible signs of injury.

A nose bleed may be regarded as an "external and visible sign" of the injury, within the meaning of a provision that the insurance shall not extend to any injury of which there is no such sign.—Whitehouse v. Travelers' Ins. Co., Case No. 17,566.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER UNDER MARINE POLICIES.

§ 116. Actual total loss.

In case of the total loss, the insurance is what the property insured was worth at the time and place of shipping, the expenses of lading included.—Carson v. Marine Ins. Co., Case No. 2,465.

Proof of a capture by a foreign privateer *held* sufficient evidence of total loss after three years, without showing a condemnation.—Ruan v. Gardner, Case No. 12,100.

In the case of perishable cargo there can be no recovery except in the case of an absolutely total loss.—Robinson v. Commonwealth Ins. Co., Case No. 11,949.

Where there is a total loss, the insured is entitled to recover the full amount of the policy, without deduction of a prior payment by the insurer of a general average loss.—Christie v. Buckeye Ins. Co., Case No. 2,700.

§ 117. Constructive total loss.

Where the object of the voyage is entirely defeated, and the vessel is obliged to return home, it cannot be treated as a case of a voyage to a port of necessity for repairs, but there is a total loss.—Williams v. Suffolk Ins. Co., Case No. 17,739.

Where a captured vessel is recaptured by the mate and part of the crew remaining on board who bring her home and libel her for salvage, the insurers are liable as for a constructive total loss.—Williams v. Suffolk Ins. Co., Case No. 17,739.

It is a total loss where, by reason of the perils insured against, the cargo is permanently prevented from arriving at the port of destination.—Robinson v. Commonwealth Ins. Co., Case No. 11,949.

Underwriters are liable as for a total loss where a vessel seized for violation of revenue laws is acquitted by a foreign court, but by the long exposure is so injured that necessary repairs will amount to more than her value, and she is abandoned.—Magoun v. New England Marine Ins. Co., Case No. 8,961.

A vessel, meeting with disasters, put into a port of distress, where her repairs exceeded half her value, and a bottomry bond was given for the amount. Her owner, having no information, abandoned just before her safe arrival. The vessel was sold under the bottomry bond. *Held*, that the loss was not total.—Humphreys v. Union Ins. Co., Case No. 6,871.

The insurer, in such case, is entitled to have the usual deduction on the repairs, of one-third new for old.—Humphreys v. Union Ins. Co., Case. No. 6,871.

The sale of the cargo by the supercargo, where he acted for the interest of all concerned, *held* proper, and effectual to convert a partial into a total loss.—Hurtin v. Phœnix Ins. Co., Case No. 6,941.

When the loss is total under a policy insuring freight on a cargo of jerked beef, part of which arrives at a port of distress, and is there sold to prevent further loss.—Hugg v. Augusta Insurance & Banking Co., Case No. 6,838.

Where the insurer was to be liable for a total loss only, he is not liable where the cargo saved on the wreck of the vessel did not pay the expense of saving it.—Marean v. United States Ins. Co., Case No. 9,064.

The loss cannot be made total where the vessel was sold by the master without a regular condemnation upon a report of a survey ordered by an American consul in a foreign port.—Cort v. Delaware Ins. Co., Case No. 3,257.

The necessary sale of a vessel in the course of a voyage to defray salvage creates of itself a total loss of the vessel for the voyage.—Williams v. Suffolk Ins. Co., Case No. 17,739.

Where a stranded vessel, before abandonment, was gotten off, but was in the meantime sold at auction by the master and purchased by him, the owner cannot recover for total loss.—Church v. Marine Ins. Co., Case No. 2,711.

§ 118. Abandonment—Right to abandon in general.

The mere stranding of a ship on a bar will not justify her abandonment, until the master and crew have used their best exertions to get her off.—Howland v. Marine Ins. Co., Case No. 6,798.

The owner of a perishable cargo at a port of distress may abandon it and recover for a total loss where it will be totally lost before repairs to the vessel can be completed, and no vessel can be found in which to transship it.—Robinson v. Commonwealth Ins. Co., Case No. 11,949.

An offer to abandon made as soon as the assured obtains the preliminary proofs of loss, to be laid before the underwriters, is not too late.—Gardner v. Columbian Ins. Co., Case No. 5,225.

Owner of cargo *held* not required to abandon on receiving the first information of the capture of the vessel, where she was acquitted, and the cargo afterwards seized by the government.—Duncan v. Koch, Case No. 4,136.

A vessel captured and detained until she should give security that the cargo will not be carried to the port of destination cannot be abandoned as a total loss.—Hurtin v. Phœnix Ins. Co., Case No. 6,941.

A seizure of the vessel by a privateer, and a prohibition to carry the cargo to the port of destination, *held* a complete destruction of the voyage, authorizing an abandonment of the cargo.—Hurtin v. Phœnix Ins. Co., Case No. 6,941.

The right to abandon is determined by the actual state of affairs at the time it is made. Where a captured vessel was restored at the time of attempted abandonment, though not known to the owner, *held*, that the same was ineffectual.—Marshall v. Delaware Ins. Co., Case No. 9,127.

A capture as prize will authorize an abandonment as soon as notice is received, provided the loss continue to the time when the abandonment is made.—Queen v. Union Ins. Co., Case No. 11,505.

Where the voyage is lost or rendered worthless by the recapture, or where the salvage expenses are very high, the assured may abandon.—Queen v. Union Ins. Co., Case No. 11,505.

The insurers are liable as for a total loss, on the abandonment of the vessel, arrested in a port in which she was detained by head winds, and proceeded against under the embargo laws passed the day after she cleared.—Odlin v. Insurance Co. of Pennsylvania, Case No. 10,433.

Where a ship and freight were insured from New York to Cape Francois or other ports named, but the ship was prevented from entering any of the ports named, and was carried to Kingston, by one of the blockading squadron, *held*, that the voyage was completely broken up, and the insured had a right to abandon.—Simonds v. Union Ins. Co., Case No. 12,875.

Where, in consequence of an illegal seizure and recapture, the voyage is lost, the owners may abandon for a total loss.—Williams v. Suffolk Ins. Co., Case No. 17,738.

A clause in relation to the right to abandon the vessel *held* inapplicable to the cargo.—Robinson v. Commonwealth Ins. Co., Case No. 11,949.

§ 119. —— Right as affected by amount of injury.

There is no right to abandon under a valued policy when the estimates of the repairs do not exceed one-half the value.—Howell v. Philadelphia Mut. Ins. Co., Case No. 6,781.

Where the right to abandon is conditioned upon it being ascertained that the recovery and repair of the vessel is impracticable, there is no right of abandonment where a vessel, valued in the policies at $27,000, is repaired, after being raised by a wrecking company, for $3,100.—Levi v. New Orleans Mut. Ins. Ass'n, Case No. 8,290.

A recapture with a view to salvage produces only a temporary interruption of the voyage where the salvage and expenses do not exceed one-half the value, and gives no right to abandon.—Queen v. Union Ins. Co., Case No. 11,505.

The owners may abandon the vessel where she is stranded, and her situation is desperate, though she is subsequently gotten off by the agent of the underwriters, and is not injured to half her value.—Peele v. Merchants' Ins. Co., Case No. 10,905.

The half value which authorizes an abandonment is half the sum which the ship, if repaired, would be worth after repairs made. If, when repaired, she would not be worth double the amount of repairs, the owner has a right to abandon.—Peele v. Merchants' Ins. Co., Case No. 10,905.

The rule with regard to the half value is that the vessel, after repairs made, shall be of double the value of the cost of the repairs without any deduction of one-third new for old.—Robinson v. Commonwealth Ins. Co., Case No. 11,949.

If a vessel be so injured by a sea peril as not to be repairable, except at an expense exceeding its value when repaired, no abandonment is necessary.—Bullard v. Roger Williams Ins. Co., Case No. 2,122.

The loss in such case is actually total, and the value is fixed by the valuation in the policy.—Bullard v. Roger Williams Ins. Co., Case No. 2,122.

Where only a partial loss is claimed, the insurer is not entitled to an abandonment.—Murray v. Insurance Co. of Pennsylvania, Case No. 9,961.

It is the valuation fixed in the policy, and not the actual value, which governs the right of abandonment under a policy providing that the damages must amount to half the value of the vessel.—Copeland v. Phœnix Ins. Co., Case No. 3,210.

Insurers are not bound by a sale by the master as under a necessity, unless the circumstances were such as to authorize an abandonment.—Howell v. Philadelphia Mut. Ins. Co., Case No. 6,781.

§ 120. —— Who may abandon.

On the restitution to the original owners of property which had been previously delivered to a surety for payment of its value in case of condemnation, the surety, who has insured the same, is at liberty to abandon.—Russel v. Union Ins. Co., Case No. 12,146.

§ 121. —— What constitutes.

The owner notified the underwriters that he had wired the master that, if he could not raise the vessel, he should wreck her. The underwriters replied, "All right." *Held* neither an abandonment nor an acceptance of an abandonment.—Copeland v. Phœnix Ins. Co., Case No. 3,210.

§ 122. —— Notice of abandonment.

The notice of abandonment must state the reason therefor, and will estop the assured from setting up any other reason.—King v. Delaware Ins. Co., Case No. 7,788.

To make an abandonment effectual, the cause of the loss must be stated in the letter of abandonment, for the benefit of the underwriters.—Hazard v. New England Marine Ins. Co., Case No. 6,282.

The letter of abandonment must state the cause of the loss, and it must appear to have been a peril insured against.—Bullard v. Roger Williams Ins. Co., Case No. 2,122.

§ 123. —— Acceptance.

A clause giving to each party the right to act in recovering, saving, and preserving the property applies only to its relief from present peril, and the temporary care of the property.—Gloucester Ins. Co. v. Younger, Case No. 5,487.

The taking possession and repairing a vessel by the insurer after an abandonment amounts to an acceptance of the abandonment.—Gloucester Ins. Co. v. Younger, Case No. 5,487.

The act of the underwriters in taking possession of a stranded vessel after abandonment and getting her off and repairing her is in law an acceptance.—Peele v. Merchants' Ins. Co., Case No. 10,905.

§ 124. —— Effect of abandonment.

An abandonment once made is considered as continuing, notwithstanding a refusal to accept it, where it is not withdrawn.—The Sarah Ann, Case No. 12,342.

Where freight is insured, the owner of the ship may abandon on the same principles, al-

though he is also owner of the cargo.—Simonds v. Union Ins. Co., Case No. 12,875.

An abandonment accepted is irrevocable by either party without the consent of the other.—Peele v. Merchants' Ins. Co., Case No. 10,905.

After an abandonment accepted, the insurers are owners for the voyage, liable for seamen's wages, and entitled to freight, from such time.—Hammond v. Essex Fire & Marine Ins. Co., Case No. 6,001.

Abandonment to the insurers and satisfaction of the policy vests insurers with all the present rights and remedies of the insured which may be presented or proceeded upon in admiralty in the insurers' names.—Mutual Safety Ins. Co. v. Cargo of the George, Case No. 9,981.

Where a master has insured his moiety of freight, which he contracted to receive in lieu of wages, and abandons the same for a total loss, and freight is subsequently earned, he is entitled to recover his moiety of the latter against the owners or abandonees, who have received it, for the abandonment will not operate as an assignment of freight subsequently earned.—Hammond v. Essex Fire & Marine Ins. Co., Case No. 6,001.

Abandonment in writing, pursuant to the policy, *held* to convey full title, so as to prevent claim of ownership by the assured after raising and repair of the vessel.—The Mary E. Perew, Case No. 9,207.

§ 125. —— Rights, duties, and liabilities.

On an abandonment for a total loss the master cannot sell the cargo and invest the proceeds in other goods, unless justified by necessity or by a high degree of expediency.—Lawrence v. New Bedford Commercial Ins. Co., Case No. 8,140.

But where the parties interested receive the property without objection, and adopt the acts of the master, they are liable for all proper charges thereon.—Lawrence v. New Bedford Commercial Ins. Co., Case No. 8,140.

Where the property so purchased without authority yields a profit, the master, where he acted in good faith, is entitled to reasonable compensation and expenses not exceeding the profit; otherwise, where the property did not yield a profit.—Lawrence v. New Bedford Commercial Ins. Co., Case No. 8,140.

In case of abandonment the insurer is entitled to all the proceeds of the thing abandoned, and to all the profits arising from the investment thereof.—Hurtin v. Phœnix Ins. Co., Case No. 6,941.

A delay of 15 days to take possession of a sunken vessel, during which time she was being wrecked, *held* unjustifiable.—Copeland v. Phœnix Ins. Co., Case No. 3,210.

Where a vessel is captured, the voyage broken up, and the cargo abandoned to the underwriters, but its proceeds are invested by the supercargo in another cargo, the underwriters are entitled to the profit thereon, if any is made.—Simonds v. Union Ins. Co., Case No. 12,876.

Where an abandonment is accepted, the master becomes the agent of the insurers from the time of the loss, and a sale by him will be considered as on their account.—The Sarah Ann, Case No. 12,342.

§ 126. —— Revocation or waiver.

A refusal to give a deed of cession of the cargo unless the company would accept the abandonment of the vessel, insured in another policy, will not vacate the abandonment of the cargo.—Hurtin v. Phœnix Ins. Co., Case No. 6,941.

A part owner of a shipment of specie, who had no interest in the insurance thereon, was appointed supercargo, his duties as such to commence when the voyage ended. The voyage was broken up, and the master delivered the specie to the supercargo, who invested it. *Held*, that such investment was not an act of ownership, but was as agent for the underwriters, and did not waive the abandonment.—Catlett v. Pacific Ins. Co., Case No. 2,517.

§ 127. Partial loss in general.

A partial loss of an entire cargo may be converted into a technical total loss; otherwise, where a distinct portion of the cargo is lost.—Seton v. Delaware Ins. Co., Case No. 12,675.

§ 128. Limitation of liability by memorandum clause.

The effect of the memorandum clause in policies is not to enlarge the perils underwritten against, but to exempt the underwriters from certain losses, within these perils.—Potter v. Suffolk Ins. Co., Case No. 11,339.

Separate losses on one voyage cannot be added together to make up a loss of 5 per cent., which is necessary under the policy to any recovery at all.—Luma v. Atlantic Mut. Ins. Co., Case No. 8,605.

Potatoes are deemed perishable articles within the memorandum of the policy of insurance.—Robinson v. Commonwealth Ins. Co., Case No. 11,949.

In ascertaining whether the loss amounts to 5 per cent., a deduction from the costs of repairs of one-third new for old must be made.—Sanderson v. Columbian Ins. Co., Case No. 12,298.

Provisions construed to make the owner a co-insurer, and to limit liability on the policy to two-fifths of loss.—Breed v. Providence Washington Ins. Co., Case No. 1,826.

The words "in each case," in a clause fixing the minimum of loss on goods, vessel, and freight at 5 per cent., *held* not to mean "at each time of loss," but to refer to the subjects insured, and successive losses on the cargo may be added to make up the aggregate of 5 per cent.—Donnell v. Columbian Ins. Co., Case No. 3,987.

§ 129. Value of subject-matter.

The invoice price is not a proper test of value of the property lost.—Carson v. Marine Ins. Co., Case No. 2,465.

A second policy on the return cargo of coffee valued at a certain sum per pound, deducting $12,000 previously insured, is only binding on the balance of cargo after deducting so much as would at first cost amount to $12,000.—McKim v. Phoenix Ins. Co., Case No. 8,862.

Under a valued policy made without notice of a prior insurance, containing the usual clause as to prior insurance, the insurer can only be called upon for the portion of such value left uncovered by the prior insurance.—Murray v. Insurance Co. of Pennsylvania, Case No. 9,961.

In determining the amount to be paid for loss of a cargo from Calcutta, which was invoiced in rupees, the rupee should be estimated at its actual value in Calcutta when the cargo was purchased.—Phillips v. Insurance Co. of Pennsylvania, Case No. 11,102.

As between the parties, a valued policy is conclusive as to the true value of the subject insured, where the valuation is not shown to be fraudulent or grossly excessive.—Griswold v. Union Mut. Ins. Co., Case No. 5,840.

The liability, under a valued policy on freight, on jettison of a portion of the cargo, is computed on the basis of the valuation in the policy, and is not limited by the insured's contribution on a general average adjustment.—Griswold v. Union Mut. Ins. Co., Case No. 5,840.

Where less goods were in fact shipped than were expected, the recovery on a valued policy

must be in proportion.—Alsop v. Commercial Ins. Co., Case No. 262.

§ 130. Exception of particular average or partial loss.

In an insurance on "cargo," composed principally of lemons and oranges, where the underwriter is warranted free from particular average on "fruit," he is not liable where all the oranges are lost, and the lemons arrive safely.—Humphreys v. Union Ins. Co., Case No. 6,871.

An insurance on boxes of lemons *held* a single contract of insurance on the entire number, and not an insurance against the loss of any portion less than the whole, though the lemons were valued at a certain sum per box.—Hernandez v. New York Mut. Ins. Co., Case No. 6,414; Same v. Sun Mut. Ins. Co., Id. 6,415.

The word "average," when used without the adjuncts "general," "partial," or "particular," imports as well a general contribution as a particular loss.—Coster v. Phoenix Ins. Co., Case No. 3,264.

§ 131. Freight.

Where vessel and freight are separately insured, and abandoned, the insurers on the freight are entitled only to that earned before the abandonment.—Hammond v. Essex Fire & Marine Ins. Co., Case No. 6,001.

§ 132. Duties of owners, master, or crew after loss.

The owner is charged with the negligence of the master by which the damages are increased after the accident.—Copeland v. Phoenix Ins. Co., Case No. 3,210.

§ 133. Salvage.

If a ship is seized under a usurped authority, and recaptured by the crew, they are entitled to salvage, and the decree of an American court in rem will be deemed conclusive on the right unless fraud is shown.—Williams v. Suffolk Ins. Co., Case No. 17,738.

§ 134. Repairs.

The actual cost of repairs, at their true value, and not as estimated in a depreciated currency, will determine the liabilities of the insurer.—Humphreys v. Union Ins. Co., Case No. 6,871.

Vessel, when repaired and tendered to assured, must be in such condition as to fully indemnify insured for all the injury covered by the policy.—Copeland v. Phoenix Ins. Co., Case No. 3,210.

The assured need not point out obvious deficiencies in order to justify his refusal of the vessel.—Copeland v. Phoenix Ins. Co., Case No. 3,210.

The rule of deduction of one-third new for old in case of repairs, etc., does not apply to incidental expenses, from which the insured can derive no enhanced benefit or value beyond his loss.—Potter v. Ocean Ins. Co., Case No. 11,335.

Where the injury exceeds one-half the value of the vessel, the insurer must engage to pay for all necessary repairs, regardless of amount, if it insists upon a continuance of the voyage.—Hart v. Delaware Ins. Co., Case No. 6,150.

§ 135. Wages of crew.

The continuance of the voyage by the insurers without objections will be presumed to be on the original terms, as to compensation of master and seamen.—Hammond v. Essex Fire & Marine Ins. Co., Case No. 6,001.

§ 136. Expenditures.

All expenses resulting as a direct and immediate consequence of a peril insured against are covered by the policy.—Hale v. Washington Ins. Co., Case No. 5,916.

The insurers must bear the expense of a survey in a foreign port, made to ascertain the amount of damages and the propriety of making repairs.—Potter v. Ocean Ins. Co., Case No. 11,335.

The manner of making surveys in foreign ports, and fees therefor.—Potter v. Ocean Ins. Co., Case No. 11,335.

§ 137. Damages incurred or paid.

The insurers of a vessel are liable for a sum paid by its owners in compromise of damages sustained by another vessel from a collision caused by the negligence of the insured vessel, as well as the damages to the insured vessel.—Hale v. Washington Ins. Co., Case No. 5,916.

§ 138. Advances and interests.

The insurer on advances is liable only to the extent that the res as security is impaired by the peril insured against. There is no contribution for general average.—Germond v. Anthracite Ins. Co., Case No. 5,365.

Underwriters *held* liable for common interest and a commission for indorsing a draft for the amount of a loan, where a bottomry bond with marine interest was surrendered.—Peters v. Warren Ins. Co., Case No. 11,034.

§ 139. Deductions and offsets.

Insurers cannot avail themselves of freight earned in a new voyage which they have not insured, by way of recompense for losses on another voyage which they have insured, and which has already terminated.—Jordan v. Warren Ins. Co., Case No. 7,524.

The amount of a bottomry bond should be deducted from the real value, and not the agreed value, in the policy, where the latter is less than the actual value.—Watson v. Insurance Co. of North America, Case No. 17,286.

The provision that all sums due to the company from "the insured" shall be deducted from the loss *held* to apply to the person for whose benefit the insurance was made, and not the agent who procured it.—Hurlbert v. Pacific Ins. Co., Case No. 6,919.

The underwriters of a vessel on an outward voyage, which is broken up, are not entitled to freight earned on her return voyage.—Simonds v. Union Ins. Co., Case No. 12,876.

In a suit on an insurance policy the amount recovered on a libel for collision is to be deducted from the gross amount of the damage, and not from the loss adjusted as a partial loss, with a deduction of one-third new for old.—Dunham v. New England Mut. Ins. Co., Case No. 4,152.

XIV. NOTICE AND PROOFS OF LOSS.

See, also, post, § 194.

Proof of claims under policies in bankruptcy, see "Bankruptcy," § 383.

§ 140. Effect of requirement of policy in general.

If proofs of loss are presented in apt time, and substantially in compliance with the requirements of the policy, it is sufficient, unless the company asks for more specific proof.—Field v. Insurance Co. of North America, Case No. 4,767.

Provision in policy requiring notice of loss and "a particular account of such loss or damage" requires an account of the articles lost, and does not refer to the manner and cause of the loss.—Catlin v. Springfield Fire Ins. Co., Case No. 2,522.

§ 141. To whom notice of proof may be given.

Notice of loss to agent of insurer, in absence of knowledge of revocation of his agency, is notice to insurer.—Bennett v. Maryland Fire Ins. Co., Case No. 1,321.

§ 142. Time for notice and proof.

Notice of loss within reasonable time, under all circumstances, is sufficient under a policy re-

quiring it to be given "forthwith."—Brown v. Mechanics' & Merchants' Ins. Co., Case No. 2,019.

Equity could not relieve against the failure to submit notice of the claim and proof of death within 90 days, as provided by statute, so as to keep the original policy in force, though this failure resulted from ignorance of the existence of the policy.—Winchell v. John Hancock Mut. Life Ins. Co., Case No. 17,866.

Delay in furnishing proofs of loss and value will not prevent recovery unless fraudulent.—Betts v. Franklin Fire Ins. Co., Case No. 1,373.

§ 143. Sufficiency of notice.

Service of copies of proofs of loss and notice is sufficient if not objected to at the time.—Cashau v. Northwestern Nat. Ins. Co., Case No. 2,499.

§ 144. Protests and surveys on marine losses.

Survey at port of delivery is not necessary to maintain action for an average loss.—Bentaloe v. Pratt, Case No. 1,330.

The report of a survey, made upon an examination of a vessel for the purpose of ascertaining her situation after a disaster in a foreign port, is not evidence of the facts stated in it, but only that such survey was made.—Watson v. Insurance Co. of North America, Case No. 17,284.

A party who reads a certificate of survey only to prove the fact of a survey and condemnation is not estopped to impeach the credit of the surveyors whose depositions have been read.—Watson v. Insurance Co. of North America, Case No. 17,285.

§ 145. Statements or proofs of loss of or damage to property.

The insured is not obliged to state his loss in dollars and cents with arithmetical accuracy, but must disclose the whole truth as nearly as he can arrive at it by reasonable and honest effort.—Sibley v. St. Paul Fire & Marine Ins. Co., Case No. 12,830.

Proofs of loss need not negative exceptions of losses from design, etc., which are matters of defense.—Catlin v. Springfield Fire Ins. Co., Case No. 2,522.

§ 146. Proofs of death or of injury to insured.

Ex parte affidavits furnished to the company as proofs of death are inadmissible to establish a controverted fact as to the mode of death.—Newton v. Mutual Ben. Life Ins. Co., Case No. 10,191.

§ 147. Certificate of physician attending insured.

Plaintiff is not concluded by the statements in a physician's certificate furnished as part of her proofs of loss, which is not required by the terms of the policy.—De Camp v. New Jersey Mut. Life Ins. Co., Case No. 3,719.

§ 148. Examination of insured.

An examination of the insured under oath after a loss, as provided in the policy, *held* ineffectual where made before a special agent of the company, during the illness of the insured.—Shaw v. Scottish Commercial Ins. Co., Case No. 12,723.

A refusal of the assured to submit to an examination on oath, or to answer material questions as to the loss, as required by the policy, *held* not to work a forfeiture, but only to suspend the right to payment until the answers are given.—Weide v. Germania Ins. Co., Case No. 17,358; Wiede v. Insurance Co. of North America, Id. 17,617; Same v. International Ins. Co., Id.; Same v. Home Ins. Co., Id.

§ 149. Defects.

Insurers cannot complain that the proofs of loss were not verified by the books of account of the insured, as provided by the policy, where, supposed by the insured to be lost, they were in fact in the insurer's possession.—Huchberger v. Providence Washington Ins. Co., Case No. 6,823.

A request for further proof, and a bona fide attempt to produce it, is a sufficient excuse for delay.—Curtis v. Home Ins. Co., Case No. 3,503.

§ 150. Misstatements or omissions.

The insured does not forfeit his rights by an overstatement of his loss, when made from his best recollection, without intention to deceive.—Huchberger v. Merchants' Fire Ins. Co., Case No. 6,822.

The involuntary omission of an existing mortgage from proofs of loss is immaterial.—Thompson v. Liverpool & L. & G. Ins. Co., Case No. 13,966.

Erroneous affidavits of loss will not prevent recovery unless willfully false.—Betts v. Franklin Fire Ins. Co., Case No. 1,373.

§ 151. Fraud or false swearing.

False statements on oath by the assured, with intent to deceive the company, relative to the terms of settlement with other companies having risks on the same property, are material, and will defeat any right on the part of the assured to recover.—Weide v. Germania Ins. Co., Case No. 17,358.

Where the assured, after the loss, with intent to deceive the company, exhibits to it books of accounts containing false entries of a material nature, he is guilty of a fraud which will defeat all right to recover upon the policy.—Weide v. Germania Ins. Co., Case No. 17,358.

Knowingly making up a false and exaggerated statement of the amount and value of property destroyed by fire forfeits all claim to insurance.—Sibley v. St. Paul Fire & Marine Ins. Co., Case No. 12,830; Huchberger v. Home Fire Ins. Co., Id. 6,821; Same v. Merchants' Fire Ins. Co., Id. 6,822.

Fraudulent overvaluation in the preliminary proofs *held* to be a "fraud" "or attempt at fraud," within the terms of the policy, and to defeat recovery.—Geib v. International Ins. Co., Case No. 5,298.

§ 152. Estoppel or waiver as to notice and proofs or defects and objections—In general.

Provisions for notice and proofs of loss are for insurer's benefit, and can be waived.—Bennett v. Maryland Fire Ins. Co., Case No. 1,321.

§ 153. —— Statements and acts of officers or agents of insurer.

The company's local agent may bind it by waiver of a clause requiring formal proofs of loss, and barring suits not brought in one year.—Ide v. Phœnix Ins. Co., Case No. 7,001.

Statements that the proofs were "all right," and that the company would pay, amount to such waiver.—Ide v. Phœnix Ins. Co., Case No. 7,001.

Proofs of loss will be considered as waived where the company's adjuster, after examining the premises, states that the company is not liable on the ground that the policy is invalid.—Field v. Insurance Co. of North America, Case No. 4,767.

§ 154. —— Express waiver.

The giving of proofs of death is not a "condition" of the policy, within a provision that a waiver of conditions must be made at the head office, and signed by an officer.—Berry v. Mobile Life Ins. Co., Case No. 1,358.

§ 155. —— Denial of liability.

Proofs of loss are waived by a refusal to pay the loss on the ground of a forfeiture.—Dutton v. New York Life Ins. Co., Case No. 4,211.

Refusal to recognize right to prove loss is a waiver of proof.—Akin v. Liverpool & L. & G. Ins. Co., Case No. 121.

Repudiation of liability for loss waives objections to notice of loss and the necessity of furnishing proofs.—Bennett v. Maryland Fire Ins. Co., Case No. 1,321.

Where the insurer refuses payment because the policy has been canceled, proof of loss is waived.—Carlwitz v. Germania Fire Ins. Co., Case No. 2,415a.

A condition in an accident policy requiring immediate notice of the nature and extent of the accident and injury is waived where, on receiving proof of the injury, the insurer refused to pay on other grounds than the omission to give such notice.—Unthank v. Travelers' Ins. Co., Case No. 16,795.

A denial of liability and a refusal to pay the loss on the ground that it is not within the terms of the policy is a waiver of proofs of loss and a provision that no suit shall be brought until after 60 days after proofs are furnished.—Norwich & N. Y. Transp. Co. v. Western Massachusetts Ins. Co., Case No. 10,363.

Where a policy should have issued, pursuant to agreement, but was refused, such refusal is a denial of liability and is a waiver of the conditions in such policies requiring proof of loss within a certain time.—Weeks v. Lycoming Fire Ins. Co., Case No. 17,353.

§ 156. —— Failure to state grounds of objection.

The failure of the company to object to proofs of loss waives defects therein.—Spratley v. Hartford Ins. Co., Case No. 13,256.

Where the insurance company has failed to object to a matter of form in the proof of loss until too late to remedy it, it is estopped to set up the defect.—In re Republic Ins. Co., Case No. 11,705.

Specific objections to proofs of loss are considered as a waiver of all other objections of which the company had knowledge.—Thompson v. Liverpool & L. & G. Ins. Co., Case No. 13,966.

An objection to paying a loss on other grounds than irregularity in the proofs of loss furnished waives all objections thereto.—Whittle v. Farmsville Ins. Co., Case No. 17,603.

Where proofs of loss are received without objection, all objections to their sufficiency will be considered as waived.—Tisdale v. Mutual Ben. Life Ins. Co., Case No. 14,059.

The failure of a reinsuring company to object to the form or substance of copies of proofs of loss furnished by the insuring company is a waiver of the objection that they were not furnished in time.—Ex parte Norwood, Case No. 10,364.

Objections to proofs of loss, not made when the same were served, but first brought forward at the trial, will be considered as waived.—Frankle v. Pennsylvania Fire Ins. Co., Case No. 5,052a.

§ 157. —— Offer to compromise.

An offer to compromise a suit is a waiver of proofs.—Berry v. Mobile Life Ins. Co., Case No. 1,358.

XV. ADJUSTMENT OF LOSS.

§ 158. Effect of provisions of policy for appraisal or arbitration.

An agreement in the policy that no action should be sustainable at law or equity until arbitration shall have determined what amount is due is not unlawful, and in such case a reference and ascertainment of the amount due are conditions precedent to the right of action.—Yoemans v. Girard Fire & Marine Ins. Co., Case No. 18,136.

A by-law, made a part of the contract of insurance, providing for a reference of all disputes as to losses, and that the claim of the parties shall be released or discharged where a suit is commenced without an offer of reference, is void, as in effect ousting the courts of jurisdiction.—Trott v. City Ins. Co., Case No. 14,189.

A condition in a fire insurance policy to refer to arbitrators the amount of the loss, and that no suit shall be brought until the award is made, is void.—Schollenberger v. Phœnix Ins. Co., Case No. 12,476.

XVI. RIGHT TO PROCEEDS.

§ 159. Policy payable to owner of interest insured.

There is no privity of contract between consignor of goods shipped to be sold on commission and an insurance company with which the consignees for their own benefit insure their interest to the full value of the goods.—Bank of South Carolina v. Bicknell, Case No. 898.

A mortgagee who, by the terms of the mortgage, is entitled to have the property insured for his benefit, has no right to the proceeds of insurance taken out by other creditors in their own names to secure their debt, though they have no insurable interest.—Wheeler v. Factors' and Traders' Ins. Co., Case No. 17,495.

§ 160. Life policy payable to insured or his estate.

On a bill of interpleader filed by an insurance company, where the widow of deceased, his son, and a foreign administrator all claimed the fund, *held* that it should be paid to the foreign administrator, on his giving bond to hold the same for the benefit of whom it may concern.—Illinois Masons' Ben. Soc. v. Booth, Case No. 7,009.

Under 2 Wag. St. Mo. p. 936, § 15, a policy payable to the wife of the insured is not void because the annual premium exceeds $300, but any excess recovered by her in an action thereon goes to the husband's estate.—Smith v. Missouri Val. Life Ins. Co., Case No. 13,083.

A policy of life insurance is subject to a lien in favor of creditors under Rev. St. Mo. 1871, c. 50, § 65, for the excess of premium over $150 per year paid by the debtor for two years.—In re Jordan, Case No. 7,511.

A quarterly payment amounting to less than $150 will not subject the policy to such lien.—In re Jordan, Case No. 7,511.

§ 161. Life or accident policy designating beneficiary.

The substitution of a beneficiary under a proviso in a policy, payable to the wife of the assured (or, in case of her death, to her children), that, in case of her death during his life, he may, at his option, make such substitution, must be made within a reasonable time after her death.—Eiseman v. Judah, Case No. 4,321.

The power of substitution is not executed by a bequest in the will of the assured, made a year after the death of the wife.—Eiseman v. Judah, Case No. 4,321.

§ 162. Life policy for benefit of creditor.

A creditor, to whom a policy was payable, having received from the insurer the amount of his claim, and surrendered the policy, no action lies by the representatives of deceased against the insurer to recover the difference between the amount paid and the amount of the

policy.—McKenty v. Universal Life Ins. Co., Case No. 8,854.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

§ 163. Election to rebuild or replace property.

When the insurer, after a fire, elects to restore and repair, the policy then becomes a contract to put the house as nearly as possible in its condition before the fire.—Collins v. Ætna Ins. Co., Case No. 3,009.

Refusal of the insured to furnish a plan of the original house, so that it may be restored according thereto, estops him from complaining that the new part does not exactly correspond with the original.—Collins v. Ætna Ins. Co., Case No. 3,009.

§ 164. Effect of payment.

A company suing to recover back money paid for a loss is presumed to have waived all questions of law and fact as to the validity of the policy which they could have raised on paying the loss, except fraud.—Metropolitan Life Ins. Co. v. Harper, Case No. 9,505.

§ 165. Concurrent insurance.

Construction of the clause providing that in the case of other insurance, the insured should be entitled to receive no greater proportion of the loss sustained than the loss bears to the whole amount insured.—Robbins v. People's Ins. Co., Case No. 11,885.

Where two policies are concurrently executed, the operation of the priority clause is excluded, and the assured may recover his whole loss upon either policy; and the other underwriters are liable only for contribution.—Potter v. Marine Ins. Co., Case No. 11,332.

In cases of double insurance the insurers are liable ratably for the amount of the loss, and not according to priority of contract; and one who has paid the whole loss can compel the others to contribute their proportions.—Thurston v. Koch, Case No. 14,016.

In the case of an insurance by a person of goods held by him in trust, and also by the owner, *held*, that the policies were contributory.—Robbins v. Firemen's Fund Ins. Co., Case No. 11,881.

In the case of policies bearing the same date, the insurers may show the actual time of the execution of each policy, to exonerate themselves from a loss covered by the prior policy.—Potter v. Marine Ins. Co., Case No. 11,332.

§ 166. Subrogation of insurer.

Insurers who have paid a loss arising from a collision may maintain an action therefor against the vessel in fault.—St. Paul Fire & Marine Ins. Co. v. The Lake Superior, Case No. 12,244.

When the underwriters have paid the loss, a suit may be maintained in the name of the insured for their benefit against the vessel through whose fault the loss occurred.—The Planter, Case No. 11,207a.

An insurance company which has paid the loss may recover against the carrier, on showing negligence.—Hall v. Nashville & C. R. Co., Case No. 5,940.

On libel by insurer, who has paid the loss, for the wrongful act causing it, it is no defense that the insurer was not legally liable.—Amazon Ins. Co. v. The Iron Mountain, Case No. 270; Insurance Co. v. The C. D., Jr., Id. 7,051.

Where there has been actual payment of the loss before trial, it is no defense that the suit was brought before payment.—The Manistee, Case No. 9,028.

Where the loss of a cargo has been paid by the insurer, it is no defense to a libel against the carrier that the policy was issued by a foreign insurance company which had not complied with the laws of the state.—The Manistee, Case No. 9,027.

Where a carrier contracts with a shipper that the former, in case of damage for which he is liable, may have the benefit of any insurance to be effected by the shipper, and a loss is sustained, the payment of the loss by the insurer to the shipper does not give the insurer any right of action against the carrier.—Phœnix Ins. Co. v. Erie & W. Transp. Co., Case No. 11,112.

Effect of insurance on right to recover for negligence, see "Collision," § 153.

XVIII. ACTIONS ON POLICY.

See, also, post, § 195.
Jurisdiction of admiralty over contracts of marine insurance, see "Admiralty," § 18.

§ 167. Effect of provisions of policy in general.

Plaintiff must prove a compliance with conditions precedent referred to on the face of the contract, or a sufficient excuse for noncompliance.—Eaton v. Supreme Lodge K. of H., Case No. 4,259a.

A provision in a mutual policy that suit shall only be brought at the term of court next succeeding the loss does not apply to one holding the policy as collateral security.—Smith v. Atlantic Mut. Fire Ins. Co., Case No. 13,005.

§ 168. Grounds of action.

Repudiation of obligation under the policy while it is still legally binding gives the insured a right of an immediate action for damages.—Hancock v. New York Life Ins. Co., Case No. 6,011.

An action at law will lie for breach of a contract to issue a policy insuring against fire, and the same damages may be recovered as in an action on the policy agreed to be issued.—Humphry v. Hartford Fire Ins. Co., Cases Nos. 6,874, 6,875.

A court of equity will enforce a contract to make a policy of insurance, and, treating that agreed to be done as if actually done, will ascertain the amount due, and enforce payment by a decree.—Union Mut. Ins. Co. v. Commercial Mut. Marine Ins. Co., Case No. 14,372.

In assumpsit on a policy with counts for money had and received, plaintiff can recover premiums paid, though the policy did not attach.—Clark v. Manufacturers' Ins. Co., Case No. 2,829.

Where an insured vessel is damaged by collision, the owner may at his election proceed either against the underwriters in contract or against the offending vessel in tort.—New England Mut. Marine Ins. Co. v. Dunham, Case No. 10,155.

Both the carrier and the insurance company are responsible to the owner or consignee, and in case of loss the owner or consignee may elect against which he will proceed.—Hall v. Nashville & C. R. Co., Case No. 5,940.

§ 169. Defenses.

Where the loss is payable to the mortgagee on a policy issued to the mortgagor, any defense admissible against the mortgagor is available against the mortgagee; otherwise where the contract is made with the mortgagee.—Humphry v. Hartford Fire Ins. Co., Case No. 6,875.

A decree for damages for collision, satisfied, will bar a suit on an insurance policy only to the extent of the amount decreed.—Dunham v. New England Mut. Ins. Co., Case No. 4,152.

A recovery of damages against the vessel in fault is no bar to a further recovery from the underwriters of any excess in the cost of re-

pairs over the amount previously recovered.—New England Mut. Marine Ins. Co. v. Dunham, Case No. 10,155.

In an action by an agent on a policy procured by him for the benefit of whom it concerns, defendant cannot set off debts due from the agent in his own right.—Hurlbert v. Pacific Ins. Co., Case No. 6,919.

A mutual insurance company cannot, by plea in abatement, make the objection that, under its charter, suit can only be brought at the term of court succeeding the loss.—Smith v. Atlantic Mut. Fire Ins. Co., Case No. 13,005.

§ 170. Limitations by provisions of policy.

The parties may, by agreement, limit the time for bringing suit to a shorter period than that fixed by general law.—Cray v. Hartford Fire Ins. Co., Cases Nos. 3,374, 3,375.

The "sixty days after due notice and proof of loss," before right of action accrues, begin to run from the time of furnishing the proof, not from the time of furnishing additional proof required by the company.—Huchberger v. Home Fire Ins. Co., Case No. 6,821; Same v. Providence Washington Ins. Co., Id. 6,823.

A provision requiring suit to be brought within six months after the "loss or damage shall occur" means six months after ascertainment of loss by arbitration, where the policy forbids the bringing of the suit until after an award is made.—Levy v. Virginia Fire & Marine Ins. Co., Case No. 8,304.

The insurer cannot avail itself of a condition that suit must be brought within a year after loss where plaintiff delayed suing because of a promise or intimation to pay the loss.—Curtis v. Home Ins. Co., Case No. 3,503.

The contract limitation of one year for suit is not available where a complaint was filed in time, but, at request of defendant's attorney, summons was not issued.—Akin v. Liverpool & L. & G. Ins. Co., Case No. 121.

A condition limiting the time to commence suit for a loss to 12 months thereafter is valid.—Davidson v. Phœnix Ins. Co., Case No. 3,607; Cray v. Hartford Fire Ins. Co., Id. 3,375.

Proof of the claim in bankruptcy is equivalent to the commencement of a suit against a bankrupt insurance company, under a clause in the policy limiting the right of action to one year.—In re Firemen's Ins. Co., Case No. 4,796.

The condition in a fire policy that suit must be brought within 12 months after the loss is suspended by a war between the belligerent parties as to a loss occurring before the commencement of hostilities.—Semmes v. City Fire Ins. Co., Case No. 12,651.

§ 171. Parties.

A libel for wrongful act causing a loss may be brought in the name of the insurer who has paid it.—Amazon Ins. Co. v. The Iron Mountain, Case No. 270.

An order by the assured directing the insurer to pay the amount of a loss to a certain person makes him an assignee of the cause of action and the real party in interest.—Spratley v. Hartford Ins. Co., Case No. 13,256.

Where insurer has paid only part of the loss and taken a partial assignment he cannot sue wrongdoer in his own name.—Ætna Ins. Co. v. Hannibal & St. J. R. Co., Case No. 96.

Consignee who advanced money to buy cargo and took assignment of bill of lading entitled to recover on policy "on account of whom it may concern."—Aldrich v. Equitable Safety Ins. Co., Case No. 155.

Where the ownership of property lies between the husband and wife, and the husband is estopped from claiming it, the wife has a sufficient title to support an action on a policy under which it was insured as belonging to her.—Field v. Insurance Co. of North America, Case No. 4,767.

A policy for a succession of voyages, "on account of whom it may concern," loss payable to H., is valid and enforceable in a suit by H. in his own right or as trustee.—Henshaw v. Mutual Safety Ins. Co., Case No. 6,387.

Upon a valued policy, by which "A., on account of himself and B.," caused a vessel to be insured, A. may alone maintain action, and recover the whole amount insured.—Howland v. Marine Ins. Co. of Alexandria, Case No. 6,798.

An underwriter who has accepted an abandonment may be permitted to intervene as sole owner in a suit in rem.—The Ann C. Pratt, Case No. 409.

A parol assignment of the right of action on a fire policy after a loss is sufficient.—Bennett v. Maryland Fire Ins. Co., Case No. 1,321.

A trustee cannot recover upon a policy procured by him which, by its express terms, makes the loss payable to his cestui que trust, unless he has an interest therein.—Brown v. Hartford Fire Ins. Co., Case No. 2,009.

A lessee who has insured his leasehold interest cannot recover upon the policy, where he has parted with all his interest in the premises before the loss.—Hidden v. Slater Mut. Fire Ins. Co., Case No. 6,463.

A suit on a policy of insurance is properly brought in the name of the real owner, whose property was intended to be insured, though the name of the agent only appears in the policy.—Ruan v. Gardner, Case No. 12,100.

In an action for damages for failure to issue a paid-up policy after the tontine period, and before arrival at the age at which the whole amount is payable to the insured, the beneficiaries must be made parties plaintiff to entitle the insured to more than nominal damages.—Watts v. Phœnix Mut. Life Ins. Co., Case No. 17,294.

The insured cannot set up a parol title in himself to the whole of the ship when the ship's papers for the voyage prove a joint ownership in himself and the master.—Ohl v. Eagle Ins. Co., Cases Nos. 10,472, 10,473.

The creditor of the insured has no right of action on a policy of fire insurance payable to such creditor "as his interest may appear."—Hatch v. Metropole Ins. Co., Case No. 6,207a.

§ 172. Declaration and complaint.

The declaration in an action by a husband on a policy issued to him without mention of his wife's ownership, claiming an insurable interest, must set out such interest, and claim damages thereto.—Cohn v. Virginia Fire & Marine Ins. Co., Case No. 2,970.

A declaration on a policy for a succession of voyages "on account of whom it may concern" averring that at the time of the loss H. was interested in her to the amount of the insurance, *held* sufficient.—Henshaw v. Mutual Safety Ins. Co., Case No. 6,387.

A declaration on such a policy that the insurance was for the use and benefit of H., as trustee for N., need not set forth the nature or extent of the trust.—Henshaw v. Mutual Safety Ins. Co., Case No. 6,387.

Proposals, answers, and declarations, made a part of the insurance policy by its express terms, must be stated in the complaint in an action thereon.—Bidwell v. Connecticut Mut. Life Ins. Co., Case No. 1,393.

Where the declaration on a policy attributes the loss to a privateer, there cannot be a recovery for a loss by embezzlement of the crew.—Hicks v. Fitzsimmons, Case No. 6,460.

§ 173. Issues and proof.

Under a general denial, defendant cannot prove a breach of any conditions other than such as are conditions precedent to plaintiff's right to recover.—Bennett v. Maryland Fire Ins. Co., Case No. 1,321.

Averment that plaintiffs have entire interest in the subject is not supported by evidence of the joint interest with others, nor can averment of a joint interest be supported by proof of the sole interest.—Catlett v. Pacific Ins. Co., Case No. 2,517.

Plaintiff, to recover under an open policy, must prove his interest and the value of the property.—Beale v. Pettit, Case No. 1,158.

§ 174. Evidence—Presumptions and burden of proof—Marine insurance.

In determining whether the rupture of a blood vessel was the cause of the death, the burden of proving that death was the result of disease is upon the party alleging it.—McCarthy v. Travelers' Ins. Co., Case No. 8,682.

In a suit upon a policy, the sentence and proceedings of a foreign admiralty court, condemning the goods as enemy property, are competent, prima facie evidence of the fact.—Lambert v. Smith, Case No. 8,028.

The burden is on the assured to prove that defects, found to exist in the hull of a vessel during the voyage, were produced by a peril of the sea.—Bullard v. Roger Williams Ins. Co., Case No. 2,122.

Where the defenses are misrepresentation, negligent navigation, deviation, and unseaworthiness, the onus probandi as to the three former is on defendant, but the assured must prove seaworthiness.—Tidmarsh v. Washington Fire & Marine Ins. Co., Case No. 14,024.

Unfitness to proceed with the voyage, where no extraordinary peril of the sea has been encountered, authorizes a presumption of unseaworthiness at the time of departure requiring strong evidence to rebut.—Cort v. Delaware Ins. Co., Case No. 3,257.

Seaworthiness at the commencement of a voyage is not prima facie evidence that subsequent necessary repairs arose from extraordinary peril.—Donnell v. Columbian Ins. Co., Case No. 3,987.

If the insured lay a rational ground for the disability of the vessel by proving severe gales during the voyage, and seaworthiness on a preceding voyage, the burden of the proof of the want of seaworthiness lies on the insurer.—Watson v. Insurance Co. of North America, Case No. 17,285.

Aliter, when a disability happens from stress of weather, without any sufficient cause.—Watson v. Insurance Co. of North America, Case No. 17,285.

Burden of proving unseaworthiness is on insurer.—Adderly v. American Mut. Ins. Co. of Baltimore, Case No. 75.

Safe performance of voyage raises a presumption that the vessel was properly manned, and devolves upon the insurers of cargo injured by fire the burden of showing the contrary.—Meigs v. Sun Mut. Ins. Co., Case No. 9,396.

§ 175. —— Idem—Fire insurance.

Prima facie case is made out by production of policy and proof of loss, delivery of preliminary proofs, and the value of the property destroyed.—Geib v. International Ins. Co., Case No. 5,298.

The burden is upon the company to show that the over-valuation was intentional.—Field v. Insurance Co. of North America, Case No. 4,767.

The burden of proof is on the insurer to show willful burning.—Carlwitz v. Germania Fire Ins. Co., Case No. 2,415a.

The burden of proof is upon the insurer to show violation of the conditions of the policy.—Whittle v. Farmville Ins. Co., Case No. 17,603.

The burden is on the insurer to prove that the insured knew that the property was lost when he procured the insurance.—Clement v. Phœnix Ins. Co., Case No. 2,881.

§ 176. —— Idem—Life insurance.

The defense of concealment of material facts must be made out affirmatively by the insurer.—Folsom v. Mercantile Mut. Ins. Co., Case No. 4,902.

The burden to establish a defense of a breach of specific warranties as to existing facts in an action on a life policy is upon the insurer.—Swick v. Home Ins. Co., Case No. 13,692.

The fact that the application is signed by the applicant is prima facie evidence that the answers therein contained are his answers, casting the burden on plaintiff to show the contrary.—Lee v. Guardian Life Ins. Co., Case No. 8,190.

The burden of proof to sustain the defense that the plaintiff murdered the insured to obtain money is on the insurer, but a fair preponderance of the evidence is sufficient.—Prather v. Michigan Mut. Life Ins. Co., Case No. 11,368.

Defendant has the burden of showing that deceased died by suicide.—Snyder v. Mutual Life Ins. Co., Case No. 13,154; Coverston v. Connecticut Mut. Life Ins. Co., Id. 3,290.

The burden of proof is upon plaintiff to establish insanity, when set up in reply to the defense of suicide in an action on a life policy.—Hiatt v. Mutual Life Ins. Co., Case No. 6,449a; Terry v. Life Ins. Co., Id. 13,839; Moore v. Connecticut Mut. Life Ins. Co., Id. 9,755; Gay v. Union Mut. Life Ins. Co., Id. 5,282.

§ 177. —— Insurable interest.

In an action on a policy in favor of a wife, upon the life of her husband, plaintiff must prove the marriage, to show an insurable interest.—Holabird v. Atlantic Mut. Life Ins. Co., Case No. 6,587.

Bill of lading of outward cargo no proof of interest in homeward cargo.—Beale v. Pettit, Case No. 1,158.

Interest in a return cargo cannot be proved by the certificate of a supercargo, since deceased, or by his declarations.—Beale v. Pettit, Case No. 1,158.

A testamentary declaration of master of vessel, though not under seal, *held* admissible in evidence.—Blagg v. Phœnix Ins. Co., Case No. 1,477.

§ 178. —— Policy or other contract and terms thereof.

In an action upon a policy, plaintiff cannot show that another insurance company, or other underwriters on the same policy, have paid upon the same risk.—Lambert v. Smith, Case No. 8,028.

§ 179. —— Condition of subject-matter.

The warrant of survey, and report made thereon, under which the vessel is sold, is the best evidence as to the condition of the vessel at the time, and testimony of the master is not admissible, except to prove the facts contained in the report.—Robinson v. Clifford, Case No. 11,948.

§ 180. —— Performance or breach of warranty or condition.

In an action against insurers, invoice on board at time of capture as enemy's property, and deposition of mate, competent evidence for defendant.—Azuria v. Insurance Co. of Pennsylvania, Case No. 691.

Where the property has been condemned by the court of a belligerent, only the sentence of that court is to be read in evidence, except un-

der peculiar circumstances.—Marshall v. Union Ins. Co., Case No. 9,135.

The declarations of the insured husband, made after the date of the policy, as to his health existing, or matters of private history occurring, prior to the date of the policy, are not admissible as evidence in a suit by the wife upon her policy.—Wilson v. Life Ass'n of America, Case No. 17,818.

§ 181. —— Fraud or misrepresentation.

The fact that the company made an autopsy on deceased body is no evidence of fraud when the right to do so is given by the policy.—Whitehouse v. Travelers' Ins. Co., Case No. 17,566.

In the absence of any claim of fraud or misrepresentation, *held*, that the application for insurance, when merged in the policy, was properly excluded from evidence when unaccompanied by any offer of evidence of misrepresentation.—Folsom v. Mercantile Ins. Co., Case No. 4,903.

A person engaged in the insurance business, who has expert knowledge of the existence of facts affecting the premium, may give such knowledge in evidence on the question of the materiality of such facts represented or concealed by the assured.—Hawes v. New England Mut. Marine Ins. Co., Case No. 6,241.

§ 182. —— Loss or damage to property and cause thereof.

Acquittal of the insured on a criminal charge of arson, in connection with the burning of his property, is of no weight in a civil suit on the policy.—Sibley v. St. Paul Fire & Marine Ins. Co., Case No. 12,830.

A foreign decree for damages for collision is not admissible in a suit on an insurance policy as evidence of the collision, its causes or consequences, but only of the amount awarded.—Dunham v. New England Mut. Ins. Co., Case No. 4,152.

Testimony of the captain that the vessel was condemned on his application after report by the surveyors that she could not be repaired except at too great expense, though not evidence of such proceedings, is evidence that he coincided with surveyors in opinion.—Catlett v. Pacific Ins. Co., Case No. 2,517.

Depositions from the record of a prize court are admissible to show the ground of condemnation.—Dederer v. Delaware Ins. Co., Case No. 3,733.

§ 183. —— Death of or injury to person insured and cause thereof.

In determining whether the rupture of a blood vessel was the proximate cause of death, testimony showing the health of the insured from infancy is admissible.—McCarthy v. Travelers' Ins. Co., Case No. 8,682.

On an issue as to whether a person whose life was insured died by his own hand, declarations of a third person, since deceased, were admitted.—Newton v. Mutual Ben. Life Ins. Co., Case No. 10,191.

§ 184. —— Valuation of property.

The invoice of the cargo is uniformly admitted as prima facie evidence of its value.—Graham v. Pennsylvania Ins. Co., Case No. 5,674.

Bill of lading and invoice may be given in evidence, though made out after usual and regular time, where delay is satisfactorily explained.—Graham v. Pennsylvania Ins. Co., Case No. 5,674.

In an action upon a valued policy on a cargo, defendants will not be permitted to give evidence of its actual cost, except in support of an allegation of fraud.—Gardner v. Columbian Ins. Co., Case No. 5,225.

§ 185. —— Amount of loss.

In a valued policy, the assured need not prove at the trial the amount of the loss.—Carson v. Marine Ins. Co., Case No. 2,465.

To recover an average loss, *held* that plaintiff need not produce invoice or prove prime cost of goods.—Bentaloe v. Pratt, Case No. 1,330.

§ 186. —— Waiver.

A letter offering to compromise, but containing a waiver, may be read in evidence, not to prove the offer, but to establish the waiver.—Unthank v. Travelers' Ins. Co., Case No. 16,795.

§ 187. —— Sufficiency.

It is sufficient, on a question of seaworthiness, if the vessel was fit to perform the voyage insured, as to ordinary perils. The underwriters are bound as to extraordinary perils.—Watson v. Insurance Co. of North America, Case No. 17,285.

The defenses of arson and of fraudulent overvaluation must be made out by the insurer by a satisfactory preponderance of evidence.—Sibley v. St. Paul Fire & Marine Ins. Co., Case No. 12,830.

Sufficiency of evidence of proof of delivery of goods involving the question of the alteration of receipts after signature. — Stuart v. Boyer, Case No. 13,553.

The defense in a suit on a fire policy that the assured burned the property need only be sustained by the quantum of proof required in civil cases.—Scott v. Home Ins. Co., Case No. 12,533.

Weight and sufficiency of evidence to show that the insured caused his property to be burned determined.—Howell v. Hartford Fire Ins. Co., Case No. 6,780.

The defense of incendiarism, fraud, or negligence must be made out by a preponderance of proof. The evidence must be either direct and positive, or the circumstances must be convincing, admitting no other natural conclusion.—Huchberger v. Home Fire Ins. Co., Case No. 6,821; Same v. Merchants' Fire Ins. Co., Id. 6,822.

Plaintiff in order to sustain his answer to the defense of insanity must prove that the insured was moved by an irresistible insane impulse, or that his powers of reason were so far overthrown that he could not exercise them in reference to the act of self-destruction.—Moore v. Connecticut Mut. Life Ins. Co., Case No. 9,755.

The question of fraud on the part of the insured, which, under the terms of the policy, works a forfeiture, is to be decided by the preponderance of evidence, under the rule in civil cases.—Howell v. Hartford Fire Ins. Co., Case No. 6,780.

§ 188. Amount of recovery and measure of damages.

One who holds a life policy to secure a past debt and future advances may recover the full amount due thereon, irrespective of the amount of his debt against the assured.—Swick v. Home Ins. Co., Case No. 13,692.

Amount of recovery in a case where the consignee has advanced money to buy cargo, taking an assignment of the bill of lading, and brings action on a policy "on account of whom it may concern," and the interests are separable.—Aldrich v. Equitable Safety Ins. Co., Case No. 155.

Interest on the amount of the loss, from the commencement of the action, should be allowed.—Huchberger v. Home Fire Ins. Co., Case No. 6,821.

In a suit on an open policy, the actual value must determine the amount of recovery.—Snell v. Delaware Ins. Co., Case No. 13,137.

A mutual life insurance company *held* liable for the amount insured by endowment policy, without deduction for unpaid premium notes, given upon the representation that they would be paid by dividends.—Brooks v. Phœnix Mut. Life Ins. Co., Case No. 1,960.

Where a vessel, not having been heard from, is considered as lost, interest is calculated after 12 months and 30 days from the last period when the vessel was heard from.—Hallet v. Phœnix Ins. Co., Case No. 5,958.

The actual loss is the measure of damages where recovery is restricted to the cost of replacing the property destroyed, less its depreciation from use, etc., and the difference in values before and after the fire will not give such indemnity.—Thompson v. Liverpool & L. & G. Ins. Co., Case No. 13,966.

The measure of recovery from the underwriters is the amount necessary to restore the vessel to her previous condition, without deduction for new materials.—New England Mut. Marine Ins. Co. v. Dunham, Case No. 10,155.

In adjusting a loss under a policy on a cargo, the value is to be ascertained at the port from which the vessel last sailed before the loss; and if freight has there been earned, and not paid, it is not chargeable on the salvage, but is an addition to the original cargo.—Catlett v. Columbian Ins. Co., Case No. 2,514.

Where the policy contained the clause "to add an additional premium if by vessels rating lower than A2," and the cargo was shipped in a vessel with a lower rating, the insured can recover, in case of loss, the value agreed in the policy, less such additional premium beyond the agreed per cent. as the underwriters might deem adequate for the increased risk.—Wright v. Sun Mut. Ins. Co., Case No. 18,095; Same v. Orient Mut. Ins. Co., Id.

§ 189. Questions for jury.

The question whether, upon facts specially found by the jury, the voyage was broken up, so as to justify a return to the port of departure, is one of law for the court, and a finding of the jury thereon will be disregarded.—King v. Delaware Ins. Co., Case No. 7,788.

Whether goods embraced in a stock insured as "dry goods" were or were not "dry goods" is for the jury.—Bassell v. American Fire Ins. Co., Case No. 1,094.

The question as to whether or not notice of loss was given within a reasonable time is for the jury.—Brown v. Mechanics' & Merchants' Ins. Co., Case No. 2,019.

In the case of a negative answer to the question whether the applicant ever had a rupture, it is for the jury to say whether a rupture, considered as cured, was material to his soundness of health.—France v. Ætna Life Ins. Co., Case No. 5,027.

It is for the jury to say whether a statement in the application, "never sick," was false, where the medical examiner stated to the applicant that the alleged sickness was too trivial to mention.—Trefz v. Knickerbocker Life Ins. Co., Case No. 14,166.

Whether a death resulting from the use of liquors during a period of three weeks is caused by an "habitual" use of intoxicating liquors, within the meaning of a condition in the policy, is a question for the jury.—De Camp v. New Jersey Mut. Life Ins. Co., Case No. 3,719.

§ 190. Instructions.

An instruction that the arson charged against owner in defense of action or policy need not be proved beyond a reasonable doubt is not necessary where court correctly charges as to measure of proof required.—Bayly v. London & L. Ins. Co., Case No. 1,145.

Charge to a jury on the question of suicide set up in defense to an action on a life policy.—Rinker v. Manhattan Life Ins. Co., Case No. 11,851.

§ 191. Verdict.

A consent to a verdict, subject to the report of auditors to ascertain the amount of the loss, does not preclude inquiry as to the cause and nature of the loss, and the amount attributable to the perils insured against.—Donnell v. Columbian Ins. Co., Case No. 3,987.

A verdict for the insured will be set aside where it appears that he has been guilty of falsehood and fraud in the proofs of loss, which the policy provides shall vitiate the insurance.—Shaw v. Scottish Commercial Ins. Co., Case No. 12,723.

XIX. REINSURANCE.

§ 192. Validity and effect of contract in general.

Condition in policy of reinsurance that reinsurer shall pay pro rata at and in the same time and manner as the reinsured, means that the reinsurer shall have all the advantages specified in the policy of the reinsured, and does not refer to the insolvency of the reinsured.—Cashau v. Northwestern Nat. Ins. Co., Case No. 2,499.

Under the clause in a reinsurance policy, "loss, if any, payable at the same time, and pro rata with the insured," the reinsurer is liable to pay the amount the first insurer is liable for, and not the amount it actually pays.—In re Republic Ins. Co., Case No. 11,705.

§ 193. Extent of liability of reinsurer.

A party reinsured is entitled to full indemnity for his entire loss and the costs and expenses reasonably incurred to protect himself and entitle him to recover over against the reinsurers.—New York State Marine Ins. Co. v. Protection Ins. Co., Case No. 10,216.

Where the language of a policy was equally applicable to either of two charters, and parol evidence was admitted to explain it, and the insured recovered, *held*, that reinsurers on an open policy were liable for the amount of such recovery. Case No. 10,407 reversed.—Ocean Ins. Co. v. Sun Mut. Ins. Co., Case No. 10,408.

§ 194. Notice and proof of loss to reinsurer.

Condition, in policy of reinsurance, for immediate notice of loss, means that the notice must be given in a reasonable time under the circumstances.—Cashau v. Northwestern Nat. Ins. Co., Case No. 2,499.

§ 195. Actions on contracts of reinsurance.

Reinsurers, having paid to the insurer their proportions of a loss insured against, may maintain a libel in rem in their own names to recover of the carrier the amounts so paid, with interest, where the owner had been fully satisfied for the loss by the original insurer.—The Ocean Wave, Case No. 10,417.

Reinsurers may make the same defenses and take the same objections as the original insurers might in a suit on the first policy.—New York State Marine Ins. Co. v. Protection Ins. Co., Case No. 10,216.

Quære, whether notice to reinsurers of the commencement of a suit against the first insurers is indispensable in order to make them liable for the costs and expenses thereof.—New York State Marine Ins. Co. v. Protection Ins. Co., Case No. 10,216.

A clause in a policy of reinsurance, "Loss, if any, payable at the same time and pro rata with the insured," merely gives the company the benefit of any defenses the first insurer may have.—Ex parte Norwood, Case No. 10,364.

XX. MUTUAL BENEFIT INSURANCE.

§ 196. Corporations and associations.

The act of an agent in receiving money at a time not authorized by the rules of the society does not bind the society.—Eaton v. Supreme Lodge K. of H., Case No. 4,259a.

To establish a waiver as to such act, plaintiff must show knowledge and acquiescence on the part of the managing officers of the central society.—Eaton v. Supreme Lodge K. of H., Case No. 4,259a.

The members of an insurance association are bound by the act of the majority, unless there be some restriction in the articles.—Dean v. Tucker, Case No. 3,711.

The directors of a mutual insurance company are personally liable for a failure to make an assessment when a claim for a loss is presented, though its validity is denied and litigated.—Jordan v. Union Mut. Fire Ins. Co., Case No. 7,522.

In the Knights of Honor, the financial reporter of the local lodge is not an officer of the supreme lodge.—Eaton v. Supreme Lodge K. of H., Case No. 4,259a.

§ 197. Dues and assessments.

The rule charging with assessments all members who take the final degree "on and prior to" a certain date makes them liable to contribute to all deaths occurring during that calendar day.—Eaton v. Supreme Lodge K. of H., Case No. 4,259a.

A new assessment may be made where drafts have been made upon the fund in the hands of the treasurer sufficient to reduce it below the limit, though such drafts have not been paid.—Eaton v. Supreme Lodge K. of H., Case No. 4,259a.

It is optional with the local lodges to allow sick benefits, and they are under no legal duty to pay the amount thereof, when allowed, upon the assessments of their members.—Eaton v. Supreme Lodge K. of H., Case No. 4,259a.

§ 198. Forfeiture and suspension.

A misappropriation would not excuse the nonpayment of subsequent assessments, or justify a member in refusal to pay.—Eaton v. Supreme Lodge K. of H., Case No. 4,259a.

§ 199. Beneficiaries.

If the member fails to object to a misappropriation of the funds contributed by him, his beneficiary cannot complain thereof.—Eaton v. Supreme Lodge K. of H., Case No. 4,259a.

INSURRECTION.

See "Treason"; "War."
Government by insurgents, see "International Law," § 2.

INTENT.

Criminal, see "Criminal Law," §§ 1–3, 52; "Customs Duties," §§ 93, 116; "Internal Revenue," § 98; "Larceny," § 3; "Neutrality Laws," § 9; "Perjury," § 5; "Riot," § 1; "Treason," § 3.
Fixing domicile, see "Domicile," § 3.
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INTEREST.

§ 1, Right and liabilities in general. § 2, Rate. § 3, Time and computation.

See, also, "Usury."
Effect of war on running of interest, see "War," §§ 2, 81.
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Liability of executor or administrator, see "Executors and Administrators," § 60.
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On particular classes of liabilities.

See "Account Stated," § 2; "Bills and Notes," § 105; "Bonds," § 24.
Claims in bankruptcy, see "Bankruptcy," § 406.
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Fees and expenses of officers, see "United States Marshals," § 13.
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Pecuniary interest in particular subjects.

Affecting credibility, see "Witnesses," § 80.
Disqualification as witness, see "Witnesses," §§ 28–50.
Insurable interest, see "Insurance," §§ 7–9.

§ 1. Right and liabilities in general.

Interest accrues by operation of law after maturity of a note providing only for semiannual installments of interest.—In re Bartenbach, Case No. 1,068.

Interest is allowed on liquidated demands in admiralty the same as at law, and on seamen's wages from the time they are due.—The Swallow, Case No. 13,665.

Interest is recoverable on interest coupons payable to bearer after their maturity.—Hollingsworth v. Detroit, Case No. 6,613.

Interest will not be allowed on unliquidated and contested claims sounding in damages.—Willings v. Consequa, Case No. 17,766; Consequa v. Willings, Id.

An account made up of principal and interest, when settled, bears interest on the aggregate balance.—Bainbridge v. Wilcocks, Case No. 755; York v. Wistar, Id. 18,141.

The jury may or may not allow interest upon the balance of an account, considering the general usage.—Killingly v. Taylor, Case No. 7,766.

Interest will run from the time of a statement of a balance of account against a person, though the amount was subsequently reduced on the allowance of further credits claimed.—United States v. Ormsby, Case No. 15,969.

Where an agent sends goods to his principal for sale, interest is due on the proceeds from the time when the principal first claimed a lien or set-off upon them for a balance due from the agent up to the time of a judgment therefor.—Vose v. Philbrook, Case No. 17,010.

The government is entitled to interest on bonds given in liquidation of an account against an officer.—United States v. Zantzinger, Case No. 16,785.

An open account does not carry interest, but interest may be given as damages in an action thereon.—Bispham v. Pollock, Case No. 1,442.

A jury may give interest as damages after six months, in an action on an account for goods sold, where the custom was to charge interest after six months from the sale.—Bispham v. Pollock, Case No. 1,442.

§ 2. Rate.

Rate of interest in China.—Consequa v. Willings, Case No. 3,128.

In admiralty, interest on cargo lost by collision runs at 6, not at 7, per cent.—The Mary J. Vaughan, Case No. 9,217.

The laws of Missouri will govern as to the interest on bonds and coupons of a Missouri mu-

nicipal corporation, when sought to be enforced in that state, though they are made payable in New York.—Fauntleroy v. Hannibal, Case No. 4,692.

The law of the state must be produced to prove the rate of interest allowed therein.—Jaffray v. Dennis, Case No. 7,171.

Under a bond payable at the expiration of five years, with interest thereon until paid at 8 per cent., interest to be paid semiannually, *held*, that the principal would bear interest at 8 per cent. until paid, and the semiannual installments at the legal rate.—Northwestern Mut. Life Ins. Co. v. Perrill, Case No. 10,339.

Under the Pennsylvania act of April 21, 1841, one suing upon a note providing for 20 per cent. interest can recover that rate if suit is brought within one year from the issuance of the note.—McCormick v. Allegheny City, Case No. 8,717.

A bond payable on a certain date, with interest thereon "at the rate of 10 per cent. per annum," draws such rate until maturity, and only the statutory rate thereafter, as in cases where interest is not specified.—Hunneman v. Milwaukee, Case No. 6,878.

Where the trustees on foreclosure allow time on the price at a reasonable interest, the debt secured by the deed continues to bear its original interest.—In re Carter, Case No. 2,471.

A judgment merges the contract, and the interest thereafter accrues only at the statutory rate, irrespective of the agreement of the parties.—Evans v. White, Case No. 4,572a.

A judgment which gives a greater rate of interest than the legal rate after its rendition is reversible, though such greater rate is stipulated in the contract.—Byrd v. Gasquet, Case No. 2,268a.

A judgment in Iowa upon coupons made there and payable in New York, but silent as to interest, will draw interest at the legal rate in Iowa.—Rogers v. Lee County, Case No. 12,013.

The law of the state where the contract is made will fix the rate of interest in an action thereon in a federal court sitting in another state.—Jaffray v. Dennis, Case No. 7,171.

Judgment may be rendered for 10 per cent. interest until paid, where that rate is expressed in the contract.—Henderson v. Desha, Case No. 6,351a.

§ 3. Time and computation.

There is no difference as to the application of the general rule for calculating interest to debts legally carrying interest and of those where interest is given in the name of damages.—Smith v. Shaw, Case No. 13,107.

The lex loci contractus must prevail, in the computation of interest, up to the time of judgment.—Evans v. White, Case No. 4,572a.

On a note payable on demand, with 10 per cent. interest until paid, the interest is to be computed from date.—Pate v. Gray, Case No. 10,794a.

Interest from the commencement of the suit is recoverable as a matter of law in an action upon a money demand, even though interest is not claimed in the petition.—Whitaker v. Pope, Case No. 17,528.

Where an attachment is laid on money in the hands of a third person, interest ceases from the time of the attachment until it is dissolved; but when a debtor, who is also a creditor, lays an attachment in his own hands, interest is chargeable, during the continuance of the attachment.—Willings v. Consequa, Case No. 17,767; Consequa v. Willings, Id.

Mode of computing interest in case of partial payments.—Russell v. Lucas, Case No. 12,156a; Smith v. Shaw, Id. 13,107; Dunlop v. Alexander, Id. 4,166.

A state statute allowing interest on unpaid installments of interest has reference to installments due by contract, and does not apply to interest accruing after maturity by operation of law.—In re Bartenbach, Case No. 1,068.

On overruling motion for new trial, judgment will be entered for the amount of the verdict, with interest from the day it was rendered, both in actions of contract and tort.—Gibson v. Cincinnati Enquirer, Case No. 5,391.

Exchange should be calculated according to the rate prevailing at the time of trial.—Smith v. Shaw, Case No. 13,107.

The authorities on the subject of compound interest reviewed.—Hollingsworth v. Detroit, Case No. 6,613.

INTERIOR DEPARTMENT.

See "Public Lands," §§ 46-49.

INTERLOCUTORY INJUNCTION.

See "Injunction," §§ 14-34.

INTERLOCUTORY JUDGMENT.

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INTERNAL REVENUE.

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Application of laws to territories, see "Territories," § 1.

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I. OFFICERS OF INTERNAL REVENUE.

§ 1. Tenure.

Act July 1, 1862, creating the office of assessor of internal revenue, does not prescribe the tenure thereof, and the incumbent is deemed to hold such only during the pleasure of the appointing power.—United States v. Avery, Case No. 14,481.

§ 2. Powers and authority.

The commissioner of internal revenue has a right to make regulations concerning gauging and in relation to gaugers obligatory upon them.—United States v. Bittinger, Case No. 14,599.

A gauger has no power to delegate his authority, or to have his duties performed for him.—United States v. Bittinger, Case No. 14,599.

The assessor may investigate returns made by a distiller, and increase the amount of the assessment in all cases of fraud or omission, and assess the amount of tax for which the party is liable (Act June 30, 1864, §§ 14, 20, amended July 13, 1866); and such authority is in its nature judicial.—United States v. Hodson, Case No. 15,376.

Money collected by a collector of internal revenue under Act March 3, 1791, and paid over by him to the inspector, cannot be recovered back by the collector as money had and received to his use.—Wells v. Neville, Case No. 17,403.

§ 3. Bonds.

The execution of a collector's bond by the sureties with the date left blank authorizes the principal to fill the blank at his discretion.—United States v. Halsted, Case No. 15,287.

The sureties on a collector's bond are liable for the sum received by a collector under Act June 30, 1864, § 122, though there was no assessment or return made of the tax.—United States v. Chase, Case No. 14,788.

Bond of internal revenue collector not binding as to collections previously made.—Armstrong v. United States, Case No. 549.

The sureties on a collector's bond are discharged where, without their knowledge, the proper officers of the treasury took bonds and mortgages on time to secure the payment of a balance due from him.—United States v. Hillegas, Case No. 15,366.

The payment of money to a deputy collector as a tax on brandy without receiving stamps therefor is not a payment of the tax; and, where the collector converts the money to his own use, the sureties on his bond are not liable therefor.—United States v. Hermance, Cases Nos. 15,355, 15,356.

The proper credits to a collector on transferring the list of assessments to his successor.—United States v. Able, Case No. 14,417.

A declaration on an official bond of a tax collector *held* insufficient where the bond did not identify the officer's district, the date of his commission, the sort of taxes he was to collect, or the date of the statute under which it was given.—United States v. Jackson, Case No. 15,456.

On a joint judgment obtained against all the parties to the bond of a revenue collector, the personal estate of all liable to the execution must be exhausted before the land of any one of them can be reached. 3 Stat. 83.—United States v. Graves, Case No. 15,250.

In an action on a collector's bond on account of his breach of duty in allowing spirits to be removed from a warehouse without the furnishing of proper bonds, it is no defense that he did not act corruptly, but only negligently.—United States v. Thorn, Case No. 16,493.

§ 4. Compensation.

Officers' fees need not be immediately paid over to the internal revenue department, but may be accounted for in the semiannual returns of the officers.—United States v. Cigars, etc., Case No. 14,793a.

The collector will not be allowed a per diem for watching seized property, where he fails to turn it over to the district attorney, to have proceedings commenced, for 37 days after the seizure.—In re Fifteen Empty Barrels, Case No. 4,778.

The discretion of the secretary of the treasury in making additional allowances to collectors (Act June 30, 1864, § 25) cannot be judicially revised.—United States v. Hall, Case No. 15,284.

§ 5. Duties and liabilities.

The assessor acts judicially in determining what persons and things are subject to taxation, and a mistake in this respect, or an irregularity of proceedings, does not invalidate his action so as to make the collector a trespasser.—Delaware R. Co. v. Prettyman, Case No. 3,767.

An internal revenue officer, who, under color of his office, commits a trespass, is liable therefor; such cases being contemplated by the internal revenue act of July 13, 1866.—Coblens v. Abel, Case No. 2,926.

An internal revenue collector is not responsible for more than ordinary care and diligence in the collection of bonds for duties placed in the hands of an attorney by his predecessor for suit by direction of the commissioner of revenue. —United States v. Snyder, Case No. 16,351.

In such case the collector is not bound by a treasury statement charging him with the amount of such bonds.—United States v. Snyder, Case No. 16,351.

A revenue officer cannot disregard a requirement of the law as useless, or because he deems the government protected by other provisions.—United States v. Allen, Case No. 14,432.

§ 6. Actions against.

The taxpayer has a remedy by an action at law against an assessor making an illegal assessment.—Cutting v. Gilbert, Case No. 3,519.

Act July 13, 1866, § 63, does not prevent the owner of goods seized unlawfully from suing the seizing officer for trespass.—Cardinel v. Smith, Case No. 2,395.

An action against an internal revenue officer for a trespass committed under color of his office (July 13, 1866) cannot be brought until the six months specified in the act had expired.—Coblens v. Abel, Case No. 2,926.

See, also, post, §§ 19, 20.

Certificate of probable cause of seizure, see "Searches and Seizures," § 3.

II. ASSESSMENTS AND COLLECTIONS.

Gauging rectified spirits, see post, § 54.

§ 7. Necessity of assessment.

The producing capacity of a distillery being the measure of taxation (Act July 20, 1868, § 20), an assessment by an officer is not a condition precedent to the collection of the tax.—United States v. Halloran, Case No. 15,286.

§ 8. Entry and examination by officer.

A collector, deputy collector, or inspector of internal revenue may, without process, enter any building where distilled spirits subject to tax are produced or kept, so far as may be necessary for examining the same (Rev. St. § 3177), and may without process seize illicit distilled spirits (section 3453).—United States v. Fears, Case No. 15,080.

A national bank is not exempt from examination by the internal revenue officers under Rev. St. § 3177.—United States v. Rhawn, Case No. 16,150. But see United States v. Parkhill, Case No. 15,994.

A clerk of a supervisor of internal revenue cannot make such examination.—United States v. Rhawn, Case No. 16,150.

§ 9. Returns.

The returns of gross receipts under Act June 30, 1864, § 109, must state whether the amount is stated in legal tender currency or coined money, and the duty is to be paid according to the values in coined money when reduced to their equivalent in legal tender currency.—Wells v. Shook, Case No. 17,406.

The income tax acts require a return for taxation as income of all gains derived from the sale of corporation stock in 1868, if purchased at any time after August 5, 1861.—United States v. Smith, Case No. 16,341.

A merchant, in making his statement of income, may deduct, from his gross profits, bad debts made during the year, or such as appear bad at the end of the year. Act June 30, 1864. —United States v. Mayer, Case No. 15,753.

See, also, post, § 91.

§ 10. Production and examination of books.

The business of distillers and rectifiers, being wholly within control of the government, it may require the production of, and, if necessary, seize, any or all the books and papers kept by them in their business.—United States v. Three Tons of Coal, Case No. 16,515.

Summons reciting appropriate statute and section as authority need not refer to section of Revised Statutes embodying it.—In re Becker, Case No. 1,208.

Authority of supervisor to issue summons to produce books and papers, made coextensive with that of assessors (Act July 20, 1868), is not affected by subsequent transfer of assessor's authority to collectors.—In re Becker, Case No. 1,208.

Adjournment of hearing does not necessitate a new summons.—In re Becker, Case No. 1,208.

A summons issued to a person not engaged in a business particularly affected by revenue laws must be limited to books and papers concerning the subject of investigation, and describe them with reasonable certainty.—In re Becker, Case No. 1,208.

Rev. St. § 860, is modified and partially repealed by Act June 22, 1874, § 5, in relation to the production of books and papers. — United States v. Three Tons of Coal, Case No. 16,515.

Claimants and their counsel have the right to be present at the examination of their books and papers.—United States v. Mason, Case No. 15,735; Same v. Three Tons of Coal, Id. 16,515.

An assessor has no right, in order to determine liability for income tax, to examine books of third persons who have had dealings with the taxpayer.—In re Chadwick, Case No. 2,570.

A corporation is not bound to produce its books to the assessor on an inquiry into the income of its shareholders.—In re Chadwick, Case No. 2,570.

The supervisor of internal revenue is entitled to examine the books and papers belonging to banks, bankers, brokers, and banking associations, and is not bound to inform the owners of his purpose in making such examination. Act July 20, 1868, § 49.—Stanwood v. Green, Case No. 13,301.

The service by a supervisor of internal revenue, in person, of a summons upon a clerk of a railroad company to produce certain books and papers, and submit to examination under Act July 20, 1868, § 49, *held* sufficient.—Perry v. Newsome, Case No. 11,009.

A tobacco manufacturer will be required to produce his books before the assessor, notwithstanding a criminal proceeding against him; but he will be allowed to object to the exhibit of any particular entry as tending to criminate himself.—In re Lippman, Case No. 8,382.

The government has the right to examine all books kept by the distiller or rectifier pertaining to the business,—private, as well as those required by law.—United States v. Mason, Case No. 15,735.

If a distiller's private books show a different state of facts from those kept for the government, they also may be treated as government books.—United States v. Mason, Case No. 15,735.

In an order for the production of books and papers of a distiller or rectifier, the same need not be more specifically described than as those used and kept in his business as distiller or rectifier between certain dates named.—United States v. Three Tons of Coal, Case No. 16,515.

The order need not specify the books, but the officers may take all books found on the premises; the presumption being that they belong to the distilling business.—United States v. Mason, Case No. 15,735.

Where a summons for the production of books has not been complied with, the district judge, upon application, may issue a writ of attachment.—Stanwood v. Green, Case No. 13,301.

The statute giving such right is not unconstitutional, either as purporting to authorize an unreasonable seizure and search, or as compelling a party to testify against himself.—Stanwood v. Green, Case No. 13,301.

A banking firm *held* not punishable for a contempt in refusing to produce their books on the demand of a supervisor of the internal revenue, and in not appearing in response to a summons, where they asked a short delay to consult counsel, and there was no place of return in the summons.—United States v. Fordyce, Case No. 15,130.

The court has power to authorize an assessor to amend his application for attachment for contempt against a taxpayer for not producing his books, and giving evidence concerning his liability for the income tax.—In re Chadwick, Case No. 2,570.

On the application by an assessor for an attachment for contempt against a taxpayer for not producing his books and giving evidence as to his liability for the income tax, the court may issue an order to show cause, instead of proceeding ex parte.—In re Chadwick. Case No. 2,570.

Order for attachment for failure to obey summons to produce books and papers will be conditional.—In re Becker, Case No. 1,208.

If a distiller refuse to produce his books, the court may order the vaults containing them to be opened by its officers.—United States v. Mason, Case No. 15,735.

Effect of Rev. St. §§ 3172–3182, on settlements of income taxes.—In re Archer, Case No. 506.

See, also, post, § 68.

§ 11. Examination of taxpayer and witnesses.

A supervisor may procure an attachment to compel a person liable to taxation to appear and testify, without showing that he acted under special instructions from the commissioner in issuing the summons.—In re Meador, Case No. 9,375.

The taxpayer cannot be examined as to returns and payments made prior to the passage of Act June 30, 1864.—In re Brown, Case No. 1,977.

The assessment cannot be re-examined after the assessor has accepted the returns, assessed the tax, made a return, and the tax has been paid.—In re Brown, Case No. 1,977.

A witness, summoned for examination before an assessor, may be compelled to answer questions touching the falsity of tax returns of tobacco manufacturers, as disclosures or admissions thus made cannot be used against him in criminal prosecutions under Act Feb. 25, 1868.—In re Phillips, Case No. 11,097.

§ 12. Against whom assessment may be made.

A tax upon the income of a person up to the time of his death, during the tax year, is properly assessed against his executor.—Mandell v. Pierce, Case No. 9,008.

§ 13. Appeal to commissioner.

Failure of a purchaser of property leased for a distillery, with covenants to be subject to the lien of taxes and penalties, to appeal from an assessment thereon, precludes him, in a subsequent action against the collector, from showing that no tax or penalty was in fact due.—Milan Distilling Co. v. Tillson, Case No. 9,539.

Where the period of fermentation has been fixed at 48 hours by the officers of the government upon survey, it is not a valid objection to the tax that the distillery uses a longer time in fermentation. The distiller's remedy is by appeal to the commissioner of internal revenue.—United States v. Bicket, Case No. 14,590.

In a suit on a distiller's bond for the amount of an assessment (Rev. St. § 3182) defendant may impeach the assessment, though he has not first appealed to the commissioner.—United States v. Myers, Case No. 15,846.

§ 14. Reassessment.

Assessor has power to make a supplementary assessment, increasing amount of distiller's tax.—Barker v. White, Case No. 996.

The assessable capacity of a distillery, as determined by survey (Act July 20, 1868), cannot be raised by the assessor or the government, except by a new survey directed by the commissioner of internal revenue.—United States v. King, Case No. 15,533.

An assessor has power to reassess the income tax of a citizen who has already paid the tax first assessed against him.—Doll v. Evans, Case No. 3,969.

Where the assessment is too small, the assessor may make an assessment of an additional tax to cover the deficiency.—United States v. Black, Case No. 14,600.

The fact that, in the aggregate, there is no excess in the number of matches on which a tax is paid, will not prevent the commissioner from assessing an additional tax on those boxes of the lot which overrun.—Schmitt v. Trowbridge, Case No. 12,468.

§ 15. Collection in general.

Under Act March 7, 1864, imposing an additional duty on imported spirits, the duty is to be collected in such manner as the secretary of the treasury may direct, and he has power to direct it to be paid to a collector of internal revenue.—Westfall v. Shook, Case No. 17,448.

§ 16. Actions for taxes.

The obligation or duty to pay taxes is one which may be enforced by suit, by an action at law, or a bill in equity, according to the nature of the relief sought.—United States v. Pacific R. R., Case No. 15,983.

The remedy in equity to collect assessments (Rev. St. § 3207) is cumulative.—Alkan v. Bean, Case No. 202.

Under the revenue acts of 1862 and 1864 the United States may sue for and collect a tax on income without a prior assessment in the mode specified in the act creating the tax.—United States v. Tilden, Case No. 16,519.

The causes of action for unpaid taxes on income arising under the Acts of 1862 et seq. are not barred by delays in discovering imperfections in the return after the tax was paid, or by the fact that no return was made, and a tax and penalty was assessed and paid.—United States v. Tilden, Case No. 16,519.

The recovery of an assessment and the penalty for a failure to make return of income *held* no bar to an action to recover the tax on income, under Act March 2, 1867, § 13.—United States v. Hazard, Case No. 15,337.

To a suit to recover the balance of a tax the defense that the amount already paid was determined to be the true amount by the assessor cannot be tried upon demurrer.—United States v. New York Guaranty & Indemnity Co., Case No. 15,872.

A suit will not lie to recover a tax in a district other than that in which the tax accrues, or that in which the delinquent resides, although he may be found and served with process therein. Rev. St. § 733.—United States v. New York, N. H. & H. R. Co., Case No. 15,874.

In a suit for taxes defendant cannot plead a set-off, legal or equitable, growing out of independent claims.—United States v. Pacific R. R., Case No. 15,983.

The validity of an assessment against a distiller may be inquired into by defendant's answering a bill by the United States to subject to the payment of such assessment lands transferred to them.—United States v. Rindskopf, Case No. 16,166.

Where defendants have rebutted the presumption of law as to the validity of the assessment, the burden of proof is shifted upon the government to establish its validity.—United States v. Rindskopf, Case No. 16,166.

The assessor's original list, transmitted to the collector, is prima facie evidence of the amount of the tax due.—United States v. Butler, Case No. 14,702.

Evidence that the pecuniary circumstances of a distiller were apparently improved while engaged in distilling, during a period when such business was not profitable, is not admissible to show fraud.—United States v. Chaffee, Case No. 14,772.

§ 17. Lien for taxes.

A demand for the payment of taxes is necessary, under Rev. St. § 3186, to create and bring into operation a lien therefor, and such demand must state the amount of the tax.—United States v. Pacific R. R., Case No. 15,984.

Bona fide purchaser of distillery property for value and without notice takes subject to existing liens for taxes.—Alkan v. Bean, Case No. 202; United States v. Turner, Id. 16,548.

Lien on distillery for unpaid taxes is not lost by a bonding and release of the property in forfeiture proceedings afterwards discontinued without judicial action.—Alkan v. Bean, Case No. 202.

The government is not estopped by statements of its collector to enforce existing liens for unpaid taxes.—Alkan v. Bean, Case No. 202.

§ 18. Distress.

Where a national bank refuses to pay taxes assessed upon its income and profits (Act July 14, 1870, §§ 15, 17), a collector or his deputy, after notice and demand, may distrain therefor. —State Nat. Bank v. Morrison, Case No. 13,325.

§ 19. Restraining collection of taxes.

The circuit court has power to enjoin threatened proceedings of a collector of internal revenue to collect a tax which is not authorized by act of congress.—Georgia v. Atkins, Case No. 5,350; Frayser v. Russell, Id. 5,067.

If an assessment of income tax under act July 1, 1862, is not made in legal form, the remedy of the person aggrieved is at law, and not in equity.—Magee v. Denton, Case No. 8,943.

If such assessment is made in legal form the party aggrieved must pursue the remedy given by section 93 before he can resort to a court of equity for relief.—Magee v. Denton, Case No. 8,943.

A federal court has power to prevent, by injunction, the imposition of an illegal tax under Act June 30, 1864. Act March 2, 1833, § 2; Act June 30, 1864, § 50.—Cutting v. Gilbert, Case No. 3,519.

Where a great number of persons are affected by a tax, and the remedy by separate suits in equity will involve onerous and vexatious litigation, the court will not interfere by injunction in any suit.—Cutting v. Gilbert, Case No. 3,519.

Act March 2, 1867, § 10, prohibits a suit to restrain the collection of any sum by authority of the United States, having the form and color of a tax, by any means authorized by law for the collection of taxes.—Howland v. Soule, Case No. 6,800.

Under Rev. St. § 3224, a federal court cannot enjoin the collection of an assessment levied by the commissioner of internal revenue against a stockholder of a corporation engaged in the business of distilling spirits.—Kissinger v. Bean, Case No. 7,853.

To justify a holding that Rev. St. § 3224, does not forbid the issuance of an injunction, it must appear that the assessment could not by any possibility be legal.—Kissinger v. Bean, Case No. 7,853.

A suit in equity will not lie to restrain the collection of an income tax on the ground that the act of congress imposing the tax is unconstitutional and void.—Robbins v. Freeland, Case No. 11,883.

Collection of assessment not restrained on allegation in bill that assessment is irregular, and in violation of law, and void.—Alkau v. Bean, Case No. 202.

The constitutionality of an internal revenue act cannot be tested in a suit to restrain the collection of a tax levied thereunder.—Delaware R. Co. v. Prettyman, Case No. 3,767.

§ 20. Actions to recover taxes illegally collected.

Duties or taxes erroneously or illegally assessed and collected may be recovered back from the collector where paid under protest and with notice of an intention to test the validity of the claim.—Nelson v. Carman, Case No. 10,103.

A payment of a tax under protest is not a voluntary payment. — Schmitt v. Trowbridge, Case No. 12,468.

A verbal protest, which is noted by the deputy collector on the back of the tax receipt given the person, is a sufficient protest.—Shaefer v. Ketchum, Case No. 12,693.

When taxes are paid on the demand of an officer having authority to collect them by distraint, there is sufficient duress of the property to make the payment involuntary.—Hendy v. Soule, Case No. 6,359.

Judgment for defendant was ordered in this case upon the ground that the claim of the plaintiff was barred by the act of July, 1862, as construed by the supreme court.—Francis v. Slack, Case No. 5,041.

An appeal limiting the time to sue for a tax illegally collected dates from the filing of the application to refund in the office of the commissioner of internal revenue.—Cotton Press Co. v. Collector, Case No. 3,271.

An appeal after payment of a tax is not necessary before commencing suit to recover the same, where an appeal had been taken from the illegal assessment. — San Francisco Savings & Loan Soc. v. Cary, Case No. 12,317.

The failure to take an appeal to the commissioner of internal revenue, as provided by Act July 13, 1866, § 19, to be available in an action to recover a tax as illegally assessed, must be pleaded in abatement.—Hendy v. Soule, Case No. 6,359.

Where it appears that some of the boxes of matches in a lot contained an excessive number, the burden is put upon the manufacturer to show

what boxes did not overrun the number.—Schmitt v. Trowbridge, Case No. 12,468.

In a suit to recover back taxes paid on a reassessment, for error in the first assessment, the record of reassessment is not evidence of the error.—Barker v. White, Case No. 996.

The remedy against an illegal tax assessment pointed out.—United States v. Pacific R. R., Case No. 15,983.

III. SPECIAL TAXES.

See, also, post, § 71.

(A) INCOME AND LEGACY AND SUCCESSION TAXES.

§ 21. Legacy and succession taxes.

The tax on a pecuniary legacy accrues on the death of testator, though not payable until the legatee becomes entitled thereto, and a repeal of the statute does not affect the liability of the executor.—Hellman v. United States, Case No. 6,341; Mason v. Sargent, Id. 9,253; May v. Slack, Id. 9,336; United States v. Hellman, Id. 15,343.

Legacies paid out of the proceeds of real estate directed to be sold for that purpose are not subject to the tax upon legacies arising from personal property. Act July 1, 1862, § 111.—United States v. Wilder, Case No. 16,694.

Under the acts of June 30, 1864, and July 13, 1866, no succession tax could be levied against the devisee of a remainder in fee until the life estate terminated.—Mason v. Clapp, Case No. 9,233.

Testator died in 1847. Plaintiff came into possession in 1867, under his will, after the death of the first life tenant. *Held*, that she was liable for the succession tax. Act June 30, 1864.—Blake v. McCartney, Case No. 1,498.

Payments made in compromise by the executor with claimants under a will are not subject to a tax as "legacies" or "distributive shares" of intestate's estate.—Page v. Rives, Case No. 10,666.

Property bought and paid for by the husband, and deeded to his wife under an understanding that it should be willed to him, *held* liable to the succession tax, where it is subsequently devised to the husband.—Ransom v. United States, Case No. 11,574.

The legatee or cestui que trust is not liable in personam for the legacy tax imposed by Act July 1, 1862, §§ 111, 112, and an action will not lie against him to recover it.—United States v. Allen, Case No. 14,430.

The beneficiary of a trust fund under a will, who had not on October 1, 1870, become entitled to the possession or enjoyment of, or to the beneficial interest in, any of the principal sum (Act July 14, 1870, § 3), is not liable to the legacy tax under Acts June 30, 1864, §§ 124, 125, and July 13, 1866, § 9.—United States v. New York Life Insurance & Trust Co., Case No. 15,873.

The person beneficially interested, and not the trustee or executor in whom the legal title is vested, to whom a power in trust is given for the benefit of such person, is liable for the succession tax. Act June 30, 1864, §§ 126–137.—United States v. Tappan, Case No. 16,431.

A beneficial interest, arising, after Act June 30, 1864, was passed, under a will of a person who died before the act was passed, on the termination of a life estate, is a "succession," subject to tax under sections 127, 133.—Wright v. Blakeslee, Case No. 18,073.

An acceleration of a succession by an amicable agreement, by which the life tenant receives absolutely a certain proportion, and the remainder-men the balance, *held* within sections 27 and 35 of the act of 1867, and the property liable for the tax.—Brune v. Smith, Case No. 2,053.

§ 22. Income tax—Statutory provisions.

Congress has power to impose a tax on incomes.—Clark v. Sickel, Case No. 2,862.

An income tax (Act June 30, 1864) is not a "capitation or other direct tax," within the prohibition of Const. U. S. art. 1, § 9.—Clark v. Sickel, Case No. 2,862.

The internal revenue law of 1866 is constitutional and valid.—Michigan Cent. R. Co. v. Slack, Case No. 9,527a.

The income tax laid by the act of July 14, 1870, is not a "direct tax," within the meaning of the constitution, and the act is valid though it imposes the tax by the rule of uniformity.—Smedberg v. Bentley, Case No. 12,964.

Act July 14, 1870, re-enacts Act June 30, 1864, §§ 122, 123, in reference to the tax of 5 per cent. upon the amount of interest upon a corporation's bonded indebtedness. — Schuylkill Nav. Co. v. Elliott, Case No. 12,497.

Congress has a right to impose a tax by a new statute, although the measure of the tax is governed by the income of the past year.—Schuylkill Nav. Co. v. Elliott, Case No. 12,497.

§ 23. —— Persons liable.

Nonresident aliens are not liable to the income tax under Act June 30, 1864.—Jackson v. Northern Cent. Ry., Case No. 7,142.

So the interest on bonds of a corporation held by nonresident aliens is not taxable under Act June 30, 1864, § 122, amended by Act July 13, 1866, § 9.—United States v. Erie Ry. Co., Case No. 15,056.

A corporation whose business is compressing cotton is not required to pay a tax on dividends. Act June 30, 1864, § 120.—Cotton Press Co. v. Collector, Case No. 3,271.

The tax of 5 per cent., out of certain corporate dividends, is a tax on the income of the holder of the stock, the corporation being the government agent for its collection, and the corporation is not liable for such tax.—Philadelphia & R. R. Co. v. Barnes, Case No. 11,087.

A tax upon a dividend declared in January, 1870, of earnings for the past year, made payable on or before March 15, 1870, cannot be collected from the corporation.—Home Mut. Ins. Co. v. Stockdale, Case No. 6,662.

A railroad company purchasing a railroad subject to an existing mortgage *held* liable for taxes subsequently assessed upon the coupons of the mortgage bonds. Act July 14, 1870.—Eastern Ky. R. Co. v. Slack, Case No. 4,253.

§ 24. —— Receipts subject to tax.

A person's compensation as state's attorney for a certain county is not liable to the income tax.—United States v. Ritchie, Case No. 16,168.

The salary of a judge of a court of record, payable out of the state treasury, cannot be taxed as income.—Day v. Buffinton, Case No. 3,675; Freedman v. Sigel, Id. 5,080.

The fact that such salary is fixed by the board of supervisors of the county of New York, or that it is payable out of the treasury of the city of New York, is immaterial.—Freedman v. Sigel, Case No. 5,080.

The compensation of a state officer cannot be applied to the satisfaction of the $1,000 exemption from the income tax.—United States v. Ritchie, Case No. 16,168.

A transfer of stocks for a collectible promissory note, or an exchange thereof for lands which are sold within the year for collectible promissory notes, is considered as a sale of such stock for so much cash.—United States v. Smith, Case No. 16,341.

A bona fide exchange of stock for other property is not a sale thereof from which profits are derived liable to taxation as income.—United States v. Smith, Case No. 16,341.

The amount of a promissory note taken in 1871 on a sale in that year of a patent right not maturing or paid until 1872, is not taxable as income for 1871. Act July 14, 1870, § 6.—United States v. Schillinger, Case No. 16,228.

Taxability of promissory notes, book accounts, etc., due during the year.—United States v. Frost, Case No. 15,172.

An insurance company owning bank stock is not liable to be taxed on dividends received therefrom, which have already been taxed in the hands of the bank.—Merchants' Ins. Co. v. McCartney, Case No. 9,443.

Certificates of stock representing the pro rata interest of stockholders in a railroad foreclosed by the corporation issuing the stock are not dividends, within Act July 1, 1862, the mortgage representing advances made.—Chicago, B. & Q. R. Co. v. Page, Case No. 2,668.

The terms "income or articles or objects charged with an internal tax" (Act July 13, 1866) include "gross receipts" of express companies or stage proprietors.—Wells v. Shook, Case No. 17,406.

"Profits used for construction" *held* not to include money used by a railroad company, to replace a wornout bridge with a much more costly structure.—Hartford & N. H. R. Co. v. Grant, Case No. 6,159.

A fund accumulated in 1863 by a railroad company, in government bonds, as net earnings, and turned over in 1867 to a trustee for the stockholders on the consolidation of the railroad with another, *held* not liable to tax as income.—Reynolds v. Williams, Case No. 11,734.

Accumulated profits in the hands of a bank, prior to the act of June 30, 1864, is capital, and not income to be taxed thereunder.—Merchants' Ins. Co. v. McCartney, Case No. 9,443.

Act July, 1870, § 14, providing for a tax on interest, dividends, etc., of corporations, did not include dividends and earnings for the last half of that year.—Metropolitan R. Co. v. Slack, Case No. 9,506; Philadelphia & R. R. Co. v. Kenney, Id. 11,088.

The undistributed surplus earnings of savings banks, added during the year to their contingent funds, are subject to taxation, under Act July 13, 1866, § 9.—United States v. Dollar Sav. Bank, Case No. 14,979.

Where the net earnings of a savings institution are divided among the reserve fund, capital stock, and deposits, in proportion to their respective amounts, the money paid to the depositors is dividends, within Act 1866, § 120.—San Francisco Savings & Loan Soc. v. Cary, Case No. 12,317.

It is immaterial that such fund is held as an authorized security for depositors.—United States v. Dollar Sav. Bank, Case No. 14,979.

Stock certificates issued by a railroad company to represent earnings invested in construction and equipment are not taxable as "scrip dividends."—New York Cent. & H. R. R. Co. v. Bailey, Case No. 10,203.

Undivided earnings of incorporated companies *held* not taxable as income in the returns of stockholders.—Ex parte Ives, Case No. 7,114.

A dividend declared will form part of the taxable income of the stockholder, though he has not called for and received it. Act July 1, 1862. —Magee v. Denton, Case No. 8,943.

The provisions bringing the income tax to a close with the year 1869 did not apply to a tax on the dividends of a railway company. The latter is an excise, not an income, tax.—Metropolitan R. Co. v. Slack, Case No. 9,506.

Act 1867, terminating the income tax, does not apply to the tax on bonds, income, etc., of railroad and other corporations.—Concord R. Corp. v. Topliff, Case No. 3,093.

A dividend declared payable after December 31, 1869, although for earnings of the past year, is not liable to the income tax, which expired with the year 1869.—Philadelphia & R. R. Co. v. Barnes, Case No. 11,087.

Interest coupons of railroad bonds are not taxable under the general tax law of Pennsylvania, nor the act of April 30, 1864.—Jackson v. Northern Cent. Ry., Case No. 7,142.

(B) TAXES ON TRADE OR BUSINESS.

Distillers, see post, §§ 40–55.

§ 25. In general.

Congress has power to pass a law imposing a license duty on those who are engaged in a business which is a subject of a police regulation by the states.—United States v. Riley, Case No. 16,164.

§ 26. License issued to partners.

Where a license is issued to a firm, the continuing partner, on the dissolution of the firm, may carry on the business until the end of the year.—United States v. Daniels, Case No. 14,916; Same v. Glab, Id. 15,213.

§ 27. Manufacturers generally.

The use by a manufacturer of salt of more than one set of boilers or evaporating pans, or more than one smoke flue or chimney, does not make him a manufacturer at more than one place.—Salt Co. of Onondaga v. Wilkinson, Case No. 12,269.

The owner of a patent, who has the patented machines made for him at a fixed price, and then sells them to others, *held* to be the manufacturer, and liable for the tax upon the sums realized by their sale. Act July 13, 1866, §§ 79, 86.—Hendy v. Soule, Case No. 6,359.

The word "brick" *held* not to include fire brick. Acts 1862, § 75, 1864, § 94.—De Casse v. Spader, Case No. 3,720.

The assignees of a bankrupt manufacturer selling his goods in the course of their trust in the condition in which they found them are not bound to pay the tax imposed by Act March 31, 1868, on sales by manufacturers.—In re Whipple File Co., Case No. 17,522.

Where wool is bought and spun into yarn, and the latter wove into fabrics, *held*, that the yarn was a separate manufacture, and subject to an assessment of 5 per cent. Act June 30, 1864.—United States v. Washington Mills, Case No. 16,647.

Persons supplying and sewing two small buckles and straps upon knapsacks, under agreement with the government contractor, are not liable for the manufacturer's tax. Act July 1, 1862, § 75.—United States v. Stevens, Cases Nos. 16,393, 16,393a, 16,393b.

Animal charcoal or bone black and bone dust are taxable as "manufactures of bone," and the former is not exempt as "charcoal."—Schriefer v. Wood, Case No. 12,481.

A merchant tailor who makes clothes to order for individual customers, for their personal use, is a manufacturer, within Act July 1, 1862, § 75. —Saunders v. Howard, Case No. 12,375.

The exemption of manufactured goods whose increased value does not exceed 5 per cent. ad valorem (Act 1864, § 96) applies only where duties have previously been paid on the articles before manufacture.—United States v. Boylan, Case No. 14,634.

Removal of goods for delivery to the persons on whose orders they were manufactured, on the agreement that they should be stored for the manufacturer until after Act July 13, 1866, reducing the tax, took effect, renders them liable for the original tax.—Dike v. Howe, Case No. 3,906.

Revenue officers are not required to give notice of the expiration of a manufacturer's license, and a failure to give such notice does not discharge the sureties on the manufacturer's bond.—United States v. Truesdell, Case No. 16,543.

§ 28. Assayers.

A mining company assaying its own ores only, and not assaying any bullion or amalgam, is required to pay a special tax as assayer. Act June 30, 1864, § 79, subd. 48.—Yellow Jacket Silver Min. Co. v. Gage, Case No. 18,134.

§ 29. Banks and bankers.

Taxation of the business of bankers under Acts June 30, 1864, and March 3, 1865.—Northrup v. Shook, Case No. 10,329.

What are banking institutions within Int. Rev. Act, § 110, providing a tax on deposits.—German Savings & Loan Soc. v. Oulton, Case No. 5,362.

A tax of 1/24 of 1 per cent. each month on deposits subject to check is collectible under Act June 30, 1864, § 110, even though interest is allowed on such deposits.—Clark v. Bailey, Case No. 2,814.

Surplus earnings of a bank are not liable to a license tax under the act of June 30, 1864, § 79.—Mechanics' & Farmers' Bank v. Townsend, Case No. 9,381.

The tax imposed by Rev. St. § 3408 is a tax on the bank, and not on the depositor, and is not subject to the objection that it is not a uniform tax. Const. U. S. art. 1, § 8.—German Sav. Bank v. Archbold, Case No. 5,364.

Though a deposit in a savings bank exceed $2,000, that amount thereof is exempt. Rev. St. § 3408.—German Sav. Bank v. Archbold, Case No. 5,364.

A corporation, whose sole business consists in loaning and investing its capital on mortgages of real estate, in selling the mortgage securities, and guarantying the payment thereof, is not taxable as a "bank or banker," under Rev. St. § 3407.—Equitable Trust Co. v. Seldon, Case No. 4,508.

Act June 30, 1864, § 110, does not authorize a tax of 1/24 of 1 per cent. on money borrowed by a banking firm.—Clark v. Bailey, Case No. 2,814.

A loan and trust company which issues certificates of deposit, and makes loans on stocks, bonds, and other security, is subject to the payment of the license fee imposed by Act 1864, § 79, cl. 1.—United States v. Farmers' Loan & Trust Co., Case No. 15,070.

Such company is "engaged in the business of banking," so as to be liable for the payment of a duty of 1/24 of 1 per cent. for each month upon the average amount of its deposits, as provided by Act 1864, § 110.—United States v. Farmers' Loan & Trust Co., Case No. 15,070.

§ 30. Billiard-table proprietors.

A person in possession and control of a billiard table in a place open to the public is liable prima facie to pay the special tax, though the general property and ultimate control of the table or place are in another.—United States v. Howard, Case No. 15,402.

§ 31. Brokers.

Definition of broker under the internal revenue tax acts.—Peabody v. Gilbert, Case No. 10,868.

The provision in Act March 3, 1865, extending the definition of "brokers" given in Act June 30, 1864, § 79, subd. 9, does not apply to section 99 of the act of 1864.—United States v. Fisk, Case No. 15,104.

A person purchasing stock for others in his own name, advancing his own money, and holding the stock as security, is liable to a tax as a broker.—Clark v. Gilbert, Case No. 2,822.

A person having a license of a banker, who receives stocks, etc., and sells them, charging as a banker, is not liable to the tax imposed upon brokers by Act June 30, 1864, § 99.—Clark v. Gilbert, Case No. 2,822.

Taxation of brokers under Acts June 30, 1864, and March 3, 1865.—Northrup v. Shook, Case No. 10,329.

A person whose occupation is to sell agricultural produce in public market is liable to a tax as a "produce broker" (Act 1866, § 79), though the produce is raised by himself upon his farm.—United States v. Simons, Case No. 16,291.

§ 32. Cigar manufacturers.

A cigar manufacturer cannot sell cigars at retail at the place of manufacture, notwithstanding he has paid the special tax required of retail dealers. Rev. St. §§ 3236, 3387, 3397.—Crisp v. Proud, Case No. 3,392.

§ 33. Lottery business.

The provisions of the internal revenue laws in relation to lotteries and taxes on the business of selling lottery tickets.—In re Lindauer, Case No. 8,358.

A person who gave out to customers combinations of numbers, specifying them as being in certain lotteries, entering the same in his policy book, and paying the customers according to the drawings, though no certificate or ticket was given, *held* a policy holder and liable for the special tax.—United States v. Stange, Case No. 16,375.

The game of "keno" is not a "lottery" within the meaning of the internal revenue laws.—United States v. Hornibrook, Case No. 15,390.

§ 34. Railroads and steamboat owners.

A railroad owned and managed by a state, and whose profits form a part of its revenue, is not liable to taxation under Act June 30, 1864, amended March 3, 1865.—Georgia v. Atkins, Case No. 5,350.

The gross receipts of a steamboat include receipts for the use of berths and staterooms as well as for the carriage of passengers. Act 1864, § 103, amended Act 1866, § 9.—New Jersey Steamboat Co. v. Pleasonton, Case No. 10,166.

§ 35. Retail liquor dealers.

A single sale of spirituous liquors makes the seller a retail dealer.—United States v. Barnhardt, Case No. 14,526.

A sale of intoxicating liquors without a license is a violation of Act June 30, 1864, § 73, although the person intended to give the proceeds to a charitable use.—United States v. Dodge, Case No. 14,974.

A sale of whisky in small quantities on several occasions may be sufficient to warrant a conviction for selling by retail without a license, though defendant did not keep a shop or store, or did not carry on the business for a livelihood.—United States v. Harbison, Case No. 15,300.

An association whose initiation fees were used to buy a stock of liquors which were dealt out to members only on payment by the drink, at cost price, is a partnership for the sale of liquors at retail, and each member thereof is guilty of violating the statute, where the special tax is not paid.—United States v. Roliger, Case No. 16,190a.

An unincorporated social or literary club, which sells checks to its members, which it takes in exchange for glasses of beer, is a deal-

er, and liable to taxation under Act 1875, c. 36, § 18.—United States v. Wittig, Case No. 16,748.

§ 36. Shipbuilders.

Where a tax on ships was changed to a tax on hulls only, pending completion of a vessel, and after it was sold by the builder for a price "in full," the purchaser is not liable for the tax.—Size v. Curtis, Case No. 12,920.

§ 37. Jugglers and proprietors of shows.

A corporation which maintains a driving track where public racing is given, and the public admitted for pay, is liable to a tax on its gross receipts. Act June 30, 1864, § 108.—United States v. Buffalo Park, Case No. 14,681.

A "spirit medium," who performs various feats for pay, *held* liable to pay license as a "juggler."—United States v. Colchester, Case No. 14,831.

§ 38. Wholesale dealers generally.

Agents who sell by sample from their place of business all the goods of a manufacturing company, from whose factory the goods are delivered, are not liable to a special tax as wholesale dealers. Acts June 30, 1864; July 13, 1866.—Tucker v. Slack, Case No. 14,226.

§ 39. Wholesale liquor dealers.

The words "five gallons," as used in Act April 10, 1869, § 44, defining what constitutes a wholesale dealer refers to "wine" gallons and not to "proof" gallons.—In re Wangerien, Case No. 17,141.

A sale of a single lot of spirits which have been taken for a debt, in quantities of not less than five gallons at one time, does not make the person a wholesale liquor dealer. Rev. St. § 3242.—United States v. Feigelstock, Case No. 15,084.

Brewers selling elsewhere than at the place of manufacture are liable to taxation as wholesale dealers. Acts July 20, 1868, § 59; April 10, 1869.—Underhill v. Pleasonton, Case No. 14,337.

See, also, post. § 50.

IV. DISTILLED SPIRITS.

§ 40. Regulation in general.

Under the revenue laws, the government has the right to control and regulate the manufacture of spirits for the purpose of collecting the revenue.—United States v. Mason, Case No. 15,735.

The regulations of April 22, 1869, were authorized by the act of July 20, 1868, § 2.—United States v. Thirty-Seven Barrels of Apple Brandy, Case No. 16,466.

§ 41. Statutory provisions.

Construction of acts of March 3, 1791, May 8, 1792, Feb. 18, 1793, and April 6, 1802, in relation to the duties on domestic distilled spirits.—United States v. Sweeney, Case No. 16,426.

Act July 20, 1868, in relation to a tax on distilled spirits, is not unconstitutional because of its regulations requiring a bond before commencing business, etc.—Mason v. Rollins, Case No. 9,252.

§ 42. Who is a distiller.

A manufacturer of vinegar, who, in the process, produces a fluid containing from 5 to 7 per cent. of spirits, with machinery which is not capable of producing a higher per cent., is not bound to take out a distiller's license.—United States v. Two Barrels, Case No. 16,575.

A rectifier of spirits distilled from domestic materials is not a distiller of spirituous liquors, within the meaning of Act July 24, 1813.—United States v. Tenbroek, Case No. 16,446.

To make one in possession of a still a distiller, because he keeps mash, wort, or wash, the mash, wort, or wash kept must be such as will produce spirits on distillation. Rev. St. § 3247.—United States v. Frerichs, Case No. 15,166.

A person is liable for illicit distilling under Act July 20, 1868, where the spirits extracted partake of the qualities of alcohol, irrespective of their degree of strength.—United States v. Bagwell, Case No. 14,494.

Under Act March 2, 1867, § 16, a manufacturer of vinegar is not a distiller, although he uses a patent apparatus in which a mash, fermented in the same manner as for the production of whisky, is used.—One Vaporizer, Case No. 10,537.

And a person who makes alcoholic vapor in the process of making vinegar by machinery, which is not adapted to the condensation of such vapor is not a distiller. Act July 13, 1866, §§ 21, 23; Act March 2, § 16.—United States v. One Still, Case No. 15,956.

But such a manufacturer is liable as a distiller if, by the process used, he obtains alcohol from his mash so that he is saved the expense of purchasing the alcohol necessary for the manufacture of vinegar.—United States v. Distillery, Case No. 14,960; Same v. Steen & Cwergius' Factory, Id. 16,383.

If a rectifier, by any process, manufactures spirits from fruits or berries, saloon washings containing fermented substances, or from sour beer, he becomes a distiller. Rev. St. §§ 3259, 3260.—United States v. Marshall, Case No. 15,726.

§ 43. Who is liable for tax.

Act July 20, 1868, § 44, is applicable to any person distilling spirits without paying the special tax, or giving bond, whether he has registered his still, or given notice of intention to engage in the business, or not.—United States v. Mathoit, Case No. 15,740.

All persons having an interest in the business of distilling or directly aiding in the production of spirits for their use or benefit are distillers, and amenable to the provisions of the internal revenue laws.—United States v. Howard, Case No. 15,401.

A person is not liable for the tax unless he has a direct interest in the business. An interest as lessor, or as a creditor who expected to collect his claim if the business proved successful, is not sufficient.—United States v. Van Slyke, Case No. 16,610.

Knowledge by defendant that illicit spirits were being manufactured on the premises does not render him liable for the tax.—United States v. Van Slyke, Case No. 16,610.

The word "proprietor" (Rev. St. § 3251) is used in the sense of an owner who has the exclusive right to and control over the premises, and includes a lessee.—United States v. Van Slyke, Case No. 16,610.

§ 44. Amount of tax.

The tax must be paid at the rate prescribed by the law in force at the time the bond was given.—United States v. Dutcher, Case No. 15,014.

A distiller is liable to a tax upon 80 per cent. of the producing capacity of the distillery, whether that quantity is produced or not. Act July 20, 1868, § 20.—Daley v. United States. Case No. 3,542; Mason v. Peabody, Id. 9,250; United States v. Bicket, Id. 14,590; Same v. Nissley, Id. 15,893. CONTRA, see United States v. Singer, Case No. 16,292.

Act July 20, 1868, § 10, must be strictly followed in ascertaining the capacity of the distillery.—Mason v. Peabody, Case No. 9,250.

A distiller who pays tax on the actual product of the distillery, though falling short of 80 per cent. of its estimated capacity, cannot be made liable for a larger amount.—United States v. Bicket, Case No. 14,590.

The court has no power to allow an abatement of tax to a distiller from the loss of mash by the bursting of a fermenting tub.—Turner v. Williams, Case No. 14,265.

Spirits in a bonded warehouse at the time of the passage of Act March 7, 1864, are subject to the additional duty imposed by section 7.—Westfall v. Shook, Case No. 17,448.

Where the producing capacity of a distillery is reduced by a direction of the government that the distillery be run only a certain number of hours, a pro rata tax only can be collected.—United States v. Park, Case No. 15,991.

A distiller cannot avail himself of any mistake of the officer in overgauging the spirits.—United States v. Dutcher, Case No. 15,014.

Time from which reduction of producing capacity of distillery takes place.—Caldwell v. Weitzel, Case No. 2,306.

The "deficiency" tax is based upon the quantity of spirits actually produced, or on 80 per cent. of the capacity of the distillery. Act July 20, 1868.—United States v. Reed, Case No. 16,135.

§ 45. When tax becomes due.

The tax on distilled spirits is due the moment they are produced, and must be paid, even if they are afterwards destroyed by leakage or fire.—Mason v. Peabody, Case No. 9,250.

§ 46. Distillers' bonds—Who required to give bond.

The person to give the warehouse bond under section 27, Act July 13, 1866, is the person who, under section 24, notifies the government that he is the person engaged in the business of a distiller.—United States v. Henry, Case No. 15,350.

§ 47. —— Nature and operation.

A distiller's bond for the payment of a tax (Act July 13, 1866) is not a penalty, but a contract or security, and is unaffected by the repealing act of January 11, 1868.—United States v. Dutcher, Case No. 15,014.

A distiller's bond given under Act July 1, 1862, § 39, conditioned that the distiller should comply with the conditions of such act and of such other acts as might thereafter be enacted, *held* valid.—United States v. Mynderse, Case No. 15,850a.

The delivery of the bond, by one of the firm of obligors, for the purpose of obtaining a permit for the removal of the spirits, with the declaration that it is all right, is a ratification of the bond.—United States v. Turner, Case No. 16,547.

A transportation bond, executed in blank as to the quantity of spirits and amount secured, is not binding unless ratified after the blanks are filled.—United States v. Turner, Case No. 16,541.

A public officer cannot vary, or in any way change the terms of distillers' bonds required by law.—United States v. Bicket, Case No. 14,590.

The giving of transportation bonds for the removal of whisky from a warehouse does not authorize the sale of the spirits without payment of the tax.—United States v. Grotenkemper, Case No. 15,267.

§ 48. —— Liabilities of sureties.

It is no defense to the sureties on a distiller's bond that the assessor failed to obtain the consent of the mortgagee of the distillery premises to their use as such, and a stipulation for priority of lien of the United States.—United States v. Hosmer, Case No. 15,394.

The liability of the sureties is not released by the fact that the collector permitted the distiller to remove from the bonded warehouse a quantity of spirits, sufficient to pay all the taxes due, without first requiring payment thereof.—United States v. Hosmer, Case No. 15,394.

It is a good defense to a surety on a distiller's bond that it was signed and delivered on a condition of the nonfulfillment of which plaintiff's agent had notice when he accepted it.—United States v. Hammond, Case No. 15,292.

A pardon operates the same as an actual fulfillment of the sentence, and completely releases the sureties from all liability for the acts or breach of duty charged.—United States v. Cullerton, Case No. 14,899.

A conviction and sentence for violation of the law is no bar to an action on the distiller's bond, unless the sentence is actually fulfilled.—United States v. Cullerton, Case No. 14,899.

An agreement by a district attorney to release a surety on a stipulation for value on condition of his giving information against other persons is not valid without the concurrence of the commissioner of internal revenue, the secretary of the treasury, and the attorney general.—United States v. Quantity of Distilled Spirits, Case No. 16,099.

The destruction of spirits by fire while in a distillery warehouse, due to the absence of the government storekeeper, does not release the bondsman from liability for the amount of taxes due.—United States v. Farrell, Case No. 15,073.

In an action on a distiller's bond under Act July 20, 1868, a plea that the still exploded, whereupon the assessor locked up and took control of the property, is a good defense as to the time the still was disabled.—United States v. Miller, Case No. 15,770.

Errors in the assessment and reassessment of a distiller's tax cannot be set up by the sureties in defense to a suit on the bond. Their remedy is to pay the tax under restraint, and to appeal to the commissioner of internal revenue. If the appeal is denied, a suit will lie against the collector.—United States v. Black, Case No. 14,600.

A sale of a distillery for the sum due to the United States will extinguish the debt, though it is incumbered by valid liens to its full value, and the distiller's bond is discharged thereby.—United States v. Triplett, Case No. 16,539.

The surety on a distiller's bond is liable, though the same is approved in violation of the provisions of Act July 20, 1868, § 7, that prior liens on the property must first be released.—Osborne v. United States, Case No. 10,599.

The fact that distilled spirits are seized, condemned, and sold for violation of the internal revenue law while bonded, does not release the obligors on the warehouse bond.—United States v. South Branch Distilling Co., Case No. 16,359.

The fact that the purchaser at the sale paid the tax is immaterial.—United States v. South Branch Distilling Co., Case No. 16,359.

It is a good defense to a suit on a distiller's transportation bond that during the act of transportation the government officers seized them, and the collector of the district to which they were consigned refuses to grant a certificate of delivery.—United States v. Stewart, Case No. 16,399.

It is immaterial that the seizure was made by reason of the wrongful act of the persons having the goods in charge.—United States v. Stewart, Case No. 16,399.

Defense to action on distiller's bond of seizure of property by the collector and surrender to state court receiver.—United States v. Grant, Case No. 15,247.

The government has its remedy upon the distiller's bond, though it might have collected the tax from the proceeds themselves.—United States v. Bicket, Case No. 14,590.

§ 49. —— Actions.

In an action on a distiller's bond it need not be shown affirmatively that the survey required by Act July 20, 1868, § 10, has been made, and a copy of it served upon him, and a demand of payment made.—United States v. Black, Case No. 14,600.

In an action upon a distiller's bond, an erroneous assessment, which does not include the amount actually due as prescribed by the statute, is not conclusive against the government.—United States v. Halloran, Case No. 15,286.

Moneys paid to the collector without specific appropriation during the existence of a bond are properly applied first to the payment of back taxes.—United States v. Bicket, Case No. 14,590.

§ 50. Books of distillers and of rectifiers and wholesale dealers.

Act July 13, 1866, § 26, as to the entries of purchases and sales or receipts and deliveries of spirits, is complied with as to entries made before the act of 1868, if the entries, although made in a continuous manner, without anything to designate to what the figures refer, are a true statement of such transaction.—United States v. Fifty Barrels of Whiskey, Case No. 15,091.

Rectifiers and distillers must take the proper steps to ascertain what the rules and regulations are as to keeping of a book as required by Act July 13, 1866, § 26.—United States v. Dutcher, Case No. 15,013.

Dealers in foreign as well as domestic spirits are subject to Act 1868, § 45, and must keep the books and make the entries specified therein so far as they can.—United States v. McCullough, Case No. 15,665.

The same rules apply to the making of notices of rectification.—United States v. Amann, Case No. 14,438.

Rectifiers are bound to keep the book prescribed by Act July 13, 1866, § 26, and make the proper entries in it, whether the revenue commissioner has prescribed any rules and regulations on the subject or not.—In re Quantity of Distilled Spirits, Case No. 11,494.

All ambiguous entries in the book are to be taken most strongly against the rectifier where discrepancies are not explained.—Quantity of Distilled Spirits, Case No. 11,494.

The duty of making entries may be delegated to a clerk, but the principal is responsible if the proper entries are not made.—United States v. Fifty Barrels of Whiskey, Case No. 15,091; Same v. Amann, Id. 14,438. But see Quantity of Distilled Spirits, Case No. 11,495.

A retail dealer in liquors, who also purchases and sells malt liquors in quantities of more than five gallons at the same time, is not required to keep the book provided for in Act July 20, 1868, c. 186, § 45.—United States v. Reagan, Case No. 16,128.

The book is to be kept only by wholesale dealers in domestic spirits, and a person does not become such dealer by taking out a wholesale license for selling ale, though he also sells domestic spirits at retail.—United States v. Reagan, Case No. 16,128.

Sale of spirits by the consignee, after the arrival and transfer of the bill of lading, so that the purchaser receives them from the carrier, makes the seller liable, under Rev. St. § 3318, for sending them out of his stock and possession, without entering them on his books.—United States v. Miller, Case No. 15,771.

The bonded warehouse in which a liquor dealer stores his goods is to be regarded as his premises, in the meaning of the act; and, by a sale and transfer of the goods in bond without removal, the premises then become the premises of the vendee, instead of the vendor.—United States v. McCullough, Case No. 15,665.

§ 51. Suspension of work.

Notice of intention to suspend work *held* not invalid because addressed to the assessor, where it was acted upon by the assistant assessor.—Daniels v. Tarbox, Case No. 3,568.

Where the distiller refuses to fix the time to run off the mash on hand before the notice of suspension takes effect there can be no legal suspension.—Stowell v. Williams, Case No. 13,515.

The failure of the assistant assessor to comply with the statute by locking the door of the furnace, and reporting the suspension, will not affect the right of the distiller.—Daniels v. Tarbox, Case No. 3,568.

A distiller is relieved from the tax during a suspension of work, though the resumption be irregular. Act July 20, 1868, § 22.—Daniels v. Tarbox, Case No. 3,568.

A noncompliance with the statute in regard to one interval of suspension cannot affect the question of the regularity of another suspension.—Daniels v. Tarbox, Case No. 3,568.

Having mash or wort on the premises during the period of suspension does not make the distiller liable to the tax.—Daniels v. Tarbox, Case No. 3,568.

See, also, post, § 70.

§ 52. Meters.

Congress has the right to compel distillers to affix certain patented meters to their stills as a condition precedent to carrying on their business.—Nusbaum v. Emery, Case No. 10,380.

A collector with whom money has been deposited by a distiller to pay for patented meters is a mere stakeholder, and the distiller cannot recover such deposit.—Nusbaum v. Emery, Case No. 10,380.

§ 53. Stamps.

A person transporting empty barrels is bound to know whether or not there were uneffaced stamps thereon. Rev. St. § 3324.—United States v. Goodrich Transp. Co., Case No. 15,228.

Wholesale dealers are bound to "cause" their casks to be stamped and branded in the cases which come under Act July 20, 1868, §§ 25, 47.—United States v. Ninety-Five Barrels of Distilled Spirits, Case No. 15,889.

Stand casks in a retail liquor dealer's saloon need not be marked or stamped, though they may hold over five gallons.—United States v. Mooney, Case No. 15,800a.

§ 54. Gauging and inspection of rectified spirits.

"Form 122" for the return of spirits emptied for rectification, *held* authorized by law.—United States v. One Hundred and Two Packages Distilled Spirits, Case No. 15,944.

A regulation requiring a regauging of distilled spirits on their being emptied to be rectified, and the certificate of the gauger as to the destruction of stamps, *held* valid and reasonable.—Thacher v. United States, Case No. 13,851.

Spirits merely poured from the original packages into an open vat for rectification, need not be again inspected, gauged, and branded. Act 1866, c. 184, § 43.—United States v. Eight Barrels of Whiskey, Case No. 15,028.

§ 55. Tax on sparkling wines.

Wine made from grapes grown in the United States is not subject to a tax under Act June 6, 1872, § 12, because made in imitation of sparkling wine by injecting carbonic acid gas by a separate process of manufacture.—United States v. One Case, Case No. 15,922.

V. TAXES ON FERMENTED LIQUORS, TOBACCO, CIGARS, AND OTHER ARTICLES.

§ 56. Fermented liquor.

Construction of Act 1862, § 50, in relation to the taxation of beer.—Shaefer v. Ketchum, Case No. 12,693.

A book of general accounts, kept by a brewer in conducting his business, is not such a book as is required to be kept by section 49 of the act of 1866.—United States v. Bellingstein, Case No. 14,566.

The terms "malt liquor" and "fermented liquor" are used synonymously in Act June 6, 1872, and the brewer is expressly required to enter all malt liquors in his book, whether sold to other brewers or the public.—United States v. Dooley, Case No. 14,984.

§ 57. Tobacco.

Under Act June 30, 1864, §§ 90, 94, as amended by Acts July 13, 1866, and July 20, 1868, a completed sale or a completed removal of manufactured tobacco is a necessary preliminary to the accruing, assessment, and payment of the tax upon it.—United States v. Quantity of Tobacco, Case No. 16,106.

It is illegal for a tobacco manufacturer to remove from the wholesale to the retail department a quantity of tobacco, and to make a return and pay tax on it as one sale instead of on the actual sales in the retail department.—United States v. Quantity of Tobacco, Case No. 16,106.

The term "granulated tobacco" (Rev. St. § 3368) is not synonymous with "snuff," but refers only to chewing and smoking tobacco.—Venable v. Richards, Case No. 16,913.

Manufactured goods under Act 1864, § 90, means goods the manufacture of which is completed, so that the goods are in a condition to be sold.—United States v. Quantity of Tobacco, Case No. 16,105.

Under Act July 13, 1866, § 9, a tobacco manufacturer is required to keep a book showing the goods manufactured as well as those sold.—United States v. Quantity of Tobacco, Case No. 16,105.

Liability of the sureties on the bond of a manufacturer of tobacco (Act March 3, 1863, § 34) does not cease upon the expiration of his license as such manufacturer.—United States v. Truesdell, Case No. 16,543.

The seizure of the goods as forfeited is no defense to an action upon a tobacco manufacturer's bond to recover the tax.—United States v. Barrowcliff, Case No. 14,528.

Tobacco removed from the manufacturers' factory to their store *held* not subject to increased duties under Act July 1, 1864.—Gale v. Sauerwein, Case No. 5,191.

The commissioner of internal revenue may require a tobacco manufacturer to give explanation of the undue consumption of leaf tobacco in the manufacture of cigars, and, where the manufacturer refuses, may base the amount of tax upon the average amount of tobacco used by other manufacturers.—United States v. Appel, Case No. 14,462.

The treaty of July 19, 1866, art. 10, with the Cherokee Nation, so far as repugnant to Act July 20, 1868, imposing taxes on manufactured tobacco, is thereby abrogated.—United States v. Tobacco Factory, Case No. 16,528.

The revenue laws imposing taxes on manufactured tobacco are in force in the Indian country.—United States v. Tobacco Factory, Case No. 16,528.

§ 58. Cigars.

A cigar manufacturer must not only return the sales of cigars manufactured by him, but of those purchased by him and resold.—United States v. Cohn, Case No. 14,827.

Where cigars are made in the back part of a room and sold in the front part thereof, the back part is to be regarded as a manufactory, and they cannot be removed to the front part without first branding and stamping.—United States v. Neid, Case No. 15,860.

§ 59. Sugars.

Construction of Act July 24, 1813, in relation to duties on refined sugars.—United States v. Pennington, Case No. 16,026.

Sugars remaining in the place where they were refined when Act June 5, 1794, was repealed, are not subject to duties.—Coxe v. Pennington, Case No. 3,311.

§ 60. Oils.

The allowance for leakage in the case of oil shipped under a transportation bond is regulated by a rule of the treasury department, and the courts cannot depart therefrom, though there has been a greater actual loss by solar heat or the action of the elements. Laws July 13, 1866, § 94; March 3, 1865, § 61.—United States v. Barrows, Case No. 14,529.

§ 61. Canned goods.

Under Act July 13, 1866, § 70, a retail or other dealer offering canned goods for sale after August 1, 1866, was to be deemed the manufacturer thereof, and such goods were liable to a duty.—Cardinel v. Smith, Case No. 2,395.

§ 62. Cotton.

Cotton captured as prize, and in the custody of the marshal under a warrant from the prize court is not liable to be proceeded against for the internal revenue tax while in his custody.—The Victory, Case No. 16,938.

VI. STAMP TAXES ON SPECIFIC OBJECTS.

See, also, post, § 69.

§ 63. Matches.

A match box, holding less than 100 matches, containing two sliding drawers, *held* but one parcel or package. Rev. St. § 3437.—United States v. Goldback, Case No. 15,222.

§ 64. Documents.

Receipts for goods delivered to a common carrier for transportation, being in effect inland bills of lading, are not subject to stamp duty under the act of 1864.—United States v. Baltimore & O. R. Co., Case No. 14,509.

A power to represent a creditor in bankruptcy is not subject to stamp duty after March, 1867.—In re Myrick, Case No. 10,000.

A receipt for hogshead staves to be paid at a certain price is "a note for the security of money," within the stamp act of 1797.—Moore v. Gadsby, Case No. 9,762; Neale v. Hill, Id. 10,068.

The ticket given by a pawnbroker under the California law is "an agreement or contract," within section 170, Act 1864.—United States v. Smith, Case No. 16,340.

A stamp is not necessary to an acknowledgment of having hired a house.—Brown v. United States, Case No. 2,032.

A tax deed made by the sheriff and tax collector does not require a stamp, under Act July 13, 1866.—Rouse v. Hampton, Case No. 12,088.

A double-stamp duty *held* not incurred on a conveyance to the original purchaser through an irresponsible middleman.—James v. Blauvelt, Case No. 7,180.

An enhancement of value by stipulated improvements to be made by the purchaser is not

to be considered in fixing the amount of the stamp.—James v. Blauvelt, Case No. 7,180.

An instrument reading "due the bearer or [naming a payee] $7 in merchandise out of our store," and signed in behalf of an employer, by his bookkeeper, is a contract requiring a 5-cent stamp.—United States v. Learned, Case No. 15,580.

VII. VIOLATIONS OF INTERNAL REVENUE LAWS.

Rights and remedies of informers, see "Forfeitures," §§ 15–27; "Penalties," § 4.

(A) FORFEITURES AND SEIZURES.

See, also, "Forfeitures."

§ 65. Statutory provisions.

A revenue law authorizing a forfeiture of property for violation thereof is not a penal statute which is to be construed with strictness in favor of defendant.—United States v. Three Thousand Baskets of Champagne, Case No. 16,514.

Act July 20, 1868, § 44, which declares that real property employed in a violation of a revenue law shall be forfeited therefor, is not unconstitutional.—United States v. Distillery in West Front Street, Case No. 14,965.

§ 66. Grounds of forfeiture—In general.

Under Act July 20, 1868, § 96, where the statute has attached no punishment to the doing or omitting of acts required or forbidden, such act or omission, when knowingly or willfully committed, will be punished by the infliction of the penalty and forfeiture provided therein.—United States v. Forty-Eight Hundred Gallons of Spirits, Case No. 15,153; Same v. One Thousand Four Hundred and Twelve Gallons of Distilled Spirits, Id. 15,960; Same v. Ninety-Five Barrels of Distilled Spirits, Id. 15,889.

§ 67. —— Entries in books, omissions to make, or fraudulent or improper entries.

A brewery declared forfeited for fraudulent manufacture of ale.—In re Smith, Case No. 12,980.

A refusal or neglect to comply with any of the requirements of section 57 works a forfeiture under section 68. Act June 30, 1864.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,502.

A distillery is subjected to forfeiture by the omission to make such entries in the distiller's books as the law requires, or by the making of false entries.—United States v. Distillery at Petersburg, Case No. 14,961.

A rectifier and wholesale liquor dealer, who enters upon his books spirits bought by him, and the names of the manufacturers or rectifiers marked on the barrels as the names of the persons from whom purchased, instead of the names of the actual sellers, incurs the forfeiture denounced by Act July 13, 1866, § 26.—United States v. One Water Cask, Case No. 15,966.

An entry by a brewer, knowingly, on his books, in any one day, of a less quantity of beer than that manufactured by him, will subject his brewery to forfeiture. Act 1864, §§ 48–51, amended May 13, 1866.—United States v. Brewery Utensils, Case No. 14,641.

The forfeiture of spirits, etc., provided for by Act March 2, 1867, § 25, is also imposed as a penalty for violation of Act July 13, 1866, § 31, in the neglect on the part of a distiller to make entry and return as required by that section.—United States v. Eighteen Barrels High Wines, Case No. 15,033.

An entry was made on the sales books of tobacco sold, and a check was taken for the amount, but subsequently the manufacturers gave their check to the purchaser for the same amount, and the tobacco did not pass from their possession, but was treated and disposed of as their own. *Held*, that the tobacco was illegally returned for tax. Act June 30, 1864, § 94.—United States v. Quantity of Tobacco, Cases Nos. 16,105, 16,106.

The failure or omission to keep books showing the facts prescribed by the statute (Act July 20, 1868, § 19) to render a distiller liable must be shown to be with intent to defraud.—United States v. Thirty-Five Barrels of High Wines, Case No. 16,460.

§ 68. —— Failure to produce books.

A failure to produce the books of claimant after an order duly served, where unexplained, will entitle the United States to a forfeiture.—United States v. Four Hundred and Sixty-Nine Barrels of Spirits, Case No. 15,148; Same v. Distillery at Petersburg, Id. 14,961.

§ 69. —— Failure to stamp or cancel stamp.

The expression "in fraud of the internal revenue laws," means "in violation" of such laws. Act July 30, 1864, § 48, amended by Act July 13, 1866, § 9.—In re Quantity of Tobacco, Case No. 11,500.

Unstamped packages of tobacco and cigarettes, found in a tobacco store, are forfeited under Act July 20, 1868, § 70.—In re Quantity of Tobacco, Case No. 11,500.

A rectifier "knowingly and willfully" neglects to comply with the law where it was his will, freely exercised, that stamps should not be canceled when barrels were emptied on his premises; and all distilled spirits owned by him are forfeited for such neglect. Act July 20, 1868, §§ 43, 96.—In re Quantity of Distilled Spirits, Case No. 11,495.

Spirits are not liable to seizure because the barrels were emptied before the stamps were obliterated, where a clerk was in the act of obliterating them when they were seized.—United States v. Ten Barrels and Three Kegs, Case No. 16,444.

The procuring of a false certificate to be made by a gauger, as to the emptying of spirits to be rectified and the destruction of the stamps, will forfeit the spirits, though the fraud was not successfully carried out.—Thacher v. United States, Case No. 13,851.

The forfeiture by section 57 (Act July 20, 1868) is general, and that section imposes a penalty for a violation of section 25 in case the unstamped packages contain more than five gallons.—United States v. Ninety-Five Barrels of Distilled Spirits, Case No. 15,890.

Omissions of a wholesale dealer to stamp or mark packages containing more than five gallons are not within the penalty prescribed in section 96. Act July 20, 1868.—United States v. Thirty-Four Barrels of Distilled Spirits, Case No. 16,461.

§ 70. —— Maintaining business after notice of suspension.

Act March 31, 1868, § 5, in declaring that a distiller shall forfeit the distillery and distillery apparatus used by him, means "shall subject to forfeiture."—United States v. Distillery at Spring Valley, Case No. 14,963.

§ 71. —— Failure to pay special tax.

Wine and distilled spirits owned by a wholesale liquor dealer are not forfeited by reason of his not having paid the special tax, under Act July 20, 1868, § 44.—In re Two Thousand Bottles of Liquors, Case No. 14,302.

An intent to defraud forms no part of the offense of the omission to pay the special tax imposed by Act June 20, 1868, § 44.—United States v. Rectifying Establishment, Case No. 16,131.

Under Act July, 1866, § 9, it is a necessary element of the fraud specified that there should be an intent to defraud by evading the payment of the tax or duty imposed by law.—United States v. Two Hundred and Fifty-Six Barrels of Beer, Case No. 16,579.

§ 72. —— Fraudulent removal or sale of goods.

Under Act July 13, 1866, a removal by a distiller of spirits from the place of distillation to a bonded warehouse is a legal act.—United States v. One Hundred Barrels of Spirits, Case No. 15,948.

Spirits once removed from the distiller's bonded warehouse to a general bonded warehouse cannot be again removed to another bonded warehouse.—United States v. Five Hundred and Eight Barrels of Spirits, Case No. 15,114.

The removal of spirits by a distiller before they have been officially inspected, gauged, and proved is a cause of forfeiture, otherwise as to a removal before payment of duties.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,502.

A removal of brandy from a distillery without having cut or burned on the barrels the name of the distiller, the name of the district, or serial numbers, is not illegal, if all other requirements of the statute have been complied with.—United States v. Thirty-Seven Barrels of Apple Brandy, Case No. 16,466.

Goods found in the possession of a person for the purpose of being sold or removed in fraud of the law are subject to forfeiture under Act June 30, 1864, § 48, as amended July 13, 1866, though there has not been a completed sale or removal thereof.—United States v. Quantity of Tobacco, Case No. 16,106.

The forfeiture of the raw materials is not made dependent on their being seized in the possession of the person in whose possession forfeitable taxable articles are found.—United States v. Quantity of Tobacco, Case No. 16,106.

Cosmetics not manufactured in the warehouses prescribed by Acts June 30, 1864, § 168, and March 3, 1873, § 28, are liable to forfeiture for being removed without affixing stamps, although intended for exportation.—United States v. Two Hundred and Thirty-Six Dozen Boxes of Cosmetics, Case No. 16,584.

Goods removed from a bonded warehouse by consent of the collector, obtained by fraud, are subject to forfeiture.—United States v. Two Hundred and Seventy-Eight Barrels of Distilled Spirits, Case No. 16,580.

§ 73. —— Permitting use of property for fraudulent purpose.

Knowledge by the owner of a distillery that his lessees are using the same for the fraudulent manufacture of liquors, and evading payment of taxes thereon, is sufficient to warrant a forfeiture of the property.—United States v. Blair, Case No. 14,607.

Knowledge that the ingress or egress over the premises was to or from a distillery is necessary to subject it to forfeiture for having suffered its use for ingress or egress to or from an illicit distillery. Rev. St. § 3281.—Gregory v. United States, Case No. 5,803.

§ 74. Defenses.

A distiller does not "omit, neglect, or refuse to do, or cause to be done" anything which the law does not require him, but some other person, to do. Act July 20, 1868, § 96.—United States v. Thirty-Seven Barrels of Apple Brandy, Case No. 16,466.

And the failure of the inspector to mark on the barrels the quantity in proof as required by Act June 30, 1864, § 59, is not a cause of forfeiture.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,502.

False brands placed upon tobacco caddies by a revenue officer without any complicity in the fraud by claimant is no ground of forfeiture.—United States v. Eight Hundred Caddies of Tobacco, Case No. 15,036.

Permission from the commissioner of internal revenue will not justify an unlawful act.—United States v. Four Thousand One Hundred and Seventy-Five Cigars, Case No. 15,154.

The connivance of the government storekeeper in the frauds committed by the person who runs the distillery will not operate to destroy the forfeiture resulting from the acts of such person.—United States v. Distillery at Spring Valley, Case No. 14,962.

The fact that a person has, in good faith, made advances upon distilled spirits, is no defense to an action for their forfeiture.—Boyd v. United States, Case No. 1,749.

A suit in another court on the distiller's bond, commenced before an information for forfeiture under Act June 30, 1864, § 68, or before seizure of the property, does not bar or abate the forfeiture proceeding.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,502.

§ 75. Admissions and offer to compromise.

The volunteering of information by the owner after knowledge that his violations of law had been discovered will not save a forfeiture.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,503.

§ 76. When forfeiture takes effect.

In the absence of any express declaration that the forfeiture shall be instantaneous upon the commission of the forbidden acts, the forfeiture relates only to the time of seizure.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,503.

Under Rev. St. § 3281, the forfeiture does not operate when the statute is violated, but only at the time of seizure.—United States v. Feigelstock, Case No. 15,084.

§ 77. Property forfeited—Property subject to tax.

Only the spirits owned by the distiller, rectifier, or wholesale liquor dealer, or those in which he has an interest as owner at the time of the discovery of his offense, are forfeited by section 96. Act July 20, 1868.—United States v. Two Hundred Barrels of Whiskey, Case No. 16,585; Same v. Thirty-Seven Barrels of Apple Brandy, Id. 16,466.

The forfeiture denounced by Act July 13, 1866, applies only to spirits in the possession of the offender at the time of the act or neglect causing forfeiture.—United States v. One Water Cask, Case No. 15,966.

Spirits manufactured by the distiller, and still owned by him, are liable to forfeiture wherever they may be found in the United States.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,502.

The term "distilled spirits" (Rev. St. §§ 3289, 3299) includes all spirits which have been distilled, whether they have been subsequently rectified or not.—Boyd v. United States, Case No. 1,749.

The forfeiture for an illicit sale of beer applies to all beer found in claimant's possession.—United States v. Two Hundred and Fifty-Six Barrels of Beer, Case No. 16,579.

The knowing and willful omission, neglect, or refusal of the wholesale liquor dealer to cause

packages of distilled spirits to be gauged, inspected, and stamped (Act July 20, 1868, § 25) will expose all distilled spirits and liquors owned by him to forfeiture under section 96.—United States v. One Hundred and Thirty-Three Casks of Distilled Spirits, Case No. 15,940.

Though a distillery warehouse is under the lock of the inspector, as provided by Act July 13, 1866, §§ 27–29, the spirits are still in the possession of the owner, within Act July 13, 1866, § 9.—United States v. Thirty-Six Barrels of High Wines, Case No. 16,468.

Spirits in bond may be forfeited for noncompliance with the provisions of the internal revenue laws.—United States v. Quantity of Distilled Spirits, Case No. 16,100.

The failure of the rectifier to cause spirits to be gauged and stamped as required by Act July 20, 1868, § 25, is punishable by section 57 and not by section 96.—United States v. Two Hundred Barrels of Whiskey, Case No. 16,585.

Where a party, for fraudulent purposes, mixes up goods prohibited by a revenue act with those not prohibited, the whole will be forfeited.—United States v. One Hundred and Twenty-Nine Packages, Case No. 15,941; Same v. Two Hundred and Seventy-Eight Barrels of Distilled Spirits, Id. 16,580.

Where forfeited spirits have been mixed, though in good faith, with spirits which have paid the tax, so that they can no longer be distinguished, the entire amount is forfeited to the government.—United States v. Fifty-Four Barrels of Distilled Spirits, Case No. 15,093; Same v. Fifty-Six Barrels of Whiskey, Id. 15,095.

Where spirits fraudulently withdrawn from a warehouse are innocently mixed with others belonging to the claimants, so that they cannot be distinguished, the United States are entitled to a forfeiture of a fair proportion of the mixture, if the spirits would have been subject to forfeiture had they not been so mixed.—United States v. Two Hundred and Seventy-Eight Barrels of Distilled Spirits, Case No. 16,580.

§ 78. —— Property used in manufacture.

The forfeiture for an illicit sale of beer, or fraudulent intent, applies to all the raw materials, fixtures, and appliances of the brewery.—United States v. Two Hundred and Fifty-Six Barrels of Beer, Case No. 16,579.

Under Rev. St. § 3453, it is not necessary, in order that other personal property found with the distilled spirits be forfeited, that raw materials intended to be used in the manufacture should be found in the same place.—United States v. Sixteen Barrels of Distilled Spirits, Case No. 16,300.

All tools, implements, instruments, and personal property whatsoever on the distillery premises are forfeited under Act July 13, 1866, § 9, irrespective of the purpose for which they are used.—United States v. Distillery at Spring Valley, Case No. 14,963. CONTRA, see United States v. Thirty-Three Barrels of Spirits, Case No. 16,470.

A water wheel used for propelling machinery in the manufacture of friction matches is not personal property liable to forfeiture, under Act 1864, § 48, amended by Act 1866, c. 184.—United States v. Friction-Match Machinery, Case No. 15,167.

Machines used in a mill for such purpose are implements and instruments, within the meaning of the act, and are liable to forfeiture.—United States v. Friction-Match Machinery, Case No. 15,167.

Pastures, orchards, and vineyards contiguous to a distillery, and under the same ownership, but in no other way connected therewith, are not subject to forfeiture with the distillery as a part of the lot or tract of land on which it is situated.—United States v. Certain Piece of Land, Case No. 14,767.

Having on hand unstamped packages of tobacco for the purpose of being sold without payment of tax is good ground for forfeiting the entire establishment.—In re Quantity of Tobacco, Case No. 11,500.

The finding of an unstamped package of beer in the possession of a brewer, who has knowledge thereof, and does not satisfactorily explain it, is ground of forfeiture of all the beer and materials of the brewery.—United States v. Brewery Utensils, Case No. 14,641.

The intention on the part of those in charge of a tobacco store to violate the law in relation to the goods that were taxable by not canceling the stamps on packages that were sold, as required by Act July 20, 1868, § 72, will forfeit the whole establishment.—In re Quantity of Tobacco, Case No. 11,500.

Act June 30, 1864, § 68, confers no authority for the seizure of a distillery, and the lot on which it is situated, or for subjecting such real estate to forfeiture.—United States v. One Barrel of Whiskey, Case No. 15,921.

Personal property found in buildings in the same inclosure with a building in which an illicit distillery is carried on, and in such juxtaposition to it that the owners thereof could not be ignorant of the existence of the still, is subject to forfeiture. 13 Stat. 240, § 48.—United States v. Quantity of Rags, Case No. 16,103.

Distilled spirits found on the premises on which the business of distilling is carried on, being the product of such business, are not "personal property used in the business," within the meaning of Act July 20, 1868, § 19.—United States v. Forty-Eight Hundred Gallons of Spirits, Case No. 15,153.

Under Act July 13, 1866, § 9, the raw material found, if intended to be used for a fraudulent purpose, may be seized, and is subject to forfeiture, without reference to the place where it is found.—United States v. Sixteen Hogsheads of Tobacco, Case No. 16,302.

The fraudulent intent or purpose of the person in possession of articles seized because found in a place where the articles or raw materials mentioned in section 48 (Act June 30, 1864, as amended July 13, 1866, § 9) are found does not constitute an element of the ground of forfeiture.—United States v. One Still, Case No. 15,954.

The forfeiture denounced by section 26 (Act July 13, 1866) applies only to the apparatus, and articles in the possession of the offender at the time of the act or neglect whereby forfeited, and not to those subsequently acquired, and found in his possession.—United States v. One Water Cask, Case No. 15,966.

§ 79. —— Rights of third persons.

The intention of congress must be manifest and unmistakable to justify the courts in construing a law imposing a forfeiture as extending to property which, before seizure, had been sold to an innocent purchaser.—United States v. One Hundred Barrels of Spirits, Case No. 15,948.

A bona fide purchaser for value, prior to seizure, is protected.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,504; Same v. Three Hundred and Seventy-Two Pipes of Distilled Spirits, Id. 16,505; Same v. Sixty-Four Barrels Distilled Spirits, Id. 16,306.

The forfeiture declared by Act June 30, 1864, § 68, extends only to specific property belonging to the distiller, and bona fide purchasers from him are protected.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,503. But see United States v.

Forty-Six Casks of California Grape Brandy, Case No. 15,135.

Where the tax has been paid, and the barrels properly marked, branded, and stamped, the spirits cannot be seized under Act July 20, 1868, § 44, while in the hands of an innocent purchaser, for frauds of the distiller.—United States v. One Hundred Barrels of High Wines, Case No. 15,947.

Tobacco may be forfeited for fraud perpetrated by the manufacturer, even in the possession of a purchaser without knowledge of the fraud. Act July, 1866, § 9.—United States v. Eight Hundred Caddies of Tobacco, Case No. 15,036.

Distilled spirits, purchased in good faith, while in a bonded warehouse of the United States, upon which the purchaser paid the taxes, cannot be afterwards seized and condemned as forfeited for the failure of the distiller to keep proper books and to make proper reports. Acts July 13, 1866, and March 2, 1867.—United States v. One Hundred Barrels of Spirits, Case No. 15,948.

A lienor prior to seizure is protected.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,504; Same v. Three Hundred and Seventy-Two Pipes of Distilled Spirits, Id. 16,505.

A factor's lien is not protected against forfeiture unless it appear that his demand requires for his protection an enforcement of his lien against the specific property seized.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,504.

A forfeiture for a violation of the law extends to the interest of the mortgagee.—All the Distilled Spirits, etc., Found at the Distillery of England v. Evans, Case No. 3,923; United States v. Twenty Barrels of Distilled Spirits, Id. 16,558; Same v. Seven Barrels Distilled Oil, Id. 16,253.

Such forfeiture extends to the interest of the mortgagee, although he is ignorant of the fraud. —United States v. Twenty Barrels of Distilled Spirits, Case No. 16,558; Same v. Seven Barrels of Distilled Oil, Id. 16,253.

All tools, implements, instruments, and personal property on the premises are forfeited under Act July 13, 1866, irrespective of the ownership.—United States v. Distillery at Spring Valley, Case No. 14,963.

Under Rev. St. § 3281, the property is forfeited irrespective of question of ownership.—United States v. Distillery at Spring Valley, Case No. 14,963; Same v. One Copper Still, Id. 15.928.

And knowledge of the owner of its unlawful use.—United States v. One Copper Still, Case No. 15,928.

The knowledge or intent of the owner of a conveyance used in transporting goods subject to a tax, that they are being removed contrary to law, is not necessary to subject the conveyance to forfeiture under Act 1866, § 14.—United States v. Two Horses, Case No. 16,578.

Under Acts June 30, 1864, § 48; July 13, 1866, § 9; March 31, 1868, § 5; July 20, 1868, §§ 19, 22, 44; June 6, 1872, § 12,—no proof is required of the actual complicity of the owner of the property to be forfeited in the fraud or other thing which causes the forfeiture.—United States v. Distillery at Spring Valley, Case No. 14,963.

§ 80. Seizure.

The adoption by the government of a seizure under the internal revenue laws cures any defect in the competency to seize of the person who made the seizure.—United States v. Five Hundred and Eight Barrels of Distilled Spirits, Cases Nos. 15,113, 15,114.

On a libel to forfeit goods for alleged violation of the revenue laws, where the goods had been seized by, and were in the possession of, a collector of customs, the marshal will be required to attach the property by leaving a copy of the monition with the collector, and a notice requiring him to retain the property until the further order of the court.—United States v. One Case of Silk, Case No. 15,925.

Under Act July 13, 1866, replevin does not lie for property of plaintiff seized under a warrant by a collector of internal revenue as the property of another.—Treat v. Staples, Case No. 14,162.

§ 81. Release of property on bond.

Distillery property seized for violation of the revenue laws will not be released on bond where no profit would be derived by its owner from its lawful use.—United States v. Two Tons of Coal, Case No. 16,590.

The district court has power to discharge upon bail property in custody in cases of seizure under Act June 30, 1864, §§ 48, 50.—United States v. Three Hundred Barrels of Whiskey, Case No. 16,510. But see United States v. Sixty-Nine Barrels of Rum, Case No. 16,307.

Property seized for forfeiture may be delivered to the claimant on his giving stipulations for its appraised value, less the amount of tax due on it, and paying the latter amount into court.—United States v. Lot of Leaf Tobacco. Case No. 15,627.

Property so released may be sold by the owner, bona fide, so as to give a good title to the purchaser; but, except where it will interfere with subsequently acquired rights of third persons, the court may reseize the property, and order it sold.—United States v. Mackoy, Case No. 15,696.

A claim for delivery, on bond, of goods seized for forfeiture, for violation of the internal revenue laws, is one for a favor, and terms may be imposed.—United States v. Lot of Leaf Tobacco, Case No. 15,627.

Distillery property libeled for alleged violation of the revenue laws will not be bonded where there is reasonable ground to believe on the evidence that the law has been violated.—In re Quantity of Distilled Spirits, Case No. 11,493.

On such application the government need not furnish the details of its evidence further than is necessary to show reasonable and probable ground to sustain the prosecution.—In re Quantity of Distilled Spirits, Case No. 11,493.

Where property is seized for taxes due from a distiller, its subsequent release on bond does not divest jurisdiction to go on with the condemnation proceedings.—United States v. Mackoy, Case No. 15,696.

The notice required to be given to persons executing a bond for the return of property seized is that prescribed by Rev. St. § 3459, and not the previous rules of the court.—United States v. Seventeen Empty Barrels, Case No. 16,255.

It is no defense to a surety in a stipulation for property seized that on appeals by the claimant bonds were taken without surety, with the approval of the district attorney, and that government bonds had been given as further security, which had been stolen.—United States v. Quantity of Manufactured Tobacco, Case No. 16,102.

§ 82. Jurisdiction.

The circuit courts have jurisdiction in suits in rem for forfeitures arising under the internal revenue laws.—United States v. Five Hundred and Eight Barrels of Distilled Spirits, Case No. 15,113; Same v. Seven Barrels Distilled Oil, Id. 16,253.

Jurisdiction to proceed by information for the condemnation of property forfeited under the revenue laws depends upon the possession of the property, actual or constructive.—United States v. Ninety-Two Barrels of Rectified Spirits, Case No. 15,892.

§ 83. Pleading.

An information under Rev. St. § 3453, is sufficient if it follow the language of the statute, and without an express averment that the taxes were not paid.—United States v. Seventeen Empty Barrels, Case No. 16,255; Same v. Sixteen Hogsheads of Tobacco, Id. 16,302.

An information of forfeiture must aver that the property sought to be adjudged forfeited was used in the illicit distillation charged, or was the product of such distillation.—United States v. One Distillery, Case No. 15,929.

A description of property claimed as forfeited as "all the boilers, stills, and other vessels used in the distillation of spirits, and all the distilled spirits—being about twelve barrels—now in the distillery owned by W.," is not sufficiently specific.—United States v. One Distillery, Case No. 15,929.

An information for a forfeiture of liquor may properly contain distinct articulations.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,502.

Such information should contain the formal conclusion prescribed by the rules of the supreme court, "contrary to the form of the statute," etc.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,502.

An information for a forfeiture under Act June 30, 1864, § 68, does not embrace the causes mentioned in section 48.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,502.

The original information may be amended after 20 days by adding new articles containing additional causes of forfeiture.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,502.

In an information of forfeiture for neglect to make the entries required by Act July 20, 1868, § 45, it is not necessary to aver the time the liquors were received or sent out, or from whom received, or to whom sent.—United States v. Rectifying Establishment, Case No. 16,131.

An information upon Act 1864, § 48, as amended by Act 1866, § 9, may be amended on the trial by adding a count on section 44 of the latter act.—United States v. Whiskey, Case No. 16,671.

A libel of information against a vessel, to procure her forfeiture for a violation of the revenue laws, must aver that she has been seized for the offense, and that the seizure still subsists.—The Washington, Case No. 17,221.

Where a forfeiture of tobacco is claimed in two distinct charges based on separate provisions of law, the district attorney will not be required to elect between them.—United States v. Eight Hundred Caddies of Tobacco, Case No. 15,036.

The information should aver the fact that the tools, implements, and other personal property were found in the place or building or within the yard or inclosure where they were intended to be used.—United States v. Sixteen Hogsheads of Tobacco, Case No. 16,302.

Under the supreme court rules, general denials or issues are permissible in informations on the exchequer side of the court in cases under the internal revenue act.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,503.

On an information to enforce a forfeiture the statute of limitations is available as a defense under a plea of the general issue.—United States v. Six Fermenting Tubs, Case No. 16,296.

Causes of forfeiture may be inquired into at the trial which had not come to the collector at the time he seized the property; but causes omitted from the pleading should be set out by amendment.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,503.

An information of forfeiture for violation of Act July 20, 1868, § 44, need not aver that the special tax was assessed, or that payment was demanded and refused, or neglected to be paid, but only that the business was carried on without payment of such tax.—United States v. Rectifying Establishment, Case No. 16,131.

§ 84. Evidence—Presumptions and burden of proof.

Claimant has the burden of showing a compliance with Act July 13, 1866, § 31, where slight evidence is given showing a failure to comply therewith.—United States v. Eighteen Barrels High Wines, Case No. 15,033.

Where spirits are found upon a rectifier's premises, and no proof is given that the tax has been paid, it may be assumed as a matter of law and fact that the tax had not been paid. —In re Quantity of Distilled Spirits, Case No. 11,494.

Under an information on a seizure of distilled spirits under section 45, Act July 13, 1866, claimant has the burden of showing that the spirits had been lawfully removed, and that the taxes had been paid.—United States v. Eight Casks of Whiskey, Case No. 15,030; Same v. Five Hundred and Eight Barrels of Distilled Spirits, Id. 15,113; Same v. Five Hundred and Eight Barrels of Spirits, Id. 15,114.

Where rectified spirits are seized while in process of sale by a rectifier as free of tax, a claimant has the burden to show that the tax has been paid. Act July 13, 1866, § 45.—United States v. Six Barrels of Distilled Spirits, Case No. 16,294.

The fact that barrels containing spirits purchased in the open market bear all the brands indicating payment of the taxes does not create a presumption that such taxes have been paid. —United States v. Seventy-Eight Barrels, Case No. 16,257.

The burden is on the claimant to show that the situation of the property is consistent with his entire innocence of complicity with the offenses for which such articles or raw materials were seized.—United States v. One Still, Case No. 15,954.

Section 45 (14 Stat. 163) is not rendered unconstitutional by the provision which requires affirmative proof on the part of the claimant of the payment of the taxes due on the spirits seized.—United States v. Seventy-Eight Barrels, Case No. 16,257.

The act which casts upon claimant the burden of proving that the distiller's tax has been paid, *held* not repealed by Act July, 1868, as to prior seizures.—Twenty-Six Barrels and Seventeen Tierces of Distilled Spirits, Case No. 14,283.

§ 85. —— Admissibility.

Previous fraudulent intent and previous fraudulent acts are admissible to show a fraudulent intent in a subsequent transaction.—United States v. Quantity of Tobacco, Cases Nos. 16,105, 16,106.

The fact that one or more of the sureties on a bond were worthless at the time of its execution, to the knowledge of the principal, is material evidence on the question of the fraudulent intention of the parties.—United States v. Three Hundred and Eight Caddies of Tobacco, Case No. 16,501.

Distillery books seized by a revenue collector under order of the department may be used as evidence on the trial of a libel for forfeiture filed against the distillery.—United States v. Distillery at Petersburg, Case No. 14,961.

The fact that nearly all of the same property had been seized a month previously as forfeited for like fraudulent practices, and that a suit to enforce such forfeiture was pending and at issue, is immaterial.—United States v. Thirty-Six Barrels of High Wines, Case No. 16,469.

Evidence of false returns of spirits made and materials used by claimants, through each of several preceding months, is admissible to show an intent to defraud as to goods seized on October 30th. Act July 13, 1866, § 9.—United States v. Thirty-Six Barrels of High Wines, Case No. 16,469.

§ 86. —— Weight and sufficiency.

Proof by claimant that proper brands were upon the barrels is insufficient. He must show that the tax has been paid, where such payment is a prerequisite to the removal.—United States v. Eight Casks of Whiskey, Case No. 15,030.

Proof that tubs were so placed in a distillery that they could be used contrary to the law is not sufficient to warrant a finding that they have been so used.—United States v. Forty-Eight Hundred Gallons of Spirits, Case No. 15,153.

The fact that spirits are properly branded by the government inspectors is not evidence that the taxes on them have been paid.—Quantity of Distilled Spirits, Case No. 11,494.

The fact that spirits are purchased for less than the amount of the tax upon them is sufficient, in the absence of explanatory circumstances, to show that the purchaser could not have believed that the tax was paid.—Quantity of Distilled Spirits, Case No. 11,494.

A permit of a collector to transport spirits from a distillery warehouse to a general bonded warehouse is not evidence of a compliance with the prerequisites to a removal of the spirits required by sections 38, 40, Act July 13, 1866.—United States v. Five Hundred and Eight Barrels of Distilled Spirits, Case No. 15,113.

§ 87. Verdict.

In a suit to forfeit manufactured tobacco, raw materials, and certain tools, the words "condemning the goods," in a verdict "in favor of the United States," may be rejected as surplusage.—United States v. Quantity of Tobacco, Case No. 16,106a.

Where an information of forfeiture in different counts avers several frauds under different sections of the statute, a verdict of forfeiture will be sustained if any one count is good.—United States v. One Distillery, Case No. 15,930.

A verdict for defendant in a suit to forfeit goods for violation of the internal revenue laws will not be set aside as against the evidence, though as to a small part of the goods the court entertains no doubt that upon the evidence the verdict is wrong.—United States v: One Hundred and Seventeen Packages of Plug Tobacco, Case No. 15,936.

Where property seized as forfeited before information filed is bonded as for a seizure made under Act July 13, 1866, § 9, a verdict of condemnation on a count based upon section 26 cannot be sustained.—United States v. Ninety-Two Barrels of Rectified Spirits, Case No. 15,892.

The difficulty is not remedied by the fact that after the information was filed the property was reseized, and then taken possession of by the marshal on a monition founded on the information, and then rebonded by its owner.—United States v. Ninety-Two Barrels of Rectified Spirits, Case No. 15,892.

§ 88. Sale of forfeited property and distribution of proceeds.

Money paid into the district court, on the sale, in condemnation proceedings, of a distillery, cannot, while the proceedings are pending, be withdrawn, or their distribution directed, by the circuit court, on an original bill.—United States v. Mackoy, Case No. 15,696.

A sale passes to the purchaser all the interest of the United States, and they are estopped to set up against him any lien known when the sale was ordered.—United States v. Mackoy, Case No. 15,696.

§ 89. Judgment or decree.

A decree by default against spirits seized while being removed on a truck is not conclusive against the owner of the truck and horses where he interposes a defense to the libel that the spirits were being removed with intent to defraud the revenue.—United States v. Two Horses, Case No. 16,578.

Proceedings for a forfeiture under the internal revenue laws are governed by the practice of the courts of common law, and the court has no power to open a judgment after the expiration of the term at which it was entered.—United States v. Twenty Packages of Distilled Spirits, Case No. 16,569.

§ 90. Costs.

Claimants contesting a forfeiture under Act 1864, § 48, are subject to costs on a judgment of forfeiture.—United States v. Seven Barrels Distilled Oil, Case No. 16,253a.

Where the value of the property forfeited under the internal revenue laws is less than $250, the government's share is to be applied to the costs of the prosecution. Act March 2, 1799, § 91.—In re One Large Water Tub, Case No. 10,532.

In suits brought to enforce forfeitures, the clerk is entitled to tax 1 per cent. on the proceeds (Act Feb. 26, 1853, § 1), and the district attorney 2 per cent. (Act March 3, 1863, § 11), notwithstanding the repeal by Act June 22, 1874, § 2, in relation to payments of commissions, etc., to federal officers.—United States v. One Horse, Case No. 15,932.

(B) PENALTIES.

§ 91. Penalties imposed.

The imposition of an addition of 100 per cent. as a penalty for the return of a false or fraudulent valuation is constitutional.—Doll v. Evans, Case No. 3,969.

Only one penalty is recoverable for all failures to make returns for taxation under Acts June 30, 1864, and July 13, 1866, prior to the commencement of a suit.—United States v. Erie Ry. Co., Case No. 15,056; Same v. New York Guaranty & Indemnity Co., Case No. 15,872.

The penalty of $300 (Act July 13, 1866, § 49) is imposed, not for the omission to make the proper entries, but for the failure to keep any books at all.—United States v. Obermeyer, Case No. 15,907.

A person who keeps leaf tobacco for sale is a dealer, and a single sale is sufficient to fix his character as such, and to render him liable for the penalty of $500 for failure to keep a book, and make returns of purchases and sales. Act July 20, 1868, § 76.—United States v. Damiani, Case No. 14,915.

National banks are liable to a penalty for failing to make return of dividends declared, etc., during the period between July 1 and December 30, 1870. Act July 14, 1870.—United States v. State Nat. Bank, Case No. 16,381.

The penalty of 100 per cent. on reassessment for fraudulent omissions from the return to the assessor (Act March 2, 1867) is not collectible

if a sum not legally taxed is included in the re-assessment.—Michigan Cent. R. Co. v. Slack, Case No. 9,527.

The assessor himself must find a false and fraudulent omission whereby the penalty was incurred. Merely adding the penalty, by order of his superior officer, is illegal.—Michigan Cent. R. Co. v. Slack, Case No. 9,527.

Wholesale liquor dealers who received 15 barrels of spirits, and entered only 6 on their books, intending to retail the remaining 9, are liable for the penalty of $100, under Rev. St. § 3318.—United States v. Malone, Case No. 15,713.

A distiller is justified in relying upon the act of the assessor in passing upon the bond given for excise duty (Act July 20, 1868, § 7), and is not liable for the penalty because the preliminaries have not been complied with.—United States v. Thirty-Five Barrels of High Wines, Case No. 16,460.

The payment of the tax prescribed in Act July 20, 1868, § 59, is not a condition precedent to commencing business, and the penalty is not incurred until after assessment, demand, and refusal.—United States v. Thirty-Five Barrels of High Wines, Case No. 16,460.

A penalty of $300 is provided for every violation of Act March 3, 1865, § 91.—United States v. Thomasson, Case No. 16,478.

A forfeiture under Act June 30, 1864, § 68, and the penalty of $500 therein prescribed, are independent of any other penalties named, and are cumulative.—United States v. Three Hundred and Ninety-Six Barrels of Distilled Spirits, Case No. 16,502.

The penalty imposed for a violation of section 48, Act June 30, 1864, must at least equal double the amount of duties sought to be evaded, and in no case must it be less than $500.—United States v. Smock, Case No. 16,348.

Defendant is liable where he fraudulently concerted with the distiller and others to market the spirits without payment of the tax.—United States v. Grotenkemper, Case No. 15,267.

A distiller who failed to arrange his distillery apparatus, as prescribed by section 16, Act July 20, 1868, has no authority to manufacture spirits, and is subject to the penalty prescribed by section 96; and this whether he intended to defraud the revenue or not.—United States v. McKim, Case No. 15,693.

A rectifier purchasing, from one authorized as a distiller only, over 20 gallons of spirits, not of the seller's own manufacture, is liable to the penalty prescribed by Rev. St. § 3319.—New York Rectifying Co. v. United States, Case No. 10,214.

A retail liquor dealer who receives more than 20 gallons of spirits from any person other than one authorized to sell such spirits, for storage only, and not for sale, does not incur the penalty. Act July 20, 1868, § 46.—United States v. Fridenberg, Case No. 15,168.

Goods are sold "in the original and unbroken package" (Act July 13, 1866) although the package is open for inspection, if closed again before delivery without the contents being changed.—United States v. Fox, Case No. 15,155.

§ 92. Knowledge or intent as element of liability.

Under Act July 13, 1866, § 9, an intent to evade the payment of the tax must be shown.—United States v. Grotenkemper, Case No. 15,267.

An addition of 100 per cent. is authorized for an untrue return, although the return is not willfully false. Rev. St. § 3176.—German Sav. Bank v. Archbold, Case No. 5,364.

The penalties prescribed in section 96, Act July 20, 1868, apply to those who knowingly or willfully do or omit to do the thing forbidden or required, only when there is no specific penalty imposed by any other section of the act.—United States v. One Rectifying Establishment, Case No. 15,952; Same v. Rectifying Establishment, Id. 16,131.

Ignorance or carelessness will not excuse the neglect of a brewer to keep the prescribed books and accounts. Act July 13, 1866, § 49.—United States v. Foster, Case No. 15,142.

A partner is civilly liable for violations of the revenue laws by his co-partners, whether he knew of or consented to such violations or not.—United States v. Thomasson, Case No. 16,478.

§ 93. Persons liable.

In the case of a partnership, both partners are liable where the sale is made by one, or by a clerk having authority.—United States v. Fenelon, Case No. 15,085.

Act June 30, 1864, § 169, as re-enacted by Act July 13, 1866, refers to section 167, and keeps it operative so far as selling is concerned.—United States v. Houghton, Case No. 15,396.

"Selling" and "exposing for sale," as used in the statutes relating to stamp duties (Act June 30, 1864, §§ 167, 169; Act July 13, 1866), are treated as different things.—United States v. Houghton, Case No. 15,396.

Though several persons are concerned in resisting a revenue officer in the execution of his duty, the offense, under Act March 23, 1823, c. 58, is severable, and separate penalties are recoverable.—United States v. Babson, Case No. 14,489.

§ 94. Defenses.

Conviction, under Rev. St. § 5440, for conspiring to defraud the United States by the unlawful removal of distilled spirits, without paying taxes, bars a subsequent civil suit to recover the penalty of double the amount of such taxes.—United States v. McKee, Case No. 15,688.

§ 95. Actions or proceedings to recover.

When the punishment prescribed for violation of the internal revenue laws is a pecuniary penalty or fine only, and the act fixes the exact amount, an action of debt will lie to recover it.—United States v. Ebner, Case No. 15,020.

Where the law provides that imprisonment either may or must be a part of the punishment, the prosecution must be by indictment.—United States v. Ebner, Case No. 15,020.

An indictment will lie to recover a penalty for failure to affix a revenue stamp to a package sold, under Act July 13, 1866, § 9.—United States v. Abbott, Case No. 14,416; Same v. Fenelon, Id. 15,085.

Debt will not lie on Act June 30, 1864, § 73. The prosecution must be by indictment.—United States v. Morin, Case No. 15,810.

For failure to take out a license to refine petroleum, both a criminal prosecution and an action qui tam are authorized, and the institution of one is no bar to the other.—United States v. Trobe, Case No. 16,541.

Where the amount of the fine is not fixed, but left to the discretion of the court, the prosecution must be by indictment.—United States v. Ebner, Case No. 15,020.

The words "shall be liable to," etc. (Act July 13, 1866, § 53), mark the extreme limit of the penalty, and leave it discretionary whether the whole penalty shall be imposed.—United States v. Foster, Case No. 15,142.

Separate suits will lie to recover the penalty of $500, and to enforce a forfeiture for neglect to report the use of vessels, etc., in distilling liquors. Act July 1, 1862.—United States v. Belding, Case No. 14,562.

The limitation of 30 days for making a seizure and of 20 days thereafter for commencing forfeiture proceedings does not apply to the suit to recover the penalty.—United States v. Belding, Case No. 14,562.

An action in personam to recover the forfeiture of $500 under Act July 1, 1862, § 54, will lie, although the seizure provided for therein has not taken place.—United States v. Mynderse, Case No. 15,850.

Sufficiency of complaint in an action against a bank for the $1,000 penalty for failing to make return of its net earnings, incomes, or gains under Act June 30, 1864, § 120, as re-enacted July 14, 1870.—United States v. State Nat. Bank, Case No. 16,380.

Where an article is sold unstamped, the presumption is that it never was stamped, but such presumption may be overcome by evidence that the stamp had been lost or removed by accident or the like.—United States v. Brown, Case No. 14,662.

An action for a penalty for the violation of the internal revenue act is a civil action and the jury are to find according to the preponderance of the evidence.—United States v. Brown, Case No. 14,662.

(C) OFFENSES.

§ 96. Statutory provisions.

The repealing clause of Act Jan. 11, 1868, did not operate to prevent conviction and punishment for an offense, under Act July 13, 1866, § 42.—In re Callicot, Case No. 2,323.

Act March 31, 1868, § 2, which repeals Act June 30, 1864, §§ 94, 95, and acts amendatory thereof, does not operate to preserve prosecutions commenced, but not carried to judgment, before the repeal took effect.—United States v. Finlay, Case No. 15,099.

§ 97. What constitutes an offense.

The use of an inspector's brand with intent to defraud, though without the inspector's knowledge or connivance, is punishable under Act July 13, 1866, § 38.—United States v. Devlin, Case No. 14,954.

The manufacture of alcohol in the process of making vinegar, though the alcohol is not released from its impure state, is within the prohibition of Act July 20, 1868, § 4.—United States v. Prussing, Case No. 16,095.

A person may be guilty, under Rev. St. § 3177, of obstructing a revenue officer in entering a building, etc., although he does not own the building or the articles subject to tax, and did not make, produce, or keep them.—United States v. Fears, Case No. 15,080.

A dealer in tobacco has no right to forcibly eject a customs officer from his premises after the officer has fulfilled his errand.—United States v. Mosely, Case No. 15,823.

A failure to take out a license as required by the internal revenue law is an indictable offense. —United States v. Chapel, Case No. 14,781.

Selling an occasional drink from a bottle, not in a barroom, with no intention of defrauding the revenues, is not carrying on the business of a retail liquor dealer, within Rev. St. § 3242.—United States v. Jackson, Case No. 15,455.

Sales of liquors belonging to a social club, by the janitor thereof to the individual members, the money being deposited in the treasury of the club, makes the janitor a retail liquor dealer, and liable to indictment, where the special tax is not paid.—United States v. Woods, Case No. 16,759.

To convict of retailing liquor without payment of the special tax, defendant must be shown to have held himself out publicly as following the business, as one of his means of livelihood.—United States v. Logan, Case No. 15,624.

A person may be indicted under Act March 3, 1865, § 13 (amended July 27, 1866), for engaging in the business of a lottery dealer without having paid the special tax required by law.—In re Lindauer, Case No. 8,358.

A person is not liable for a fine for pursuing the business of a cattle broker without a license, unless it appear that he dealt in cattle or hogs as his principal business.—United States v. Kenton, Case No. 15,526.

A farmer occasionally buying and selling stock in connection with his main pursuit is not within the statute.—United States v. Kenton, Case No. 15,526.

Liability of a peddler for carrying on business without payment of the special tax after application for a license, where he stopped business before the tax was assessed, and refused to pay it.—United States v. Pressy, Case No. 16,086.

Where a person has complied with section 24, Act July 13, 1866, as to giving notice, bond, etc., he is not liable to indictment for carrying on the business within the 10 days after the receipt by the collector of the assessment list without having paid the special tax.—United States v. Shea, Case No. 16,269.

Tobacco manufacturers may be indicted for making a false and fraudulent return under the internal revenue laws.—United States v. McGinnis, Case No. 15,678.

Where indictments are found under Act June 30, 1864, both for making false returns (section 15) and for perjury (section 42), the prosecution must elect between them.—United States v. Rumsey, Case No. 16,207.

A false return of income for taxation made with an intent to be acted upon by the government, will subject the party to an indictment, though he make a subsequent correct return.—United States v. Benz, Case No. 14,576.

A failure to affix stamps as required by the internal revenue law is an indictable offense.—United States v. Chapel, Case No. 14,781.

Where the owner of unstamped cigars intended to sell them if an opportunity offered, he is guilty of violating the law in keeping cigars for sale not properly stamped, though he intended to stamp them before consummating a sale.—United States v. Woolheim, Case No. 16,761.

The failure of employés of a rectifier to efface or obliterate stamps at the time of emptying spirits will render the rectifier liable to indictment under Rev. St. § 3324.—United States v. Adler, Case No. 14,424.

The offense of affixing simulated customs stamps to boxes of cigars (Rev. St. § 3397) may be committed by affixing to a box of domestic cigars a likeness of a customs stamp.—United States v. Jacoby, Case No. 15,462.

It is an offense under Rev. St. § 3279, to work in a distillery on which no sign is placed and kept as provided therein.—United States v. Flynn, Case No. 15,123.

An indictment for violating Act July 13, 1866, § 53, prohibiting more than one spigot hole in any package of fermented liquors, *held* not sustainable.—United States v. McKechnie, Case No. 15,682.

A brewer who neglects to enter in a book the materials purchased for producing fermented liquors is liable to the fine of $500, regardless of whether he intended to commit a fraud. Act July 13, 1866.—United States v. Miller, Case No. 15,775.

A deputy collector who accepts a bond for the withdrawal of whisky from a warehouse, knowing that the signatures thereto have been forged, is subject to punishment under Act July 13, 1866, § 42.—United States v. Allen, Case No. 14,432.

A person who carries on business without having paid the special tax is not a delinquent of whom mileage may be collected.—United States v. Highleyman, Case No. 15,361.

§ 98. Knowledge or intent as an element of liability.

Intent to defraud the government need not be proved to sustain a conviction for selling intoxicating liquor without a license.—United States v. Barnhardt, Case No. 14,526.

On a prosecution for conducting a distillery without giving the necessary bond or paying the tax, ignorance on the part of defendant that the bond had not been given or the tax paid is no defense.—United States v. Dobbs, Case No. 14,972.

It is no defense to a prosecution for executing and signing a false and fraudulent bond that defendant knew nothing of his sureties, but hired a man to obtain them, and that they swore to all that was required by law.—United States v. O'Brien, Case No. 15,909.

The criminal liability of a brewer for selling beer and allowing its removal from his brewery without affixing the proper stamps is not dependent on his actual intent to defraud.—United States v. Torge, Case No. 16,533.

A criminal intent is not an element of the offense of having in possession tax-paid stamps once used.—United States v. Ulrici, Case No. 16,594.

§ 99. Defense.

A person is not relieved from the consequences of a violation of law by the neglect of a revenue officer to perform a duty required of him by law.—United States v. Devlin, Case No. 14,953.

A judgment in an action for the penalty given by Rev. St. § 3318, is no bar to a criminal prosecution for the same offense.—In re Leszynsky, Case No. 8,279.

§ 100. Limitations.

Act July 13, 1866, is a revenue law, within the meaning of Act March 26, 1804, § 3, limiting prosecutions thereunder to five years.—United States v. Wright, Case No. 16,770.

§ 101. Persons liable.

Whoever aids in the act of illegal distilling is to be held responsible under the law, without regard to ownership of the still or its product.—United States v. Carpenter, Case No. 14,727.

The owner of a distillery who rents the same to another knowing that the latter intends to use it for distilling whisky, in violation of law, is guilty of aiding and abetting such unlawful manufacture.—United States v. Harbison, Case No. 15,300.

A part owner of a still is liable where he has knowledge of illicit distilling by his co-owner, though he does not share in the product.—United States v. Bagwell, Case No. 14,494.

A person is liable to indictment for running a distillery upon which the special tax has not been paid, though he acted merely as the agent of another.—United States v. Davis, Case No. 14,928.

An employé having no interest in a distillery or the product as a proprietor or partner, though he is paid in such product, is not subject to indictment, though he has knowledge that the special tax has not been paid.—United States v. Cooper, Case No. 14,863; Same v. Logan, Id. 15,624.

Under Act July 13, 1866, § 45, a person cannot be convicted as a principal in removing spirits, and also as an aider and abettor in the same offense.—United States v. Blaisdell, Case No. 14,608.

A person who, with unlawful intent, designs or directs the removal of spirits on which the tax has not been paid, is equally guilty with the one who actually carries out the unlawful object.—United States v. Nunnemacher, Case No. 15,902; Same v. Blaisdell, Id. 14,608.

The punishment imposed for selling unstamped cigars (Act July 20, 1868, § 89) is not confined to importers and manufacturers, though they alone are required to pack the cigars and affix the stamp.—United States v. Edwards, Case No. 15,025.

A dealer in leaf tobacco is criminally responsible, under Act July 1868, § 76, for the neglect of his bookkeeper to make the proper book entries.—United States v. Auja, Case No. 14,478.

§ 102. Indictment or information—Requisites and sufficiency.

Sufficiency of indictment under Rev. St. § 3177.—United States v. Fears, Case No. 15,080.

An indictment under Rev. St. § 3281 or § 3257, which describes the offense in the language of the statute, is sufficient.—United States v. Staton, Case No. 16,382.

An allegation that defendant carried on the business of keeping a billiard table in a particular building is a sufficient allegation that he kept a billiard room, and was the proprietor thereof.—United States v. Howard, Case No. 15,402.

An indictment which showed the business to have been begun under the old law, and continued under a new law, which substituted special taxes for licenses, should negative the payment of the license fee, or of the additional fee, as well as of the special tax.—United States v. Fox, Case No. 15,156.

An indictment which charges defendant with carrying on the business of a wholesale liquor dealer without the payment of a special tax therefor, at a certain place, continuously between certain dates, is sufficient without stating the means or circumstances by which he became such dealer.—United States v. Page, Case No. 15,988.

The same rule applies in charging the same offense against a retail dealer.—United States v. Howard, Case No. 15,402.

An indictment for carrying on the business of a distiller of spirits without paying the special tax (Act July 13, 1866, § 23) need not set out the particular acts of distilling, or the kinds of spirits.—United States v. Fox, Case No. 15,156.

"Then and there distilling and manufacturing spirits to a very large amount, to wit, to the amount and number of 1,000 gallons of proof spirits," *held* a sufficient affirmative allegation that defendant did distill.—United States v. Fox, Case No. 15,156.

An indictment for removing malt liquors without affixing or canceling the proper stamps (Act July 13, 1866) need not negative the cases where the law authorizes a removal without affixing a stamp.—United States v. Schimer, Case No. 16,229.

As all persons dealing in tobacco are not liable to the special tax, an indictment must show that defendant was such a dealer as is required to pay the tax.—United States v. Howard, Case No. 15,402.

In an indictment founded on Rev. St. § 3397, for removing cigars not packed in boxes, it is unnecessary to aver an intent to defraud the United States.—United States v. Jacoby, Case No. 15,462.

The words "in execution and pursuance of" are equivalent in meaning to the words "to effect the object of."—United States v. Nunnemacher, Case No. 15,903.

The words "as required by law," as used in an indictment for selling cigars not properly

boxed and stamped, dispenses with the necessity of alleging that the cigars were not within the excepted classes.—United States v. Edwards, Case No. 15,025.

An indictment under Act 1866, c. 184, § 25, must allege that the still was intended to be used within the United States for distilling spirits, and that defendant failed to give the notice, etc.—United States v. Reed, Case No. 16,136.

In an indictment against a distiller for conspiracy to defraud the United States, it is not essential to state, in addition to an intent to defraud, the facts showing such intent.—United States v. Ulrici, Case No. 16,594.

An indictment for failing to efface, etc., marks and brands at the time of emptying the cask or package, need not aver a criminal intent. Rev. St. § 3224.—United States v. Ulrici, Case No. 16,594.

An allegation that the tax on certain spirits "had not been paid" is sufficient without an allegation that it "was still due and owing."—United States v. Nunnemacher, Case No. 15,903.

The last clause of Act July 20, 1868, § 78, contains no exception which must be negatived in an indictment founded on that clause.—United States v. Imsand, Case No. 15,439.

In an indictment under Act July, 13, 1866, § 42, for executing a fraudulent bond, it is not necessary to set out the particulars.—United States v. Henry, Case No. 15,350.

An indictment which charges a removal of a certain quantity of "distilled spirits" on which the tax has not been paid to a place other than the distillery warehouse, is good.—United States v. Anthony, Case No. 14,460; Same v. Ulrici, Id. 16,594.

§ 103. —— Joinder of parties and offenses.

Two persons composing a partnership, who make and sign, in their partnership names, a false return to the assessor, may be jointly indicted.—United States v. McGinnis, Case No. 15,678.

An internal revenue officer, named as such in the indictment, cannot be jointly indicted with a private person for conspiracy to defraud the revenue.—United States v. McDonald, Case No. 15,670.

Offenses under Rev. St. § 3397, which arise out of the same transaction, though some of them are designated as felonies and some not, may be charged in different counts of the same indictment, under Rev. St. § 1024.—United States v. Jacoby, Case No. 15,462.

Two offenses—the conspiracy to defraud, and a knowledge of a violation of law without reporting the same—may be committed by a revenue officer, and may be joined in the same indictment. Rev. St. § 3169.—Ex parte Joyce, Case No. 7,556.

An indictment averring the removal of spirits on which the tax had not been paid to a place other than the distillery warehouse, "and" the concealment thereof, is not bad for duplicity, under Rev. St. § 3296.—United States v. Nunnemacher, Case No. 15,903.

§ 104. —— Issues and proof.

On an indictment under Act March 2, 1867, § 30, the government is not bound to strict proof of the ownership of the rectifying distillery to which it is alleged the spirits were unlawfully removed.—United States v. Smith, Case No. 16,322.

A distiller's bonded warehouse which the law requires him to provide is a part of the distiller's premises, and proof of the unlawful removal of spirits therefrom sustains the averment that the removal was from the distillery.—United States v. Smith, Case No. 16,322.

On an indictment for removing distilled spirits on which the tax has not been paid, that the removal took place at the precise time stated need not be proved.—United States v. Nunnemacher, Case No. 15,902.

Under a count for removal and concealment, conviction may be had if removal is proved, though concealment is not shown.—United States v. Nunnemacher, Case No. 15,902.

An indictment under Rev. St. § 3397, charging that defendant "did buy, receive, and have in his possession" cigars on which the tax was not paid, warrants a conviction on proof of possession alone.—United States v. Millard, Case No. 15,769.

§ 105. Evidence—Presumptions and burden of proof.

Defendant, indicted for carrying on business without a license, and without having paid the special tax, and for failure to keep books required by law, has the burden of showing that he had a license, paid the special tax, and kept the books.—United States v. Devlin, Cases Nos. 14,953, 14,955.

§ 106. —— Admissibility.

Statements made by claimants in a proceeding against a distillery cannot be used against them in a subsequent criminal prosecution.—United States v. Distillery No. Twenty-Eight, Case No. 14,966.

On the trial of an indictment against a manufacturer for making false and fraudulent returns for a given month, evidence of false returns in previous months is admissible to show a fraudulent intent.—United States v. Rumsey, Case No. 16,207.

On an indictment for carrying on the business of a liquor dealer without having paid the tax, evidence is admissible of a sale of liquor on a day subsequent to that named.—United States v. Riley, Case No. 16,164.

On a prosecution of a collector for accepting a fraudulent bond, evidence of the acceptance of other forged bonds, and a delay to investigate after fraud was suggested, is admissible to show his participation in the fraud.—United States v. Callicott, Case No. 14,710.

Where the official records are not required by law to show the giving or not giving of a distiller's bond, the fact may be proved by the testimony of the officer.—United States v. Carpenter, Case No. 14,727.

§ 107. —— Weight and sufficiency.

To sustain the theory that a given amount of material will produce a certain quantity of spirits, it must be shown that this is a necessary and unavoidable inference from the facts proved.—United States v. Furlong, Case No. 15,178.

The government, claiming that a distiller must have used more material and manufactured more spirits than he returned is bound to prove that such was necessarily the fact, and must exclude any other conclusion.—United States v. Furlong, Case No. 15,178.

One may be convicted of keeping a tobacco press without a legal bond, on the sole testimony of the government officer that defendant told him he had used an extra press, which he had just removed.—United States v. Martin, Case No. 15,730.

On a trial for the fraudulent removal of distilled spirits from the distiller's bonded warehouse (Act July 13, 1866, § 45), it need not be shown that the warehouse was duly designated or authorized.—United States v. Harries, Case No. 15,309.

The finding of unstamped spirits on premises containing a still is, when unexplained, suffi-

cient to justify the jury in finding that such spirits were distilled there since the last inspection by the gauger.—United States v. Mathoit, Case No. 15,740.

The presence of defendants while the distillery was in operation is merely a circumstance to show their connection with it, and will not alone justify a conviction.—United States v. Dobbs, Case No. 14,972.

On a prosecution for executing and signing a false and fraudulent bond, the testimony of a subscribing witness that the bond was taken away and returned with the signature of a person whom the witness had seen sign another bond, *held* sufficient proof of execution by him.—United States v. O'Brien, Case No. 15,909.

On an indictment for issuing instruments without stamping them, proof of issuing an instrument unstamped, which by law should have been stamped, is sufficient, in the first instance, to warrant a conviction.—United States v. Learned, Case No. 15,580.

§ 108. Verdict.

A verdict of guilty of having in possession distilled spirits, with intent to sell them, and evade payment of the tax (Act June 30, 1864, § 48), is not bad merely because the number of gallons of such spirits is not found.—United States v. Mattingly, Case No. 15,743.

§ 109. Punishment.

Quære, whether one charged in different counts, under Rev. St. § 3169, with knowledge of separate frauds upon the revenue, may be punished by cumulative sentences.—United States v. Maguire, Case No. 15,708.

Act July 13, 1866, § 23, is not repealed by Act March 31, 1868, § 5, which provides a more severe punishment, as the statutes cover different subject-matters.—United States v. Cushman, Case No. 14,906.

Section 96, Act July 20, 1868, is not applicable to offenses under section 47, which prescribes a punishment in its own terms for an infraction of its requirements.—United States v. Thirty-Four Barrels Distilled Spirits, Case No. 16,461.

A person indicted under Act March 3, 1865, § 13, for engaging in the business of a lottery dealer without having paid the special tax, may be punished by imprisonment.—In re Lindauer, Case No. 8,358.

INTERNATIONAL LAW.

§ 1, Jurisdiction of nations. § 2, National independence and recognition thereof. § 3, Duty to observe neutrality.

See, also, "Aliens"; "Ambassadors and Consuls"; "Extradition," §§ 1–15; "Neutrality Laws"; "Piracy"; "Treaties"; "War."

§ 1. Jurisdiction of nations.

Every nation has exclusive jurisdiction over the waters adjacent to its shores for a marine league.—The Ann, Case No. 397.

Where there is no exclusive occupation of a river or bay, the law of nations gives to the nations inhabiting the opposite sides a territorial jurisdiction to the middle of the stream.—The Fame, Case No. 4,634.

§ 2. National independence and recognition thereof.

The fact of national independence may be deduced from history by courts exercising jurisdiction of international law; no explicit official recognition is necessary.—Consul of Spain v. The Conception, Case No. 3,137.

The fact that the number of insurgents in a state is so great that they carry on a civil war against the government does not entitle the government set up by such insurgents to the privileges of sovereignty.—United States v. Smith, Case No. 16,318.

A combination of citizens or subjects for the purpose of overturning a government does not become entitled to the privileges of national sovereignty until a revolution is actually accomplished.—United States v. Smith, Case No. 16,318.

An association of persons who undertake to establish a new government and assume the character of a nation may be recognized by other governments in whole or in part, or they may be utterly ignored by them.—Charge to Grand Jury—Treason and Piracy, Case No. 18,277.

As respects its own government, a nation becomes independent from the declaration thereof, but, as regards other nations, only when recognized by them.—United States v. Hutchings, Case No. 15,429.

§ 3. Duty to observe neutrality.

Until it appears by information and conviction thereunder that a privateer has been fitted out in our country in violation of its laws, the courts will not violate the obligation of neutrality by seizing and restoring prizes made by such privateer.—The Maria Josepha, Case No. 9,078.

INTERPLEADER.

§ 1. Rights to interpleader.

A bank may have relief by interpleader against adversary parties claiming money therein deposited.—City Bank of New York v. Skelton, Case No. 2,739.

INTERROGATORIES.

See "Depositions," §§ 5, 6.
In admiralty, see "Admiralty," § 83.
In pleading, see "Equity," § 40.

INTERSTATE COMMERCE.

Regulation, see "Commerce."

INTERVENTION.

Of parties, see "Executors and Administrators," § 47; "Parties," § 2.
—— in admiralty, see "Admiralty," § 64; "Maritime Liens," § 58; "Salvage," § 63.
—— in bankruptcy proceedings, see "Bankruptcy," §§ 36, 103–105, 325, 567.
—— in equity, see "Equity," § 27.
—— on execution, see "Execution," § 13.

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

§ 1, Licenses. § 2, Offenses. § 3, Criminal prosecution. § 4, Rights of property and contracts.

See, also, "Disorderly House."
Importation, see "Customs Duties," § 31.
Regulation, in Indian country, see "Indians," §§ 12, 13.
—— in territories, see "Territories," § 1.
Taxation of dealers, see "Internal Revenue," §§ 35, 39.
—— on manufacture and sale, see "Internal Revenue," §§ 40–56.

§ 1. Licenses.

The corporation of Georgetown had no power, in 1803, to grant retailing licenses.—United States v. Kaldenbach, Case No. 15,504.

The widow and administratrix of a deceased tavern keeper cannot sell spirituous liquors under her husband's license, nor can she transfer it to another.—United States v. Overton, Case No. 15,979.

§ 2. Offenses.

Selling less than a pint under a license to sell not less than a pint is selling without a license.—United States v. Squaugh, Case No. 16,370.

A servant selling spirituous liquors for his master, without license, is not liable to the penalty.—United States v. Paxton, Case No. 16,013; Same v. Shuck, Id. 16,285.

The gratuitous distribution of ardent spirits at a public gaming table does not constitute the keeper a retailer, in the meaning of the law.—United States v. Mickle, Case No. 15,763.

A selling by a servant is a selling by the master.—United States v. Voss, Case No. 16,628.

§ 3. Criminal prosecution.

An indictment will not lie against an inhabitant of the city of Washington for retailing spirituous liquor within the city.—United States v. Dixon, Case No. 14,969.

The day of selling spirituous liquors is immaterial if within 12 months before filing the information, as all the acts of selling constitute but one offense.—Virginia v. Smith, Case No. 16,966.

In an information for selling without license, it is not necessary to specify the kind of liquor, nor the person to whom sold.—United States v. Gordon, Case, No. 15,233.

All the acts of selling constitute one offense.—United States v. Gordon, Cases Nos. 15,233, 15,234.

The day laid in the indictment for retailing whisky without a license is not material, if the fact be proved to have been committed before the indictment was found.—United States v. Burch, Case No. 14,682.

Jurisdiction of offense of unlawful sale, see "Criminal Law," § 14.

§ 4. Rights of property and contracts.

Where a state statute prohibits the sale, the seller cannot recover the contract price, where the contract is made and completed within the state, though he holds a license to sell under the internal revenue act.—Daniels v. McCabe, Case No. 3,567.

Act Va. Dec. 26, 1792, preventing a tavern keeper from recovering more than $5 for liquors sold to one person in one year, applies to boarders.—Koones v. Thomee, Case No. 7,926.

INVENTION.

See "Patents."

ISSUES AND PROOF.

In civil actions in general, see "Pleading," §§ 66–68.
In criminal prosecutions, see "Indictment and Information," § 25; "Internal Revenue," § 104.
Trial by jury of issues in equity, see "Equity," § 102.

J

JAILS.

See "Prisons."
Imprisonment on conviction of crime, see "Criminal Law," § 107.

JEOPARDY.

Former jeopardy as bar to prosecution, see "Criminal Law," §§ 30–37.

JOINDER.

Of causes of action, see "Actions," § 3; "Admiralty," § 40; "Bankruptcy," § 360; "Patents," § 217; "Salvage," § 64.
Of issue, see "Equity," § 88.
Of offenses in indictment, see "Indictment and Information," §§ 15, 17; "Internal Revenue," § 103; "Larceny," § 4.
Of parties in admiralty, see "Admiralty," § 53; "Collision," §§ 122, 124; "Salvage," § 63.
—— in bankruptcy proceedings, see "Bankruptcy," §§ 94–100.
—— in civil actions, see "Parties," §§ 2, 5; "Pleading," § 20.
—— in criminal prosecutions, see "Indictment and Information," § 17; "Internal Revenue," § 103; "Larceny," § 4; "Receiving Stolen Goods," § 2.
—— in equity, see "Equity," §§ 24, 52.

JOINT ADVENTURES.

§ 1. Rights of parties.

One party to an agreement to purchase lands on joint account, who takes title from a guardian, cannot set up the adverse title of the cestuis que trust to defeat the equitable rights of the other party to the agreement.—Flagg v. Mann, Case No. 4,847.

Where the proceeds of a joint adventure are held for the joint account, both parties share the risks which attend them; but, where one party appropriates them to his use, he becomes debtor to the other for his moiety.—Hourquebie v. Girard, Case No. 6,732.

JOINT-STOCK COMPANIES.

See, also, "Associations."
Jurisdiction of actions as dependent upon citizenship, see "Courts," § 51.

§ 1. Forfeiture of shares.

Provisions in articles of agreement of a joint-stock company that the shares and interest of a member shall be forfeited on default in the payment of assessments does not authorize the trustee, by a naked declaration, to make a forfeiture against which a court of equity will not grant relief.—Walker v. Ogden, Case No. 17,081.

Upon payment of the amount due, with interest, the stockholder will be allowed to redeem, and the trustees will be ordered to make and deliver the proper certificates of stock.—Walker v. Ogden, Case No. 17,081.

JOINT TENANCY.

§ 1, Creation. § 2, Mutual rights, duties, and liabilities. § 3, Severance. § 4, Survivorship.

See, also, "Tenancy in Common."

§ 1. Creation.
A mortgage to four persons will not create a joint tenancy, unless the words clearly and manifestly show such an intention.—Randall v. Phillips, Case No. 11,555.

§ 2. Mutual rights, duties, and liabilities.
One joint tenant, his executor or trustee, may receive the whole rent or appoint a bailiff to collect it.—Newman v. Keffer, Case No. 10,177.

Where defendant, who has received payment of a joint debt, admits the joint interest of plaintiff without stating its amount, of which he had knowledge, plaintiff's interest will be deemed to be an equal interest, nothing appearing to the contrary.—Stokes v. Mowatt, Case No. 13,481.

The possession of one cotenant is not, ordinarily, to be treated as adverse to that of other cotenants.—Dexter v. Arnold, Case No. 3,859.

Where persons hold under a title jointly, one will not be allowed in equity to acquire a better title and claim exclusively for himself and adversely to the other.—Russell v. Beebe, Case No. 12,153.

§ 3. Severance.
A conveyance by one joint tenant of his share will sever the joint tenancy.—Robison v. Codman, Case No. 11,970.

§ 4. Survivorship.
In equity, where there is a joint tenancy in a mortgage, the surviving mortgagee will be held a trustee for the representatives of the deceased co-mortgagee.—Randall v. Phillips, Case No. 11,555.

JUDGES.

§ 1, Substitute judges. § 2, Rights and powers. § 3, Liabilities. § 4, Disqualification to act. § 5, Biographical notes of federal judges, etc.

See, also, "Courts"; "Justices of the Peace."
Death of judge as ground of rehearing, see "Equity," § 106.
Effect of change of judges, see "Criminal Law," § 104.
Mandamus to judge, see "Mandamus," § 2.
Of federal district court, see "Courts," § 103.
Power of judge in vacation, see "Injunction," § 23.
—— to take depositions, see "Depositions," § 9.
Privilege from service of process, see "Process," § 6.

§ 1. Substitute judges.
The additional judge of the orphans' court of the District of Columbia appointed under Act May 25, 1838, holds his office for life, and not during the life of the judge.—United States v. Causin, Case No. 14,759.

§ 2. Rights and powers.
Act April 10, 1869, providing for the appointment of circuit judges, and declaring who should hold circuit courts, did not affect the right of the district judges in Missouri to sit in the circuit court.—In re Circuit Court, Case No. 2,728.

A district judge can hold a circuit court, in the absence of a circuit judge, and exercise all the powers of a circuit court.—In re Kaine, Case No. 7,598.

The district judge of the Eastern district of New York has authority to hold the circuit court for the Southern district of New York.—In re Nicolas, Case No. 10,256.

A judge of the federal district court, while sitting alone as circuit judge in the circuit court, has the same power and jurisdiction as any other judge sitting in the same court.—Robinson v. Satterlee, Case No. 11,967.

Where the circuit or district judge is absent from the circuit, the supreme court justice allotted to such circuit may hear an application for an injunction in a cause pending therein at any place where he may be. Rev. St. § 719.—Searles v. Jacksonville, P. & M. R. Co., Case No. 12,586.

When the district and circuit judges and the circuit justice are all absent from the district and circuit, another justice of the supreme court may hear an application for an injunction, notwithstanding the provisions of Rev. St. § 719.—United States v. Louisville & P. Canal Co., Case No. 15,633.

Where one judge has denied a motion, another judge of the same court has jurisdiction to grant leave to renew it.—Robinson v. Satterlee, Case No. 11,967.

A decree signed by a district judge after he has tendered a conditional resignation, but before it has been accepted by the government, is valid.—Northrop v. Gregory, Case No. 10,327.

A judge may purchase at a sale under an execution issued on a judgment rendered in a court over which he presided.—Cooper v. Galbraith, Case No. 3,193.

§ 3. Liabilities.
A judge cannot be *held* civilly liable for inflicting an unlawful imprisonment where his sentence is held illegal by the supreme court of the United States on a writ of habeas corpus by a divided court.—Case of Lange, Case No. 18,307.

When a party has been brought before a court of justice in a legal manner, and circumstances are presented requiring a decision to be made, the tribunal making it cannot be deprived of protection from personal liability therefor because it may afterwards, upon fuller investigation, turn out to have been erroneous.—Case of Lange, Case No. 18,307.

§ 4. Disqualification to act.
A circuit judge who was a creditor of a bankrupt, and proved his claim, and thereafter sold and assigned it, so as to have no further interest, *held* not disqualified from subsequently hearing a petition of review by a creditor, under section 2, Act 1867.—In re Sime, Case No. 12,860.

The acts of a court presided over by a judge disqualified by the fourteenth amendment, but holding office before it was adopted, are valid.—Griffin's Case, Case No. 5,815.

§ 5. Biographical notes of federal judges, etc.
Biographical notes of the federal judges, including a brief account of the public career of all of the federal judges appointed prior to January 25, 1894.—30 Fed. Cas. p. 1361.

Resolutions and other proceedings upon the retirement of federal judges.—30 Fed. Cas. p. 1285.

JUDGMENT.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 1, Jurisdiction. § 2, Nature of parties. § 3, Amount of judgment.

II. BY CONFESSION.

§ 4, Requisites and validity in general. § 5, Stipulation to confess. § 6, Warrant or power of attorney. § 7, Time of confession. § 8, Statement or proof of indebtedness. § 9, Entry—Necessity. § 10, Effect.

III. BY DEFAULT.

§ 11, Requisites and validity. § 12, Opening or setting aside default—Jurisdiction and grounds. § 13, —— Motion to open default and proceedings thereon. § 14, —— Imposing conditions.

IV. ON TRIAL OF ISSUES.

§ 15, Parties. § 16, Conformity to pleadings, proofs, and verdict. § 17, Arrest of judgment.

V. ENTRY, RECORD, AND DOCKETING.

§ 18, Sufficiency. § 19, Time. § 20, Entry nunc pro tunc. § 21, Authentication by judge. § 22, Record as notice. § 23, Destruction or loss of record. § 24, Filing transcript of justice's judgment in another court.

VI. AMENDMENT AND CORRECTION AND REVIEW IN SAME COURT.

§ 25, Amendment and correction in general. § 26, Clerical errors. § 27, Misnomer. § 28, As to amount. § 29, As to parties. § 30, Time of payment. § 31, Time of application. § 32, Effect of amendment or correction. § 33, Release of right to amend. § 34, Review.

VII. OPENING OR VACATING.

§ 35, Jurisdiction and power to open or vacate in general. § 36, Grounds for opening or vacating. § 37, Time of application. § 38, Judgments by confession. § 39, Practice on vacating. § 40, Conditions imposed.

VIII. EQUITABLE RELIEF.

§ 41, Grounds. § 42, Jurisdiction and proceedings.

IX. COLLATERAL ATTACK.

§ 43, In general. §, 44, Judgments impeachable collaterally. § 45, Grounds.

X. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

§ 46, Judgments operative as a bar. § 47, Causes of action and defenses, merged, barred, or concluded. § 48, Persons who may take advantage of the bar.

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§ 49, Judgments conclusive in general. § 50, Persons concluded. § 51, Matters concluded.

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§ 52, What law governs. § 53, In general. § 54, Nature. § 55, What judgments create liens. § 56, Docketing or recording judgment. § 57, Property or interest to which lien attaches. § 58, Date. § 59, Priorities. § 60, Duration. § 61, Suspension, revival, and discharge of lien.

XIII. JUDGMENTS IN REM.

§ 62, What constitutes. § 63, Jurisdiction. § 64, Effect.

XIV. FOREIGN JUDGMENTS.

§ 65, Merger and bar of cause of action. § 66, Conclusiveness of judgment and collateral attack.

XV. ASSIGNMENT.

§ 67, Assignability in general. § 68, Mode of assignment. § 69, Effect.

XVI. ENFORCEMENT AND REVIVAL.

§ 70, Enforcement. § 71, Revival. § 72, Proceedings to revive.

XVII. PAYMENT, SATISFACTION, AND DISCHARGE.

§ 73, Persons to whom payment may be made. § 74, Payment of erroneous judgment. § 75, What constitutes satisfaction. § 76, Agreements for satisfaction. § 77, Entry of satisfaction. § 78, Vacating entry of satisfaction.

XVIII. ACTIONS ON JUDGMENTS.

§ 79, Domestic judgments. § 80, Foreign judgments.

XIX. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 81, Necessity of pleading and proving prior adjudication. § 82, Sufficiency of plea. § 83, Issues and proof. § 84, Admissibility of evidence.

Attachment of, see "Attachments," § 3.
Conditions precedent to creditors' suit, see "Creditors' Suit," § 6.
Decisions of courts in general, see "Courts," § 8.
—— of land office, see "Public Lands," § 49.
—— of patent office, see "Patents," §§ 82, 111.
Decree in admiralty, see "Admiralty," §§ 99, 106–111; "Collision," § 158.
—— in equity, see "Equity," §§ 119–126; "Patents," § 248.
Effect as curing defect in pleadings, see "Pleading," § 70.
—— of discharge in bankruptcy, see "Bankruptcy," §§ 616–635.
Final judgments, see "Admiralty," §§ 106–111; "Appeal and Error," § 5.
In criminal cases, see "Criminal Law," §§ 30–37, 104–111; "Homicide," § 10.
Interest on judgments, see "Interest," § 2.
Of courts martial, see "Army and Navy," § 19.
Of justices of the peace, see "Justices of the Peace," § 10.
On appeal, see "Bankruptcy," § 695.
Operation and effect as to liens, see "Maritime Liens," § 45.
Review, see "Appeal and Error"; "Audita Querela."
—— in admiralty, see "Admiralty," § 113.

In actions by or against particular classes of parties.

See "Corporations," § 58; "Executors and Administrators," § 52; "Municipal Corporations," § 43; "Partnership," § 39; "Seamen," §§ 142, 183; "United States," § 34.
Assignees in bankruptcy, see "Bankruptcy," § 367.
Receiver, see "Railroads," § 64.

In particular civil actions or proceedings.

See "Cancellation of Instruments," § 10; "Creditors' Suit," § 12; "Discovery," §§ 5, 6; "Divorce"; "Ejectment," § 17; "Quieting Title," § 9; "Replevin," § 13; "Trespass," § 11.
Appeal or writ of error, see "Appeal and Error," §§ 36–40.
—— in admiralty, see "Admiralty," § 125.
Foreclosure, see "Mortgages," §§ 38, 40; "Railroads," § 49.
For infringement of patents, see "Patents," §§ 209, 264.
For penalties, see "Customs Duties," § 120a; "Penalties," § 11.
On bills or notes, see "Bills and Notes," § 105.
On bonds, see "Bonds," § 24.
On referee's report, see "Reference," § 9.
Prize proceedings, see "War," § 68.
Probate proceedings, see "Wills," § 20.
To forfeit property, see "Forfeitures," § 10; "Internal Revenue," § 89.
To recover back duties and charges paid, see "Customs Duties," § 74.
To set aside fraudulent conveyance, see "Fraudulent Conveyances," § 34.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 1. Jurisdiction.

The jurisdiction of every court is open to inquiry, and want of jurisdiction renders the judgment unavailable for any purpose.—Gray v. Larrimore, Case No. 5,721.

The judgments of a court not having jurisdiction are void ab initio.—Fisher v. Harnden, Case No. 4,819.

A defendant who was not within the jurisdiction, and on whom no notice was served, is not personally bound by the judgment.—Isaacs v. Price, Case No. 7,097; Lincoln v. Tower, Id. 8,355; Mathewson v. Sprague, Id. 9,278; Mickey v. Stratton, Id. 9,530; Thompson v. Emmert, Id. 13,953; Westerwelt v. Lewis, Id. 17,446.

Where the service of process is simply defective or irregular, the judgment is valid until set aside or reversed.—Isaacs v. Price, Case No. 7,097.

Decree in consolidated action *held* valid, though the court failed to acquire jurisdiction in one of the actions so consolidated.—Galpin v. Page, Case No. 5,205.

The provisions of a statute authorizing a suit against a nonresident upon constructive service of summons by publication must be strictly pursued in order to sustain the judgment recovered.—Gray v. Larrimore, Case No. 5,721.

There can be no personal judgment upon constructive or substituted service by publication against a nonresident, except as a means of reaching property situated at the time within the state, or of affecting some interest therein, or determining the status of the plaintiff with respect to the nonresident party.—Galpin v. Page, Case No. 5,206.

A judgment rendered against one only of several defendants, jointly liable, who was personally served, if valid where rendered, is valid everywhere.—Burt v. Delano, Case No. 2,211.

§ 2. Nature of parties.
The record of a judgment will not be excluded from evidence for a misnomer, where the party appeared by the wrong name, and made no objection thereto.—Stevelie v. Read, Case No. 13,389.

§ 3. Amount of judgment.
In giving judgment on a note for sterling money, dated in Ireland, the difference between English and Irish sterling was computed.—Bond v. Grace, Case No. 1,622.

Where a judgment is for sterling money, the exchange is to be settled as of the day when the judgment is confessed.—Murphy v. Camac, Case No. 9,948.

In an action by the assignee in bankruptcy to recover property fraudulently transferred by the bankrupt, a finding of the value of the property in "gold coin" will support a judgment for coin.—Edmondson v. Hyde, Case No. 4,285.

II. BY CONFESSION.

Opening and vacating, see post, § 38.
As act of bankruptcy, see "Bankruptcy," § 74.
As a preference, see "Bankruptcy," § 245.

§ 4. Requisites and validity in general.
A supersedeas judgment is absolutely void under Act Md. 1791, c. 67, unless acknowledged by the original defendant and two sureties.—Smith v. Middleton, Case No. 13,079; Mandeville v. Love, Id. 9,012.

A supersedeas judgment must recite the original judgment correctly.—Holmes v. Bussard, Case No. 6,636.

Confession of judgment, to operate as a supersedeas, must be in the very words of St. Md. 1791, c. 67.—Plant v. Holtzman, Case No. 11,206.

Confession of judgment in the District of Columbia,—form and effect.—Hodgson v. Mountz, Case No. 6,569.

§ 5. Stipulation to confess.
A reference under state statutes not being recognized by the federal courts, a stipulation to confess judgment for the amount reported by the referee will not be enforced therein.—Denny v. Brown, Case No. 3,805.

§ 6. Warrant or power of attorney.
The authority to confess judgment, in Wisconsin, must be in the statutory form, and be produced before the officer.—Bonnell v. Weaver, Case No. 1,630.

A judgment having been once entered on a warrant of attorney, the warrant becomes functus officio, and will not support a second judgment.—Fairchild v. Camac, Case No. 4,610.

§ 7. Time of confession.
Judgment cannot be confessed before the return term of the writ.—Haden v. Perry, Case No. 5,893.

A judgment entered under a power of attorney, before the obligation became due, will not be set aside on motion.—Smith v. Hartwell, Case No. 13,054.

An execution on a supersedeas judgment confessed two months after the original judgment will be quashed.—Chesapeake & O. Canal Co. v. Barcroft, Case No. 2,644.

A defendant arrested to appear at next term cannot come in and confess judgment before such term.—Askew v. Smith, Case No. 588.

§ 8. Statement or proof of indebtedness.
Under the statute of California (St. 1850, p. 454, § 293), authorizing an entry of judgment upon confession without action, the statement required must be signed by the party in person, and a judgment entered upon a statement signed by the defendant's attorney in the case is void.—French v. Edwards, Case No. 5,098.

A judgment by confession *held* not void, under the Oregon Code, for want of a sufficient statement of the facts, except as to creditors who have acquired a lien before sale thereunder.—In re Fuller, Case No. 5,148.

Defendant will be permitted to come in and confess judgment for the whole damages laid in the writ, although no declaration be filed.—McNeil v. Cannon, Case No. 8,913.

§ 9. Entry—Necessity.
Under the Civil Code of Oregon of 1854, a judgment by confession was not valid, so as to authorize execution, until after the judgment was entered in the judgment book.—King v. French, Case No. 7,793.

§ 10. Effect.
In Virginia, a judgment by confession is equal to a release of errors.—Catlett v. Cooke, Case No. 2,515.

III. BY DEFAULT.

Against bankrupt, see "Bankruptcy," § 244.

§ 11. Requisites and validity.
Where the summons is served 10 days before the return day, plaintiff, on filing his declarations, may enter up judgment at the rules by nihil dicit.—Hines v. Dean, Case No. 6,519.

A judgment is a nullity where it appears from the proceeding that the defendant had no notice.—Farmers' Loan & Trust Co. v. McKinney, Case No. 4,667.

No errors in the proceedings after due notice to or appearance by defendant can make the judgment a nullity.—Farmers' Loan & Trust Co. v. McKinney, Case No. 4,667.

If any actionable part of the declaration remains unanswered by a sufficient plea, plaintiff must have judgment therefor, if he has prayed judgment at the proper time, so as to avoid a

discontinuance.—Kerr v. Force, Case No. 7,730.

Where several damages are assessed after judgment by default, in a joint action of assault and battery, plaintiff may enter a nol. pros. against one defendant, and take judgment against the other.—Conner v. Cockerill, Case No. 3,112.

Plaintiff is entitled to judgment by default where defendant does not plead by the rule day, though the term continues beyond such day.—Fowle v. Bowie, Case No. 4,994.

The application to the clerk and his promise to enter an appearance are equivalent to an appearance, and a default cannot be taken on his omission.—Sheepshanks v. Boyer, Case No. 12,741.

A judgment in ejectment by default for want of a plea, without a rule to plead, and thus putting defendant in default, is irregular.—Paterson v. Evans, Case No. 10,796.

A judgment by default for want of a plea before the expiration of the rule to plead is irregular.—Union Bank of Georgetown v. Crittenden, Case No. 14,354; Earl v. Raymond, Id. 4,243; Fellows v. Hall, Id. 4,722, 4,723.

Bank of Alexandria is entitled to judgment at the first term.—Bank of Alexandria v. Davis, Case No. 845.

Defendant not ruled to argue a demurrer at the term joined in by him.—Bowman v. French, Case No. 1,739.

After rule to plead expired, plaintiff not compelled to produce his cause of action.—Bailey v. Sutton, Case No. 747.

Where the plaintiff in actions on contract is authorized to sign judgment against defendant when he omits an affidavit of defense, if the amount be undetermined, the judgment is only interlocutory, and becomes final only when the amount is legally determined.—Whitaker v. Bramson, Case No. 17,526.

In executing a writ of inquiry, plaintiff's own affidavit of the amount of the damages is admissible in evidence.—Keene v. Cooper, Case No. 7,641.

Upon executing a writ of inquiry upon a judgment by default, the jury must find at least one mill in damages.—Frazier v. Lomax, Case No. 5,072.

A writ of inquiry cannot be executed at the same term at which judgment is rendered.—Robins v. Pope, Case No. 11,931a.

On a writ of inquiry, plaintiff's oath may be given in evidence of the amount of his claim.—Mandeville v. Washington, Case No. 9,017.

§ 12. Opening or setting aside default—Jurisdiction and grounds.

Where the right to answer has been absolutely waived, the court has no power to open a default.—The Roslyn, Case No. 12,068.

A motion to set aside a judgment by default, made, after the term is over, by petition to the judge, is not within Act 1789, § 18.—Popino v. McAllister, Case No. 11,277.

The rule in Virginia that a decree taken by default in consequence of the neglect of counsel for defendant will not be opened on motion for a rehearing is observed in the federal circuit court in the state.—Scott v. Hore, Case No. 12,535.

A judgment obtained by default through the neglect of defendant's attorneys, who erroneously supposed that the papers in the case had been destroyed in the great fire at Chicago, will not be set aside, where the attorneys took no steps to protect the interests of their client.—McClellan v. Fosbender, Case No. 8,695.

The court will not allow parties to be injured or prejudiced by any misunderstanding between their counsel.—Campbell v. Barclay, Case No. 2,352.

Judgment by default opened where motion made at the same term, and defendant showed a good defense.—Hand v. Yahoola Min. Co., Case No. 6,016.

Judgment by default will not be set aside unless defendant can show that he was guilty of no negligence in suffering the judgment, and has a meritorious defense.—Dawson v. Daniel, Case No. 3,668.

Office judgment set aside on plea of "never executrix."—Alexander v. West's Ex'x, Case No. 177.

Variance between the capias and declaration cannot be pleaded to set aside an office judgment.—Hartshorne v. Ingle, Case No. 6,170.

On motion to set aside an office judgment upon an injunction bond the court will not suffer the defendant to plead that the obligee was dead at the time of the execution of the bond.—Porter v. Marsteller, Case No. 11,287.

Habere facias issued on a default judgment against a casual ejector will be quashed at a subsequent term, and the judgment vacated, on affidavits showing that, by mistake, the clerk omitted to enter the tenant's appearance.—McCormick v. Magruder, Case No. 8,723.

Relief will be granted against default decrees against corporate stockholders in a suit to enforce subscriptions, where there was no just claim, and other defendants, who contested their liability, were successful, where there was no regular service of process, and counsel appeared without authority.—Day v. Phelps, Case No. 3,689.

§ 13. —— Motion to open default and proceedings thereon.

An affidavit of merits is not necessary on a motion to set aside a judgment by default irregularly issued.—Sheepshanks v. Boyer, Case No. 12,741.

To open a judgment by default in Wisconsin, a copy of the proposed answer and affidavit, excusing the default, and an affidavit of merits, must be recorded.—Republic Ins. Co. v. Williams, Case No. 11,707.

A judgment by default against the casual ejector for want of an appearance, and confessing lease, entry, and ouster, may be set aside at a subsequent term, on an affidavit of merits, where a trial has not been lost.—Popino v. McAllister, Case No. 11,277.

Semble, that the two-term rule, based upon the old Pennsylvania practice, may be acted upon in a case not within the affidavit of defense law.—Detmold v. Gate Vein Coal Co., Case No. 3,830.

An unexplained delay of 18 months, and after default taken and report of a commission, will bar respondent's motion to set aside proceedings as coram non judice.—Arcularius v. Staples, Case No. 509b.

The rule of the court stated as to the proper practice on motion to open a default.—Jenks v. Garretson, Case No. 7,278.

To set aside an office judgment, the court will not permit defendant to plead specially matter which may be given in evidence upon the general issue.—Vowell v. Lyles, Case No. 17,020.

§ 14. —— Imposing conditions.

A default taken for want of a plea will be set aside before the appearance term, on motion, on condition that defendant file a plea to the merits and go to trial.—Kemball v. Stewart, Case No. 7,682.

A judgment by default and writ of inquiry set aside at the following term upon affidavit of merits, payment of costs, plea to the merits instanter,

and offering ready for trial.—Reiling v. Bolier, Case No. 11,671.

IV. ON TRIAL OF ISSUES.

§ 15. Parties.

In an action on a joint contract against two, where one has suffered default, and the other has obtained verdict, judgment must be entered for both.—Champlin v. Tilley, Case No. 2,586.

§ 16. Conformity to pleadings, proofs and verdict.

The judgment cannot exceed the amount claimed in the declaration.—Hogan v. Taylor, Case No. 6,584a.

If the evidence apply to one count, which is good, and the verdict be general, the court will direct the judgment to be entered on the good count.—Lonsdale v. Brown, Case No. 8,494.

Where several distinct pleas in bar are pleaded to the same count, and issue is taken thereon, if one issue be found for defendant, and the rest for plaintiff, yet judgment must be for defendant.—Kerr v. Force, Case No. 7,730.

If several distinct pleas be pleaded to one part of a count, and issues be taken thereon, and one of the issues be found for defendant, judgment must be for him as to so much of the count as is answered by the plea, although the other issues are found for the plaintiff.—Kerr v. Force, Case No. 7,730.

Judgment will be given for plaintiff non obstante veredicto where defendant's plea is bad in substance.—Postmaster General v. Reeder, Case No. 11,311.

§ 17. Arrest of judgment.

A motion in arrest of judgment will be dismissed if made after judgment is rendered and execution issued thereon.—Dove v. Blair, Case No. 18,292.

A motion in arrest of judgment and for a new trial may be made at the same time, but the motion in arrest will be first heard.—Turner v. Foxall, Case No. 14,255.

A defendant cannot have a judgment non obstante veredicto; his remedy is a motion in arrest.—Brown v. Hartford Fire Ins. Co., Case No. 2,009.

Judgment will be arrested on verdict for plaintiff in assumpsit where only one of several joint defendants was served with process.—Edmondson v. Barrell, Case No. 4,284.

The judgment will be arrested where the verdict is general and one of the counts is bad. It cannot be amended after it is recorded by applying it to the good count only, unless the evidence given was applicable only to that count.—Fenwick v. Grimes, Case No. 4,733.

A variance between the capias ad respondendum and the declaration is not a ground for arresting the judgment.—Wilson v. Berry, Case No. 17,791.

After verdict it is too late to object the want of profert of letters of administration—or that the action is in the debet and detinet.—Gardner v. Lindo, Case No. 5,231.

Misnomer is no ground of arrest of judgment after plea in bar, but the proceedings are subject to amendment.—Scull v. Briddle, Case No. 12,570.

Where a cause of action against three is joint and several, and two join in their plea, and the other pleads severally, but no finding is made as to one of those pleading jointly, it is no ground of arrest of judgment against the other.—United States v. O'Fallon, Case No. 15,911.

A defect of jurisdiction appearing in the pleadings may be taken advantage of by motion in arrest of judgment or writ of error.—Blachly v. Davis, Case No. 1,456.

The separation of the jury after the cause is submitted, and before the verdict is agreed upon, is ground for setting it aside.—Howard v. Cobb. Case No. 6,755.

Mere negligence in an attorney, unaccompanied by fraudulent combination or connivance, is not sufficient to arrest a judgment at law.—Wynn v. Wilson, Case No. 18,116.

See, also, "Seamen," § 183.

V. ENTRY, RECORD, AND DOCKETING.

Stay of judgment, see "New Trial," § 26.

§ 18. Sufficiency.

If, from the whole entry of the docket, the amount, date, parties, and court appear, it will be held sufficient.—In re Boyd, Case No. 1,746.

The record of a judgment should show affirmatively jurisdiction of the person of defendant.—Allen v. Blunt, Case No. 215.

§ 19. Time.

Judgment in vacation cannot be entered unless in pursuance of a positive statute, whose provisions must be fully complied with.—Bonnell v. Weaver, Case No. 1,630.

All decrees in the courts of the United States are deemed to be enrolled at the term in which they were passed.—Dexter v. Arnold, Case No. 3,856.

§ 20. Entry nunc pro tunc.

Where a party dies during term, judgment may be entered as of a day antecedent to his death; otherwise, where he dies before the beginning of the term.—Griswold v. Hill, Case No. 5,834.

An order for the dismissal of a bill taken ex parte, where the defendant died after it was granted, may be entered as of a date antecedent to his death.—Griswold v. Hill, Case No. 5,834.

§ 21. Authentication by judge.

Under the act of 1790 the certificate of a judge styling himself "one of the judges" is not a sufficient authentication. It should appear that he was the chief justice or presiding judge.—Stewart v. Gray, Case No. 13,428a.

§ 22. Record as notice.

The record of a judgment is notice only of what it contains.—Plant v. Gunn, Case No. 11,205.

§ 23. Destruction or loss of record.

Where the record is destroyed after verdict, plaintiff after seven years allowed to file transcript of record in his possession, and enter judgment thereon.—Baldwin v. Lamar, Case No. 800.

Formal entry of judgment, where original docket lost, presumed after 30 years from a writing signed by defendant stating that he had confessed judgment, and from subsequent process.—Cromwell v. Bank of Pittsburg, Case No. 3,409.

§ 24. Filing transcript of justice's judgment in another court.

A judgment of a justice of the peace docketed in a county court is not a judgment of that court.—Allen v. Arguelles, Case No. 213.

VI. AMENDMENT AND CORRECTION AND REVIEW IN SAME COURT.

§ 25. Amendment and correction in general.

A judgment finally disposing of a case may be corrected, on motion, at a subsequent term, where sufficient cause is shown.—Bank v. Labitut, Case No. 842; United States v. Bennett, Id. 14,573; Same v. Harmison, Id. 15,308.

A decree entered as final, with a view to other proceedings upon it as a final decree, will be considered as final from the day of its entry, and it

cannot be altered by the court in any material part except on a review or appeal or rehearing allowed for sufficient cause.—Jenkins v. Eldredge, Case No. 7,269.

Such decrees are final, after the end of the term at which they are rendered, unless specially entered otherwise.—Jenkins v. Eldredge, Case No. 7,269.

A supplemental decree, purporting to be entered by consent, made after final adjudication and after the end of the term, and not based on any allegations in the pleadings, *held* void.—Kinney v. Consolidated Virginia Min. Co., Case No. 7,827.

As between parties who claimed title under such a decree, and purchasers from their grantees who all acted upon the hypothesis that the decree was valid, the court will act upon a like hypothesis, and hold that there was no mistake which equity will correct.—Kinney v. Consolidated Virginia Min. Co., Case No. 7,827.

Federal courts can amend only as to defects of form.—Albers v. Whitney, Case No. 137; United States v. One Hundred and Sixty-Three, etc., Barrels of Whiskey, Id. 15,937.

§ 26. Clerical errors.

A clerical error in the record may be amended after the term.—Barnes v. Lee, Case No. 1,018; Pierce v. Turner, Id. 11,148.

The record of a cause, when made out and written in the record book, cannot be altered, except by order of the court.—Barnes v. Lee, Case No. 1,017.

§ 27. Misnomer.

Misnomer not apparent of record is not amendable.—Albers v. Whitney, Case No. 137.

§ 28. As to amount.

The court will at a subsequent term correct a judgment entered by mistake for too large a sum.—United States v. Fearson, Case No. 15,081; Muscatine v. Mississippi & M. R. Co., Id. 9,971.

A judgment giving plaintiff costs to which he was not entitled cannot be corrected at a subsequent term.—Crabtree v. Neff, Case No. 3,315.

§ 29. As to parties.

An entry on the clerk's docket, after judgment, intimating that it is for the use of a third person, cannot be stricken out after the term.—Bradley v. Eliot, Case No. 1,778.

§ 30. Time of payment.

Where time of payment has been fixed by a final decree, an extension cannot be granted.—Jenkins v. Eldredge, Case No. 7,269.

§ 31. Time of application.

A federal court has no power to correct after the lapse of 16 years, an alleged error in a decree of its predecessor, not due to a clerical mistake disclosed on the face of the record, but to a mistake which is disclosed only by additional proofs.—Espinosa v. United States, Case No. 4,529.

§ 32. Effect of amendment or correction.

The action of the court in amending its own records cannot be questioned by another court, even upon error.—Cromwell v. Bank of Pittsburg, Case No. 3,409.

§ 33. Release of right to amend.

The fact of giving bail after decree is not necessarily estoppel and release of all errors.—Day v. Phelps, Case No. 3,689.

§ 34. Review.

The orphans' court of Washington county, D. C., may review its sentence, even after the right of appeal is lost; and an appeal lies on that review.—Mauro v. Ritchie, Case No. 9,312.

VII. OPENING OR VACATING.

See, also, ante, § 12.

§ 35. Jurisdiction and power to open or vacate in general.

The court has power to set aside its judgment during the term at which it was given.—Allen v. Thomas, Case No. 239; United States v. Harmison, Id. 15,308.

Such power is unlimited during such term.—Union Trust Co. v. Rockford, R. I. & St. L. R. Co., Case No. 14,401.

The court has no power to set aside a judgment or decree after the term at which it was rendered.—Brush v. Robbins, Case No. 2,059; McClellan v. Fosbender, Id. 8,695; Scott v. Blaine, Id. 12,525; Same v. Hore, Id. 12,535; Wood v. Luse, Id. 17,950.

This rule applies in the case of a final decree against two defendants jointly, where one died before the hearing.—Scott v. Blaine, Case No. 12,525.

The court may, during the term, set aside a dismissal, and restore the case, without losing its jurisdiction; and another court cannot, by taking jurisdiction during the interval, oust or supersede its jurisdiction.—Union Trust Co. v. Rockford, R. I. & St. L. R. Co., Case No. 14,401.

§ 36. Grounds for opening or vacating.

In the absence of fraud or irregularity, accident in not appearing, or otherwise, happening before final decree, cannot be relieved against thereafter except by bill in equity.—Jenkins v. Eldredge, Case No. 7,269; Medford v. Dorsey, Id. 9,389.

A judgment may be set aside at a subsequent term for irregularity.—Jones v. Kemper, Case No. 7,472; Union Bank of Georgetown v. Crittenden, Id. 14,354.

A decree entered without authority will be set aside.—In re Amory and Leeds, Case No. 336a.

A judgment void for want of jurisdiction may be vacated on motion after the expiration of the term.—Shuford v. Cain, Case No. 12,823.

If the real amount of the debt is controverted after judgment on a bond, the court may direct a writ of inquiry to ascertain the amount, or direct an issue to be made up and tried at bar.—Bobyshall v. Oppenheimer, Case No. 1,592.

Judgment not opened after the term to permit retaxation of costs.—Blagrove v. Ringgold, Case No. 1,480.

Failure to give security for costs under a general rule of court is no ground for vacating a judgment.—Lytle v. Fenn, Case No. 8,651.

When a judgment will be set aside, with permission to amend the declaration to conform to a state of facts not before known to exist.—Newton v. Weaver, Case No. 10,193.

Misapprehension of counsel as to what would be done at a given term of court is ordinarily no ground for vacating the judgment.—Lytle v. Fenn, Case No. 8,651.

A judgment entered by mistake of the clerk may be set aside at the next term, and the execution quashed.—United States v. McKnight, Case No. 15,695.

§ 37. Time of application.

The court, after five years, allowed a judgment satisfied of record to be opened to correct errors in the assessment of damages.—Crookes v. Maxwell, Case No. 3,415.

The federal district court, three years after rendering a decree in a confiscation case cannot reverse the same.—United States v. Six Lots of Ground, Case No. 16,299.

A judgment quod computet in an amicable action, in which the court is without jurisdiction as to one of the parties, being interlocutory and not appealable, is under the control of the court, and may be set aside even after many years.—Kitchen v. Strawbridge, Case No. 7,854.

A judgment by default, for want of a plea before expiration of the rule to plead, may be set aside on motion at a subsequent term.—Union Bank of Georgetown v. Crittenden, Case No. 14,354; Earl v. Raymond, Id. 4,243; Fellows v. Hall, Id. 4,722, 4,723.

§ 38. Judgments by confession.

Judgment by confession taken against one defendant set aside for irregularity where the other had been served with process.—Hyer v. Hyatt, Case No. 6,976.

On motion of special bail on return of sci. fa., court will set aside original judgment against the principal, for irregularity, and all subsequent proceedings.—Ault v. Elliot, Case No. 655.

In a joint action against two, after one has confessed judgment, it is too late for him to move to vacate the same because the capias ad respondendum was not renewed and regularly returned non est inventus, at every term preceding the trial.—McCandless v. McCord, Case No. 8,678.

A judgment entered in a federal court on a bond with warrant of attorney was set aside, both parties being citizens of the state.—Byrne v. Holt, Case No. 2,272.

§ 39. Practice on vacating.

On motion by defendant to vacate a judgment, the court may, the proper papers being before it, render a new judgment and issue execution.—Boody v. Rutland & B. R. Co., Case No. 1,635.

§ 40. Conditions imposed.

The condition of payment of costs on vacating a judgment *held* to have been waived, where no demand for payment was made, and proceedings were taken as if the judgment was vacated.—Ransom v. New York, Case No. 11,572.

VIII. EQUITABLE RELIEF.

§ 41. Grounds.

Equity will not relieve from a judgment at law unless it appear that it is unjust and inequitable, and ought not to be enforced.—Bradley v. Richardson, Case No. 1,786; Kidwell v. Masterson, Id. 7,758.

Equitable relief against a judgment at law is granted only where the judgment is obtained in consequence of accident, mistake, or fraud, without any fault of the injured party, who has no remedy, or has without fault lost his remedy at law.—Railroad Co. v. Neal, Case No. 11,534.

Relief on the ground of surprise at the trial and indisposition of counsel on the motion for a new trial, preventing a full and fair hearing was refused.—Railroad Co. v. Neal, Case No. 11,534.

Injunction granted to stay execution upon a judgment obtained by surprise.—Baker v. Glover, Case No. 769; Roach v. Hulings, Id. 11,874.

An injunction will be granted as to portion of judgment recovered by surprise against foreigners though plaintiffs acted bona fide.—Bell v. Cunningham, Case No. 1,246.

Fraud in obtaining jurisdiction in the federal court is a good ground in equity to stay execution of a judgment obtained in such action.—Sawyer v. Gill, Case No. 12,399.

Fraud upon a party by her counsel will not invalidate a decree where it does not appear that it affected the result.—Amory v. Amory, Case No. 335.

A judgment rendered against a municipality by connivance of its officers, on warrants fraudulently issued, will be set aside in equity, but the municipality will be required to pay the consideration actually received.—School District Tp. v. Lombard, Case No. 12,478.

But fraud of the payee in obtaining promissory notes is a matter of defense, and cannot be set up after judgment as a ground for relief in equity.—Muscatine v. Mississippi & M. R. Co., Case No. 9,971.

Enforcement of judgment confessed by indorser of note, under agreement with holder to proceed at once against solvent maker, enjoined where the holder delayed action, and the maker became insolvent.—Garey v. Union Bank, Case No. 5,241a.

The absence of a witness is no ground for an injunction to stay the proceedings on the judgment.—Chapman v. Scott, Case No. 2,609.

A bill in equity will be sustained to set aside a judgment upon a policy of insurance, upon the ground of such newly-discovered evidence of fraud and felony on the part of the original plaintiff as would, if pleaded, have been a perfect defense to the previous action.—Ocean Ins. Co. v. Fields, Case No. 10,406.

The fact that a judgment at law was obtained through the inattention and neglect of defendant's counsel, who was not pecuniarily responsible for the amount, is no ground of relief in equity.—Rogers v. Parker, Case No. 12,018.

Wrongfully depriving a debtor of an opportunity of making a defense is no ground of the relief in equity from a judgment at law unless a defense, apparently, would have been available.—Bradley v. Richardson, Case No. 1,786.

Injunction granted to stay proceedings on a judgment at law obtained in a suit instituted in the name of a person not interested, whose name was used only for the purpose of preventing a defense, which the defendant had against the real plaintiff in interest.—Greenleaf v. Maher, Cases Nos. 5,779, 5,780.

A judgment at law will not be enjoined to await the recovery of unliquidated damages by the debtor against the creditor unless good ground exists to believe that the former would not be able to obtain payment of his recovery.—Boone v. Small, Case No. 1,644.

Judgments are not impeachable in equity for matter which has been once tried, or so put in issue that it might have been tried.—The Acorn, Case No. 29; Breckenridge v. Peter, Id. 1,825; United States v. Flint, Id. 15,121.

Equity will not relieve against a judgment confessed by an attorney through defendant's negligence.—Mason v. Jones, Case No. 9,240.

Defendant can have no relief in equity against a judgment at law rendered against him on plaintiff's stipulation to discharge it on defendant's performance of impossible conditions.—Goodwin v. Cartwright, Case No. 5,551.

A court of equity has power to reduce the amount of judgments at law rendered on Confederate contracts to the equivalent in legal money.—Fowler v. Dillon, Case No. 5,000.

A court of equity may require the abatement of war interest embraced in judgments in Virginia.—Fowler v. Dillon, Case No. 5,000.

A release by defendant in ejectment of the right to the land in controversy to a third person will not prevent his maintaining a bill to enjoin the judgment, where his equity is a mere possibility or constructive equitable trust, created by the decree of the court of equity.—Dunlap v. Stetson, Case No. 4,164.

A judgment in attachment will be enjoined if defendant had no actual notice, and had a good defense, and his failure to make defense was owing, not to any fault or negligence on his part, but to the fault of the plaintiff.—Zerega v. McDonald, Case No. 18,212.

An agreement between plaintiffs and some of the joint defendants that, if they will abandon the defense, plaintiffs will not call upon them for any part of the judgment, is a fraud upon the co-defendants, and cannot be enforced.—Selz v. Unna, Case No. 12,650.

The federal court has jurisdiction of a bill for relief of a judgment creditor who, to protect his interest, has purchased property on foreclosure of a prior mortgage which it is attempted to redeem, for the debtor's benefit, under a fraudulently confessed judgment.—Currie v. Jordan, Case No. 3,491.

A claim by the owners of a bill of exchange for damages for failure of one to whom it was sent for collection to give notice of dishonor to the indorser, not being allowed as a set-off in an action at law by the negligent holder, is ground of equitable relief against the judgment obtained in such action.—Gallagher v. Roberts, Case No. 5,194.

Where the debtor arrested on a ca. sa. is set at liberty by plaintiff, though on express condition that plaintiff shall not be prejudiced thereby, it operates as a discharge, and equity will not interfere.—Magniac v. Thomson, Case No. 8,957.

§ 42. Jurisdiction and proceedings.

A bill to set aside and declare void a decree for fraud or otherwise can only be maintained in the court in which it was rendered.—Osborn v. Michigan Air Line R. Co., Case No. 10,594.

The delay of a year after discovery of the fraud before making a tender to the debtor's executor, and a further delay of eight months in bringing suit, *held* not sufficient laches to bar the remedy.—Van Renssellaer v. Kelly, Case No. 16,873.

A delay of eleven years after knowledge of suspicious conduct of counsel bars relief against decree for his fraud.—Amory v. Amory, Case No. 335.

Equity will not relieve against a judgment at law, upon plene administravit, on the ground that the defendant at law could not produce vouchers to support his plea, unless there be in the bill an allegation of fraud, mistake, surprise, or accident.—Wilson v. Bastable, Cases Nos. 17,788, 17,789.

Sufficiency of evidence to sustain bill to set aside judgment on a note as collusive and without consideration.—Sohier v. Merril, Case No. 13,158.

A judgment may be enjoined in part, and allowed to proceed for the residue.—Dunlap v. Stetson, Case No. 4,164.

Notice of application for a provisional injunction, in a suit in equity to restrain the enforcement of a judgment at law, does not operate as a stay.—Kamm v. Stark, Case No. 7,604.

A provisional injunction will not be granted in such case where it appears that the judgment has been enforced by execution before the time of the application.—Kamm v. Stark, Case No. 7,604.

The bankruptcy of one debtor in a joint judgment does not prevent the plaintiff from proceeding against the other defendant, though enjoined from enforcing execution against the bankrupt.—Penny v. Taylor, Case No. 10,957.

After satisfaction on execution of a judgment at law, on the dissolution of an injunction, plaintiff cannot recover, upon the injunction bond, interest accruing upon the judgment while delayed by the injunction.—Grundy v. Young, Case No. 5,851; Mason v. Muncaster, Id. 9,248.

IX. COLLATERAL ATTACK.

See, also, post, § 66.

§ 43. In general.

A judgment of a competent court is not subject to collateral impeachment.—Campbell v. Strong, Case No. 2,367a; Smith v. Pomeroy, Id. 13,092.

The regularity of a judgment when used as evidence cannot be inquired into.—Piatt v. Oliver, Case No. 11,115.

§ 44. Judgments impeachable collaterally.

A decree of a state court awarding custody of children on divorce of parents under the power given to make such order for "the maintenance and education of the children" as may be just cannot be questioned collaterally in another forum.—Bennett v. Bennett, Case No. 1,318.

The decree of a probate court appointing an administrator cannot be impeached in a suit upon a patent granted to him as the representative of the inventor.—Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co., Case No. 10,337.

§ 45. Grounds.

Where a court has jurisdiction of the res in a proceeding in rem, the record of its decree cannot be collaterally attacked for errors and irregularities appearing therein.—Otis v. The Rio Grande, Case No. 10,613.

Where the record produced upon the plea of nul tiel record shows a verdict only, the court will presume that a judgment was entered pursuant thereto.—Teasdale v. Branton, Case No. 13,813.

The determination by the court issuing the summons, that it was duly served by publication, as authorized by law, is conclusive when collaterally brought into question.—Galpin v. Page, Case No. 5,205.

A decree of foreclosure upon personal service outside of the district, and constructive service by publication, is not subject to collateral attack for defects or irregularities which would have been ground for reversal upon appeal.—Salisbury v. Sands, Case No. 12,251.

The service of summons by a party to the action is an irregularity that is cured by entry of judgment, and will not avail when the judgment is attacked in a collateral proceeding.—Owens v. Gotzian, Case No. 10,634.

The recital in a decree of due service of process is conclusive, unless contradicted by something in the record itself, showing that such recital is not or could not be true.—Lincoln v. Tower, Case No. 8,355; Riggs v. Collins, Id. 11,824; Westerwelt v. Lewis, Id. 17,446.

But it may be shown in what manner, whether by personal service or by attachment, notice is given, as its effect is not to contradict the record, but to limit its operation.—Lincoln v. Tower, Case No. 8,355.

In case of service by publication the record must show the facts which bring the case within the statute allowing such service. Code Or. §§ 55, 56.—Neff v. Pennoyer, Case No. 10,083.

The validity of a decree in a suit brought to enforce a trust by the substitution of a trustee in the place of one deceased, made by the court in the county where the land lay, though all the persons in interest were not made parties, cannot be collaterally questioned in another tribunal.—Randall v. Jaques, Case No. 11,553.

Where the court has no power to render a personal judgment against a married woman,

such a judgment may be attacked collaterally, though the court in other respects may have jurisdiction over her person and the subject-matter.—Norton v. Meader, Case No. 10,351.

A judgment of a state court whose jurisdiction was acquired under a state statute, which was virtually repealed by the adoption of a treaty before the judgment was rendered, is void ab initio.—Fisher v. Harnden, Case No. 4,819.

The question of jurisdiction is considered as having been decided by the first order or process made or issued in a case.—Manier v. Trumbo, Case No. 18,309.

All presumptions are in favor of a judgment of a court of general jurisdiction.—Alexander v. Knox, Case No. 170; Galpin v. Page, Id. 5,205; Gray v. Larrimore, Id. 5,721; Sprague v. Litherberry, Id. 13,251.

The jurisdiction of inferior courts must be affirmatively shown by parties claiming benefits thereunder.—Gray v. Larrimore, Case No. 5,721.

The recital of a jurisdictional fact, there being nothing to the contrary in the record, is conclusive of the determination of the fact upon sufficient evidence, although the evidence does not appear in the record.—Galpin v. Page, Case No. 5,205.

The presumption in favor of judgments of courts of general jurisdiction only extends to matters and persons falling within the scope of such general jurisdiction. When the proceeding is outside of such general scope, the record must show compliance with the special authority.—Galpin v. Page, Case No. 5,206.

The presumption in favor of the judgments of superior courts ceases when it appears that defendants were without their territorial limits, or that their proceedings were not in accordance with the course of the common law.—Gray v. Larrimore, Case No. 5,721; Neff v. Pennoyer, Id. 10,083.

No presumption will be indulged in favor of the regularity of proceedings in pais for the purpose of divesting one person of the title to real estate, and conferring it on another.—Schenck v. Peay, Case No. 12,450.

Where the jurisdiction of a court of special authority appears upon the record, its judgment is of equal force as that of a court of general jurisdiction.—Mohr v. Cotzhausen, Case No. 9,694.

In a suit on a judgment, the heir of the judgment debtor cannot avail himself of an error of the clerk by which the judgment was entered for the penalty of the bond sued on, instead of the damages allowed.—Alston v. Munford, Case No. 267.

Nil debet cannot be pleaded to an action on a judgment.—Jacquette v. Hugunon, Case No. 7,169; French v. Lafayette Ins. Co., Id. 5,102.

A release, the statute of limitations, or payment may be pleaded.—Jacquette v. Hugunon, Case No. 7,169.

A release of a judgment which has been subsequently revived by sci. fa. cannot be pleaded in an action brought on the revived judgment.—Snyder v. Bracken, Case No. 13,153.

A plea that the judgment was obtained by fraud, duress, etc., is bad on demurrer.—Randolph v. King, Case No. 11,560.

The frauds for which judgments are impeachable in courts of equity are collateral acts, extrinsic to the merits.—United States v. Flint, Case No. 15,121.

A decree in a divorce suit against plaintiff declaring that she was never legally married may be impeached for fraud when set up against her in another state. Case No. 334 reversed.—Amory v. Amory, Case No. 333.

A fraudulent sale and conveyance by an administrator, confirmed by a decree of the court, may be questioned and declared bad in an ejectment or other action as well at law as in equity.—Rhoades v. Selin, Case No. 11,740.

X. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

See, also, post, § 65.

§ 46. Judgments operative as a bar.

A judgment against plaintiff in a suit in a state court against an indorser of a note, on the ground that plaintiff was affected by equities existing between original parties, *held* not a bar to a suit in the federal court against the maker, where a different rule obtained.—National Bank of the Republic v. Brooklyn City & N. R. Co., Case No. 10,039.

A judgment of the Illinois circuit court under the state revenue law of February 26, 1839, is no bar unless it is shown that everything required by the statute to give jurisdiction was done.—Mayhew v. Davis, Case No. 9,347.

A final judgment upon the merits, by a state court of Massachusetts, in a writ of entry, is a bar to a writ of right between the same parties, and for the same premises, in the federal courts.—Derby v. Jacques, Case No. 3,817.

A decree of the state court declaring licenses under letters patent fraudulent and void is res judicata against defendants, and all persons acquiring rights under them, in an action by the same complainant in the federal court for infringement of the patent.—Consolidated Fruit-Jar Co. v. Whitney, Case No. 3,133.

The federal courts will not entertain a bill by a nonresident stockholder of a domestic corporation, where the issues raised by the bill have been already adjudicated by the state court in a suit between the corporation and the proper adversary parties.—Chaffin v. St. Louis, Case No. 2,573.

After reversal on appeal in the state court, and new trial ordered, plaintiff may dismiss his suit, and bring another in the federal court.—Hazard v. Chicago, B. & Q. R. Co., Case No. 6,276.

Plaintiff, in such case, is bound by the ruling of the court on appeal, unless he makes a different case in the new forum.—Hazard v. Chicago, B. & Q. R. Co., Case No. 6,276.

To maintain the plea of res judicata the judgment must be final. If it is open to appeal, the plea is bad.—New Orleans Nat. Banking Ass'n v. Adams, Case No. 10,184; Whitaker v. Bramson, Id. 17,526.

The discharge of a trustee in an action at law at nisi prius, to which discharge exceptions are pending in a law court, cannot be pleaded as a judgment in bar of another action.—Robinson v. Tuttle, Case No. 11,968.

A decree in a patent case declaring certain claims void, but sustaining another, and directing an account, is not final, and does not make the question of the validity of the claims res judicata.—Rumford Chemical Works v. Hecker, Case No. 12,133.

A decree that a preliminary injunction stand continued on the performance of certain acts within a certain time, otherwise to be dismissed, *held* not an absolute bar to a future suit, where the acts are not performed.—Jenkins v. Eldredge, Case No. 7,266.

Notwithstanding the judgment might have been rested upon an issue upon matter of abatement, the matter upon the merits will be res adjudicata, where both issues are found for defendant, and the judgment is entered generally under a local law allowing all defenses to be set up in the answer.—Four Hundred and Twen-

ty Min. Co. v. Bullion Min. Co., Case No. 4,989.

A judgment of nonsuit never operates as a bar to a subsequent action for the same cause.—Evans v. White, Case No. 4,572a.

Where a bill is dismissed on motion of complainant before testimony taken is published, and without a hearing on the merits, the record is no bar to another suit.—Badger v. Badger, Case No. 717.

A consent decree, upon a bill asking for an issue of devisavit vel non, and denying testatrix's competency, setting aside the issue of the devisavit, and providing for certain payments under the will, is not res judicata as to the sufficiency of the bequests under the will.—Kain v. Gibboney, Case No. 7,595.

A verdict on which a judgment was never entered is not conclusive in another suit.—Allen v. Blunt, Case No. 217.

An agreed statement of facts may be the proper foundation of such a judgment as will bar a new suit between the same parties for the same cause of action.—Derby v. Jacques, Case No. 3,817.

The fact that the declaration in an action at law is not sufficient to withstand a demurrer will not prevent the judgment in the action from being a bar to any other suit for the same cause of action.—Hughes v. Blake, Case No. 6,845.

An inquisition is no bar to a special action upon the case for a cause of action which accrued before the inquisition.—Wright v. Georgetown, Case No. 18,080.

§ 47. Causes of action and defenses merged, barred, or concluded.

Unless the same subject-matter was involved, and the same questions raised, judgment recovered is not res judicata.—Clark v. Gibboney, Case No. 2,821.

Where a former judgment is relied on as a defense in admiralty, it should appear by the record that the precise question or title set up was passed upon in a former suit, not merely that it might have been.—The Vincennes, Case No. 16,945.

The causes of action are the same where the same evidence will support both.—Lawrence v. Vernon, Case No. 8,146; Steam Packet Co. v. Bradley, Id. 13,333.

The principle of res judicata does not apply where there is not an identity in the cause of action, or the character of the persons for or against whom the claim is made.—Smith v. Turner, Case No. 13,119.

A judgment will not bar a matter not actually litigated and decided.—Burnham v. Webster, Case No. 2,179.

A judgment on the merits in a personal action is a bar to another action on the same claim, and between the same parties, though in a different form.—Lawrence v. Vernon, Case No. 8,146.

A judgment is a bar to a new suit for the same purpose when substantially the same as the first, except for averments therein of immaterial matter.—Case v. New Orleans & C. R. Co., Case No. 2,493.

A suit upon a ground of relief abandoned in a prior suit is barred by the final determination in such suit adversely to complainant. Case No. 13,317 overruled.—Starr v. Stark, Case No. 13,316.

A party is not bound in an action relating to one lot to litigate his title to another and different lot, even though the title to both be the same.—Starr v. Stark, Case No. 13,318.

A judgment in plaintiff's favor on coupons of county bonds is not conclusive in a suit by him on other coupons of the same bonds.—Stewart v. Lansing, Case No. 13,432.

Where two lots are held under two distinct chains of title, a decree against one of such titles in a suit relating to one of the lots will not estop the party from setting up the other title in a suit relating to the other lot.—Starr v. Stark, Case No. 13,318.

Under a local law allowing a new trial as to some issues, without disturbing the findings upon others, a judgment supported by findings not vacated is not an estoppel as to matter embraced in a vacated finding.—Four Hundred and Twenty Min. Co. v. Bullion Min. Co., Case No. 4,989.

A decree of the supreme court of probate reversing that of the inferior court, decreeing distribution, is no bar to a subsequent suit by the parties claiming as heirs or legal representatives.—Harvey v. Richards, Case No. 6,182.

A judgment respecting a claim to a life insurance policy as a pledge to secure a debt, on the ground that there had been no delivery, is no bar to a bill to enforce performance, of the contract to deliver the pledge and for a recovery of the proceeds of the policy.—Myers v. D'Meza, Case No. 9,987.

A judgment in favor of the maker of a note in replevin against a banker who held the same for collection, brought upon the ground that the note was obtained by fraud, will not bar an action by the owner, an indorsee for value thereof before maturity, from obtaining an action thereon against the maker.—Waite v. Triblecock, Case No. 17,046.

A decree against plaintiff in a suit for relief from a judgment obtained on a promissory note, on the ground that it was paid, *held* a bar to a suit to recover back the amount of the judgment paid.—Montford v. Hunt, Case No. 9,725.

Where lands were devised with directions to be sold by the executor, and a share of the proceeds paid to certain emancipated slaves, and in a suit against the executor, to which such legatees were not parties, it was decreed that they were incompetent to take, *held*, that this was no bar to their rights.—Mathews v. Springer, Case No. 9,277.

A decree for divorce declaring that articles previously entered into for alimony should remain in force is no bar to an action upon a bond given to perform those articles.—McGowan v. Caldwell, Case No. 8,806.

A verdict in assumpsit by three plaintiffs to recover for widening the upper and lower end of a street, finding defendant liable to pay for widening the upper end, will not bar a subsequent action by two of such plaintiffs to recover for widening the lower end of the street.—Lawrence v. Vernon, Case No. 8,146.

A judgment against a bank in a suit upon its teller's bond, is no bar to an action for money had and received by him for its use.—Bank of United States v. Johnson, Case No. 919.

A decree between a lot holder in Portland, Or., and a settler on the Portland land claim, declaring a certain strip of land to have been dedicated to the public, is not an estoppel in a suit by the settler's grantee against the town.—Lownsdale v. Portland, Case No. 8,578.

A decree that the title of a patent is in complainant in an action brought to determine the rights of the parties makes the rights res judicata.—Consolidated Fruit-Jar Co. v. Whitney, Case No. 3,134.

A verdict and judgment at law is not a bar to relief in equity if an equitable ground of relief be laid.—Gallagher v. Roberts, Case No. 5,194.

A verdict and judgment at law against the validity of a patent bars a suit in equity on

the same patent between the same parties.—Reynolds v. Badger, Case No. 11,726.

A judgment dismissing upon the merits a bill by a patentee against a patentee of a junior patent, claiming an interference, and praying that the junior patent be declared void, is not a bar to a suit for an infringement against an assignee of a junior patentee, where the judgment did not find an interference, and declare complainant's patent void.—Tyler v. Hyde, Case No. 14,309.

It cannot be set up, to avoid the bar of a judgment entered upon a verdict, that the evidence was wholly insufficient to establish the claim, or that no evidence was offered or received by the court.—Ramsey v. Herndon, Case No. 11,546.

§ 48. Persons who may take advantage of the bar.

A judgment against one of two joint contractors may be set up in bar to a suit against both.—Trafton v. United States, Case No. 14,135; Willings v. Consequa, Id. 17,767; Consequa v. Willings, Id.; Woodworth v. Spafford, Id. 18,020.

But where a contract is both joint and several, a judgment against both contractors is not a bar to a several action against either, and a several judgment against either is not a bar to a joint judgment against both.—Trafton v. United States, Case No. 14,135; United States v. Cushman, Id. 14,908.

A judgment obtained against one of two partners on a joint promise merges the contract.—Sedam v. Williams, Case No. 12,609.

Judgment against one partner is a bar to a subsequent suit against the others, though they were dormant partners at the time of the contract, and were not discovered by the plaintiff until after the judgment.—United States v. Ames, Case No. 14,440.

In a joint assault and battery a recovery in a suit against one is a bar to a suit against the other.—Swope v. Courtney, Case No. 13,703.

An unsatisfied judgment against one of two joint tort feasors is no bar to an action against the other.—Long v. Conner, Case No. 8,479.

The rule that a judgment against one of several joint trespassers is no bar to an action against others applies in trover for successive conversions by different persons.—Matthews v. Menedger, Case No. 9,289.

Where a tax sale is assumed to be valid, and the decision is only as to the estate conveyed, the question of the validity of the tax sale is not res judicata as to a person not a party to the record.—Smith v. Turner, Case No. 13,119.

XI. CONCLUSIVENESS OF ADJUDICATION.

See, also, post, §§ 66, 81.

§ 49. Judgments conclusive in general.

The force of former judgments between the same parties, whether foreign or domestic, or in different states of the Union, and whether in personam, or in rem, considered.—Burnham v. Webster, Case No. 2,179.

The decision of a court of competent jurisdiction is conclusive wherever the same question is again raised.—Wright v. Deklyne, Case No. 18,076.

Where the court has general jurisdiction to issue a writ or make an order, a writ or order made in a particular case in which the facts did not confer jurisdiction must be taken as valid and effectual until quashed, reversed, or otherwise superseded by a tribunal competent to review and correct the error.—Manier v. Trumbo, Case No. 18,309.

A statute making a decision of a military commission final, held not to make it conclusive as to the right in question.—Antrim's Case, Case No. 495.

A dismissal of a bill in equity is not conclusive in a court of law in an action brought for the same matter.—Wright v. Deklyne, Case No. 18,076.

A judgment in a state court of probate, where obtained by fraud, is not conclusive.—Pratt v. Northam, Case No. 11,376.

A decree pro confesso settles no rights when not followed by a final decree.—Lockhart v. Horn, Case No. 8,446.

A judgment based upon an estoppel by a previous judgment in ejectment *held* no defense on a new trial after reversal of the first judgment.—French v. Edwards, Cases Nos. 5,097, 5,098.

The federal courts are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them.—Galpin v. Page, Case No. 5,206.

Where the state court has jurisdiction, the merits of the controversy involved are not open to examination in the federal court after judgment.—Galpin v. Page, Case No. 5,206.

And the rule is the same although an adjudication involves a decision as to the legal rights of the parties as affected by the United States bankruptcy laws.—Atkinson v. Purdy, Case No. 616; In re Hussman, Id. 6,951; Van Kleeck v. Miller, Id. 16,860.

A judgment recovered between the same parties in another federal court, upon the same cause of action, may be pleaded in bar, irrespective of the time when the suit was commenced.—United States v. Dewey, Case No. 14,956.

The estoppel of a judgment is not avoided by the fact that an action has since been brought upon it in which defendant pleaded nul tiel record, and plaintiff took a nonsuit.—Michigan Ins. Bank v. Eldred, Case No. 9,528.

§ 50. Persons concluded.

When the findings and judgment in a given case are conclusive on both parties if conclusive on one, the estoppel is mutual, within the meaning of the rule requiring estoppels to be mutual.—Four Hundred and Twenty Min. Co. v. Bullion Min. Co., Case No. 4,989.

A decree is conclusive with respect to the subject-matter on which it acts, but does not affect the rights of third persons not parties.—McCall v. Harrison, Case No. 8,671; Mankin v. Chandler, Id. 9,030; Society for Propagation of the Gospel v. Hartland, Id. 13,155; Taber v. Perrot, Id. 13,721; Warburton v. Aken, Id. 17,143.

Persons claiming under such parties and purchasers pendente lite are also bound.—Society for Propagation of the Gospel v. Hartland, Case No. 13,155.

A person who sues in the name of another for his use is substantially a party, and is within the rules that the judgment of a court of competent jurisdiction is final between the parties, and a bar to a subsequent suit.—York Bank v. Asbury, Case No. 18,142.

New parties to a second suit, not privy to the parties in the first suit, cannot introduce the former judgment in their favor, though seeking to enforce the same rights. Exceptions.—Baring v. Fanning, Case No. 982.

A person compelled by the judgment of a court of competent jurisdiction to pay money to one man, having acted in good faith, is protected by that judgment from paying it to another.—Mayer v. Foulkrod, Case No. 9,342.

A judgment of a court of general jurisdiction, having cognizance of the case, however erroneous, will protect purchasers thereunder.—Bank of United States v. Voorhees, Case No. 939.

The decision of the supreme court of the state declaring a law under which bonds were authorized to be issued to be constitutional conclusively settles the question in favor of all purchasers of the bonds.—Smith v. Tallapoosa County, Case No. 13,113.

Purchasers under orders in proceedings pending a suit are not bound by a decree as to right of property between libelants and claimants.—Jones v. Walker, Case No. 7,506.

A judgment of foreclosure will operate as a bar or estoppel only between the parties and their privies, and is inoperative as against prior purchasers from the mortgagor, and their possession under it is not subversive of their right to redeem.—Gordon v. Hobart, Case No. 5,609.

The purchaser of a patent and one associated with defendant in the manufacture of an infringing article, pending assessment of damages for infringement after decree for injunction, are in privity to the decree, and are bound thereby.—Dayton v. Wright, Case No. 3,693.

In California, an adjudication affecting title to land, in an action between the administrator and another, binds the heir.—Meeks v. Vassault, Case No. 9,393.

A judgment in a suit against the sheriff to recover property wrongfully attached, where the creditor appeared and assumed the defense, is binding on the creditor in a suit for the wrongful attachment.—Murray v. Lovejoy, Case No. 9,963.

A prior judgment in favor of evicted grantee, in which he relied upon title under which he was evicted, *held* conclusive, in a suit to quiet title, upon the witnesses who appeared for him.—Goldsmith v. Greve, Case No. 5,521.

Proceedings for partition of lands in a Georgia court during the Rebellion *held* not binding upon a loyal citizen doing duty as surgeon in the Union army.—Cuyler v. Ferrill, Case No. 3,523.

A decree in a suit by the vessel owners against a shipper for freight, where the defense is nondelivery, is not evidence either for or against the master in a future suit against him by the shippers.—Swett v. Black, Case No. 13,690.

Of the nature and effect of a decree in a court of probate, and as to the parties whom it binds.—Harvey v. Richards, Case No. 6,182.

The judgment against the principal is as conclusive against the bail as against the principal.—Greathouse v. Dunlap, Case No. 5,742.

§ 51. Matters concluded.

A sentence of a court of exclusive jurisdiction is conclusive both as to the right established and fact decided.—Armroyd v. Williams, Case No. 538.

Where the record fairly presents two points, upon either of which the decision might turn, and the court fully considers and determines both, the decision of neither can be regarded as an obiter dictum.—Hawes v. Contra Costa Water Co., Case No. 6,235.

The matter decided must be within the purview of the proceedings before the court, and directly within the issue made and tried, to render the judgment or order an estoppel.—Semple v. Bank of British Columbia, Case No. 12,660.

To render a former adjudication an estoppel, the point adjudicated must have been admitted or distinctly put in issue in the course of the former adjudication, and must so appear of record.—Putnam v. New Albany, Case No. 11,481.

The verdict and judgment in a cause decided upon the statute of limitations adversely to plaintiff is no evidence of a want of consideration for a new promise in a subsequent suit upon the same cause of action.—Lonsdale v. Brown, Case No. 8,493.

A party is not estopped, by a judgment at law in a suit in which he might have set off his demand, from subsequently suing to recover the same.—Robinson v. Wiley, Case No. 11,968a.

An action will not lie on a claim which has been pleaded or offered in evidence as a set-off, and rejected by the verdict of a jury.—Janney v. Smith, Case No. 7,214.

When the jurisdiction of a court depends upon a fact which the court is required to ascertain in its decision, such decision is final until reversed in a direct proceeding for that purpose.—Otis v. The Rio Grande, Case No. 10,613.

Order of court of competent jurisdiction admitting to citizenship is conclusive in absence of fraud.—The Acorn, Case No. 29.

Grant of administration, with will annexed, to a husband of testatrix, is conclusive as to her right to make the will.—Cassels v. Vernon, Case No. 2,503.

An adjudication by a surrogate that an administrator was decedent's next of kin, in a contest between him and another as to the grant of letters of administration, is not conclusive on the question of distribution.—Caujolle v. Ferrie, Case No 2,525.

A decree of mortgage foreclosure is conclusive as to the capacity of plaintiff to maintain such suit and the validity of the note and mortgage sued on.—Semple v. Bank of British Columbia, Case No. 12,659.

The legal title to land which the owner has agreed to convey, by a contract duly recorded, remains in him, and his interest is bound by a judgment against him.—O'Neil v. Wabash Ave. Baptist Church Soc., Case No. 10,531.

A decision against a county, in a suit by it against a railroad company to restrain the negotiation of railway aid bonds issued by the company, will estop the county from setting up against subsequent purchasers any grounds of illegality which might have been set up in the bill.—Preble v. Portage County, Case No. 11,380.

Dismissal upon the merits of creditors' bill to set aside conveyance as fraudulent estops creditor from opposing bankrupt's discharge.—In re Antisdel, Case No. 490.

Defendant, in a second suit on the same patent, *held* estopped, by the judgment in the former suit, from denying the novelty of the invention put in issue therein.—Dubois v. Philadelphia, W. & B. R. Co, Case No. 4,109.

In a suit for infringement, plaintiff's patent was *held* to be anticipated by that under which defendant was licensed. *Held*, that plaintiff was not estopped by such judgment in another action against one claiming under a license granted before the judgment.—Ingersoll v. Jewett, Case No. 7,039.

A decree of forfeiture of spirits for alleged frauds on the revenue is not conclusive in a subsequent proceeding for the forfeiture of the distillery and numerous articles contained therein.—United States v. One Distillery, Case No. 15,930.

XII. LIEN.

Operation and effect in bankruptcy, see "Bankruptcy," §§ 262–264.

§ 52. What law governs.

The lien of a judgment of the United States court on the lands of defendant cannot be restricted by state statutes.—Carroll v. Watkins, Case No. 2,457.

Under the acts of 1789 and 1792, the lien upon land, created by judgments in the federal courts, and the mode of obtaining satisfaction of judgments, are regulated by the state law.—Koning v. Bayard, Jr., Case No. 7,924.

§ 53. In general.

A judgment which by its terms cannot be enforced against the property of a party cannot become a lien thereon.—In re Boyd, Case No. 1,746.

§ 54. Nature.

A lien by judgment does not create any vested right in the property subject to the lien.—In re Jordan, Case No. 7,514.

A judgment lien is not a title to land, against which the statute of limitations can operate, but a mere security, which is not affected by a subsequent conveyance.—Kemper v. Adams, Case No. 7,688.

§ 55. What judgments create liens.

An entry of "Judgment nisi, four days," will bind the debtor's land where judgment is subsequently made absolute.—Prevost v. Healy, Case No. 11,408.

An indorsement by plaintiff's attorney upon the declaration and the words, "Nov. T., 1866, verdict," on the bench warrant, *held* not such a judgment as to constitute a lien which would operate from such time, on its entry nunc pro tunc under order of court.—Plant v. Gunn, Case No. 11,205.

A judgment appealed from the Ohio common pleas to the supreme court remains a lien on the land in the county.—McLean v. Lafayette Bank, Case No. 8,889.

A decree in chancery, equally with a judgment at law, creates a lien on lands.—Scriba v. Deane, Case No. 12,559.

An admiralty decree is not a lien on land.—Ward v. Chamberlain, Case No. 17,152.

§ 56. Docketing or recording judgment.

In order to constitute liens on real estate, judgments of the federal courts in Virginia need not be recorded.—United States v. Humphreys, Case No. 15,422.

The declaration in the New York statute of March 19, 1787, that no judgment shall affect land until filing of the roll and docketing, implies that a lien arises when this is done.—Koning v. Bayard, Jr., Case No. 7,924.

The entry of a judgment cannot be referred to for the purpose of supplying omissions or explaining ambiguities in the docket from which the lien arises by statute.—In re Boyd, Case No. 1,746.

The act of the circuit clerk in filing the docket transcript of a judgment is a ministerial act, and not void though done on a nonjuridical day, and the judgment creditors thereby acquired a lien upon the real estate of the judgment debtor the same as if done on any other day. Case No. 18,052 reversed.—In re Worthington, Case No. 18,051.

§ 57. Property or interest to which lien attaches.

A judgment or decree docketed in a court of the United States for the Southern district of New York is a lien on the lands of the defendant in any county of the district without the filing of a transcript.—Cropsey v. Crandall, Case No. 3,418.

A judgment rendered by a federal circuit court is a lien upon all lands of defendant within the district, without being recorded in the several counties where such lands lie.—United States v. Scott, Case No. 16,242.

A judgment rendered in a federal court is a lien from its date on all lands of defendant within the district.—Barth v. MaKeever, Case No. 1,069; Carroll v. Watkins, Id. 2,457; Lombard v. Bayard, Id. 8,469; Shrew v. Jones, Id. 12,818; United States v. Duncan, Id. 15,003.

Where the state is divided into several districts, a judgment obtained in the federal court in one district is a lien upon the defendant's real estate in all parts of the state, and plaintiff has the right to concurrent execution all over the state.—Prevost v. Gorrell, Case No. 11,400.

Act Ind. 1831, limiting judgments of the state supreme court to the counties in which they shall be entered, being passed after the act of congress of 1828 adopting the execution laws of the several states, can have no effect upon judgments of the federal courts.—Shrew v. Jones, Case No. 12,818.

A judgment lien operates only upon such property as is subject to levy and sale under legal process issued for its payment.—In re Badenheim, Case No. 716.

A judgment without process is not a lien on personalty.—In re Badenheim, Case No. 716.

The lien on lands created by a judgment depends upon the right to sue out an elegit.—Bank of United States v. Winston, Case No. 944; Shrew v. Jones, Id. 12,818.

A judgment is a lien on subsequently acquired land.—Barth v. MaKeever, Case No. 1,069; Jackson v. Bank of United States, Id. 7,131.

A permanent leasehold estate in land in Ohio is bound by a judgment against the owner.—McLean v. Rockey, Case No. 8,891.

The proceeds of the sale of an equitable title to land are equitable, and not legal, assets, and not bound by the lien of a judgment.—Law v. Law, Case No. 8,128.

A judgment at law does not overreach a prior equity of a third person, bona fide acquired for a valuable consideration.—Georgetown v. Smith, Case No. 5,347.

Where a receiver is appointed of the rents and profits in a suit to remove an incumbrance on land, so that it may be sold under plaintiff's judgment, they are in equity subject to the lien of the judgment, the same as the land itself.—United States v. Butler, Case No. 14,696.

Where the incumbrance is disposed of by settlement, plaintiff paying its amount, the land, and the rents and the profits accrued become subject to the judgment, and the latter are in equity immediately applicable.—United States v. Butler, Case No. 14,696.

A. and B. exchanged property, there being at the time a recent judgment, unknown to B., which was a lien on A.'s property, and the property for that reason was re-exchanged, the original parties being put into possession. *Held*, that a purchaser under an execution on such judgment against B.'s property had a title at law superior to the title of B. or subsequent purchasers from him.—Wolf v. Plunkett, Case No. 17,926.

An interest in lands acquired at an administrator's sale, before title is passed, is liable to the liens of judgment creditors.—In re Reynolds, Case No. 11,724.

A judgment lien does not operate upon property at the time in possession of the sheriff under attachments.—In re Badenheim, Case No. 716.

A judgment against joint debtors *held* not a lien, either at law or in equity, on real estate standing in the name of one who had not been served with process, and did not appear in the suit, though purchased with funds belonging

partly to the other debtors.—In re Hinds, Case No. 6,516.

A judgment against a railroad company in Ohio becomes a lien upon the road in the same manner as upon the land of a natural person.—Ludlow v. Clinton Line R. Co., Case No. 8,600.

The same rule obtains as to a judgment rendered in the federal circuit court for a district of Ohio.—Ludlow v. Clinton Line R. Co., Case No. 8,600.

§ 58. Date.

A judgment lien takes effect from the first day of the term.—Bank of Cleveland v. Sturges, Case No. 861; McLean v. Rockey, Id. 8,891; Sturgess v. Bank of Cleveland, Id. 13,571.

The lien of a judgment on which execution is stayed dates only from the time when execution may be sued out.—Bank of United States v. Winston, Case No. 944; Scriba v. Deane, Id. 12,559.

The lien given upon the docket of a judgment (Civ. Code Or. § 266) arises from the docketing, and not the judgment.—In re Boyd, Case No. 1,746.

In Pennsylvania the judgment operates, as against bona fide purchasers or mortgagees, only from the time of the entry.—Hurst v. Hurst, Case No. 6,931.

§ 59. Priorities.

A judgment prior in point of time is paramount to a later judgment, though the latter be first enforced, and the former is enforced by a bill in equity to which the owner of the second judgment is not made a party.—Howard v. Milwaukee & St. P. Ry. Co., Case No. 6,761.

A judgment upon a verdict, subject to the opinion of the court upon a case stated, does not relate back to the date of the verdict as against an intermediate judgment.—Bank of Metropolis v. Walker, Case No. 904.

All judgments rendered at the same term have equal liens on the realty of defendant, if execution be levied within a year.—McLean v. Rockey, Case No. 8,891.

If execution is not issued and levied within a year, the judgment is no lien as against a subsequent judgment, as to which execution was duly issued and levied.—Bank of United States v. Longworth, Case No. 923.

Judgments entered on the same day create equal liens, and the issuing of an execution on any one of them does not affect the lien of the others, and the proceeds on a sale should be distributed pro rata.—Rockhill v. Hanna, Case No. 11,980.

Lands in Indiana may be sold under a judgment of the federal circuit court notwithstanding a prior levy under a subsequent judgment of a state court.—Shrew v. Jones, Case No. 12,818.

The lien of a judgment creditor without notice, in Texas, is superior to the unrecorded deed of a vendee of the judgment debtor.—Daggs v. Ewell, Case No. 3,537.

In Texas, the lien of a mortgage, executed and recorded subsequent to a judgment, but prior to the recording of the judgment in the clerk's office, has priority over such judgment.—In re Lacy, Case No. 7,970.

By the Minnesota statute (Rev. St. p. 339, § 1), judgment creditors were put upon the same footing in respect to unrecorded deeds, as bona fide purchasers for value.—Lash v. Hardick, Case No. 8,097.

§ 60. Duration.

Levy and condemnation under an execution keep a judgment alive, and preserve the lien, without a scire facias.—United States v. Mechanics' Bank, Case No. 15,756.

State statutes limiting the duration of the lien of judgments and decrees of the state courts apply equally to those of the federal courts.—Cropsey v. Crandall, Case No. 3,418; Thompson v. Phillips, Id. 13,974.

§ 61. Suspension, revival, and discharge of lien.

The lien of the judgment on property is suspended during imprisonment on a ca. sa. in favor of other levying creditors.—Griswold v. Hill, Case No. 5,836.

Lien of judgment on real estate *held* not lost by suspension of proceedings after levy under execution.—Green v. Allen, Case No. 5,753.

The lien of a satisfied judgment cannot be revived in favor of one of the debtors, who was a surety, to the prejudice of third persons.—McLean v. Lafayette Bank, Case No. 8,888.

The lien of a dormant judgment is lost as against a mortgage executed by the judgment creditor during the continuance of the judgment lien, and a revival will not give it priority.—Tracy v. Tracy Case No. 14,128.

A covenant in a mortgage taken from a judgment debtor to suspend proceedings on the judgment until the property is regularly disposed of, and to return property levied on, does not discharge the lien of the judgment on the debtor's lands.—Scriba v. Deane, Case No. 12,559.

Where execution creditors take a mortgage on the debtor's lands, and the sheriff returns that the property was released by order of plaintiffs, the lien is destroyed, and equity will not connect the mortgage with the judgments, so as to preserve the original lien.—Scriba v. Deane, Case No. 12,559.

A judgment is not barred under Act Va. Dec. 19, 1792, where execution has been issued thereon, and returned 10 years after its date.—Irwin v. Henderson, Case No. 7,084.

XIII. JUDGMENTS IN REM.

§ 62. What constitutes.

A foreign attachment under Rev. Code Va. 1819, c. 123, is not a proceeding in rem.—Mankin v. Chandler, Case No. 9,030.

§ 63. Jurisdiction.

A state may authorize a judgment to be given against a nonresident owner of property within its jurisdiction for the claim of a citizen prior to seizure of such property, and without notice of the proceedings.—Neff v. Pennoyer, Case No. 10,083.

A decree *held* void where neither party had any interest in the land whereby the court could obtain jurisdiction to make the decree.—Lownsdale v. Portland, Case No. 8,578.

§ 64. Effect.

Personal judgment on a money demand against a nonresident not personally served with process will not affect property in another state.—Burt v. Delano, Case No. 2,211; Lincoln v. Tower, Id. 8,355.

A decree in a proceeding in rem binds all the world.—Mankin v. Chandler, Case No. 9,030.

A judgment in a suit in rem for forfeiture of a vessel is not conclusive in an action on a bond conditioned for the proper use and delivery up of the certificate of registry.—Allen v. United States, Case No. 240.

The decree of a court of admiralty on a proceeding in rem, for a forfeiture, is conclusive on all persons claiming an interest in the thing.—The Mary Anne, Case No. 9,195.

XIV. FOREIGN JUDGMENTS.

See, also, post, § 80.

§ 65. Merger and bar of cause of action.

A judgment of a state court extinguishes the original cause of action when such judgment is

considered in another state.—Green v. Sarmiento, Case No. 5,760.

Otherwise where judgment was obtained in a foreign country.—Lyman v. Brown, Id. 8,627.

A foreign decree, unappealed from, refusing an injunction and dismissing a bill in equity to restrain the infringement of an alleged trade-mark, will bar a suit in this country for the same purpose by the same complainants against the agent of the defendant in a foreign suit.—Lea v. Deakin, Case No. 8,154.

A foreign judgment in a suit at law against the vessel owner for damages for a collision is no bar to a suit in rem in admiralty in this country; but such judgment is conclusive as to the extent of the damages.—The East, Case No. 4,251.

A dismissal for want of prosecution is not a bar to a subsequent proceeding for the same cause of action in another state.—Sarchet v. The General Isaac Davis, Case No. 12,357.

§ 66. Conclusiveness of judgment and collateral attack.

A judgment in a state court is conclusive in every other state.—Green v. Sarmiento, Case No. 5,760; Jacquette v. Hugunon, Id. 7,169; Owens v. Gotzian, Id. 10,634; Sarchet v. The General Isaac Davis, Id. 12,357.

But such judgment is not conclusive in a suit instituted upon it in another state.—Peck v. Williamson, Case No. 10,896.

Where a judgment is reversed on appeal, and a new trial granted, unless plaintiff consent to reduce the same to a certain amount, but no new judgment is entered, the judgment of the appellate court is not conclusive in another jurisdiction.—In re Shelbourne, Case No. 12,745.

The sentence of a foreign court, acting in rem in cases of revenue, seizure, and prize, is conclusive.—Magoun v. New England Marine Ins. Co., Case No. 8,961; Pierce v. The Alberto, Id. 11,142; Peters v. Warren Ins. Co., Id. 11,035; Sheaff v. Seventy Hogsheads and Nine Barrels of Sugar, Id. 12,730.

A sentence of a foreign court of admiralty is not conclusive in our courts to falsify a warranty of neutrality, but is admissible as evidence.—Calbreath v. Gracy, Case No. 2,296.

To hold a sentence of a foreign court in rem conclusive on the parties, personal or public notice to the parties and proper judicial proceedings must appear.—Bradstreet v. Neptune Ins. Co., Case No. 1,793.

An admiralty court is not concluded by an adjudication of a foreign court, not of admiralty, upon principles not recognized within the jurisdiction of the admiralty court, though professing to decide according to the law thereof.—Lang v. Holbrook, Case No. 8,057.

A judgment against the plaintiff in an action does not preclude the court of another state from examining the question whether the suit was in fact brought by the plaintiff herself, or by some other persons in her name and without her knowledge or consent.—Wood v. Ward, Case No. 17,965.

Slaves being without capacity to sue or defend, no valid judgment can be rendered against them, and a judgment of a sister state in a suit for freedom against plaintiff will not estop her from contesting the question in a subsequent suit.—Wood v. Ward, Case No. 17,966.

A judgment in a suit for freedom against a person who was kidnapped into slavery will not estop the plaintiff from a re-examination of the same question in a subsequent suit against the kidnapping party, as a valid judgment cannot be rendered against a slave.—Wood v. Ward, Case No. 17,966.

In a suit on a judgment of another state, the court cannot look to the merits, though it may be founded on an illegal contract.—Dawson v. Daniel, Case No. 3,668.

A judgment against the principal debtor in a foreign attachment is not evidence in another state of a debt due.—Ricketts v. Henderson, Case No. 11,806.

A judgment of a foreign court is subject to impeachment for want of jurisdiction.—Bradstreet v. Neptune Ins. Co., Case No. 1,793; Burt v. Delano, Id. 2,211; Lincoln v. Tower, Id. 8,355; Warren Mfg. Co. v. Etna Ins. Co., Case No. 17,206.

And is subject to impeachment in cases of fraud.—Bradstreet v. Neptune Ins. Co., Case No. 1,793; Magoun v. New England Marine Ins. Co., Id. 8,961; Warren Mfg. Co. v. Etna Ins. Co., Id. 17,206.

In a suit on a judgment of another state, whatever pleas would be good to a suit thereon in such state, and none other, can be pleaded.—Warren Mfg. Co. v. Etna Ins. Co., Case No. 17,206; Barras v. Bidwell, Id. 1,039.

In an action at law in the federal court, or a judgment of another court, defendant cannot set up equitable defenses.—Montejo v. Owen, Case No. 9,722.

Facts, in opposition to the record of a judgment obtained in one state, cannot be alleged to contradict the judgment, in an action brought upon it in another state.—Field v. Gibbs, Case No. 4,766.

Nil debet cannot be pleaded to action on judgment obtained in another state.—Armstrong v. Carson, Case No. 543; Westerwelt v. Lewis, Id. 17,446.

Nil debet is not a good plea to an action of debt in the District of Columbia on a judgment of a Kentucky court. But defendant may, by leave of court, withdraw it, and plead nul tiel record, upon terms.—Short v. Wilkinson, Case No. 12,810.

Nil debet is not a good plea to an action brought in the federal court in one state on a judgment obtained in the federal court of another state.—Reed v. Ross, Case No. 11,652.

In an action upon a judgment of another state, the record recital of service of process is not conclusive.—Hunt v. Woodward, Case No. 6,901; Logansport Gaslight & Coke Co. v. Knowles, Id. 8,467; Arnott v. Webb, Id. 562. But see Field v. Gibbs, Case No. 4,766.

But the burden is in all cases upon defendant to overcome the recital by competent evidence.—Hunt v. Woodward, Case No. 6,901.

In a suit on a judgment rendered in another state, the statute of limitations of the state where the suit is brought cannot be pleaded.—Moore v. Paxton, Case No. 9,772a.

XV. ASSIGNMENT.

§ 67. Assignability in general.

A decree, though not assignable at law, is transferable for valuable consideration in equity.—Coates v. Muse, Case No. 2,918.

Judgments and decrees are not assignable at law, so as to vest the legal title in the assignee; but the latter takes only an equitable interest, subject to the equities attaching to them in the hands of the assignor.—United States v. Samperyac, Case No. 16,216a.

§ 68. Mode of assignment.

Judgments may be assigned otherwise than of record, but payment to the assignor before notice of the assignment is valid.—Cavender v. Grove, Case No. 2,530.

In Indiana, judgments are assignable by indorsements on the record attested by the clerk.—Cavender v. Grove, Case No. 2,530.

§ 69. Effect.

A., B., and C., in that order, obtained judgments against D. A.'s judgment was paid by D., who procured its assignment to his hired man, and again caused it to be assigned to C., who had no notice of its payment, but who paid nothing therefor. *Held* that, as against B., C. was not a bona fide holder for a valuable consideration, and a sale under A.'s judgment was void.—Lee v. Rogers, Case No. 8,201.

XVI. ENFORCEMENT AND REVIVAL.

Enforcement by creditors' suit, see "Creditors' Suit."
—— by mandamus, see "Mandamus," § 4.
—— in admiralty, see "Admiralty," § 2.
—— in ejectment, see "Ejectment," § 20.
Jurisdiction to compel payment, see "Courts," § 19.
Proof in bankruptcy, see "Bankruptcy," § 388.
Sales under judgment, see "Judicial Sales."

§ 70. Enforcement.

The date of a decision is the time when it is finally settled and approved, and ready to be promulgated.—American Wood-Paper Co. v. Glen's Falls Paper Co., Case No. 321a.

The enforcement of a judgment is regulated by the laws of the state where it is recovered, though the cause of action is a contract made in another state.—Mathuson v. Crawford, Case No. 9,279.

A judgment at law will not be enforced in equity for a greater amount than is equitably due the creditor.—Bryant v. Hunter, Case No. 2,068.

Equity will not lend its aid to enforce a judgment at law obtained on a prize ticket in a lottery, drawn by mistake in a place not authorized by law.—Smith v. Chesapeake & O. Canal Co., Case No. 13,024.

§ 71. Revival.

Execution issued more than a year and a day after judgment which has not been revived by sci. fa., *held* void.—Azcarati v. Fitzsimmons, Case No. 690.

A decree in a chancery attachment after the expiration of a year and a day must be revived by sci. fa. before execution can be had.—Veitch v. Farmers' Bank, Case No. 16,910.

Judgments may be kept alive by taking out a fi. fa. within a year and a day, to lie in the office, and so from year to year.—Ott v. Murray, Case No. 10,615.

Where a levy under a fi. fa. was quashed, and afterwards defendant died, *held*, that the judgment should be revived against his executors before a new fi. fa. could issue.—Wilson v. Hurst, Case No. 17,808.

After the lapse of a year, execution cannot issue in the District of Columbia upon a judgment obtained in Maryland without a sci. fa.—McDonald v. White, Case No. 8,769.

Where plaintiff's lessor dies after judgment in ejectment, the execution may issue in the name of the lessee, without the necessity of a sci. fa.—Penn v. Klyne, Case No. 10,936.

Where an execution is countermanded at defendant's request and for his accommodation, plaintiff may have a new execution after a year and a day, without a sci. fa.—Phillips v. Lowndes, Case No. 11,103.

Revival of judgment by scire facias. Va. Act 1792.—Alston v. Munford, Case No. 267.

St. 13 Edw. I. c. 45, which gives a sci. fa. to revive judgments in personal actions, *held* still in force in Virginia.—Offutt v. Henderson, Case No. 10,451.

A sci. fa. is not necessary to revive a judgment if a fi. fa. has been issued and returned.—Johnson v. Glover, Case No. 7,385.

In Pennsylvania a judgment must be revived every five years, by sci. fa., to preserve its lien, as against bona fide purchasers or mortgagees.—Hurst v. Hurst, Case No. 6,931.

Judgment entered on penalty of bond of indemnity may be enforced by sci. fa.—Bergen v. Williams, Case No. 1,340.

§ 72. Proceedings to revive.

Where the judgment is revived between the original parties, it is not necessary to issue a sci. fa. to purchasers from defendant.—Jackson v. Bank of United States, Case No. 7,131.

To a scire facias against an executor to revive a judgment obtained against his testator, the defendant cannot plead that there are terre-tenants whose lands are also bound by the judgment, so as to oblige the plaintiff to sue out a scire facias against them.—Wilson v. Watson, Case No. 17,847.

Under the plea of nul tiel record to sci. fa. on a judgment entered on the penalty of an indemnity bond, the judgment only is put in issue.—Bergen v. Williams, Case No. 1,340.

Under a plea of payment to a sci. fa. issued to revive a judgment, defendant is entitled to a credit for real estate conveyed to plaintiff.—United States v. Thompson, Case No. 16,487.

The terre-tenants warned may plead in delay of execution that there are other terre-tenants in the same county not summoned.—Mandeville v. McDonald, Case No. 9,013.

Where the statute of limitations has run against a judgment, it may be pleaded to a sci. fa. to revive the judgment.—Simpson v. Lassalle, Case No. 12,882.

Act Va. Dec. 19, 1792, § 5, limiting the time of issuing writs of sci. fa. in certain cases, is an act of limitations, and must be pleaded.—Offutt v. Henderson, Case No. 10,451.

Such act does not apply to a case where an execution has issued and been returned.—Offutt v. Henderson, Case No. 10,451.

To a sci. fa. to revive a judgment in ejectment for the term and damages, defendant cannot plead a conveyance by plaintiff's lessor subsequent to the judgment.—Penn v. Klyne, Case 10,936.

In such case a sci. fa. and a hab. fac. must issue in the name of the plaintiff in the original judgment.—Penn v. Klyne, Case No. 10,936.

On a sci. fa. to revive a judgment, defendant cannot avail himself of matters of defense which occurred previous to the original judgment.—United States v. Thompson, Case No. 16,487.

The release by a devisee and heir of his equitable interest in a bond taken by an executor from his coexecutor, conditioned to pay a certain sum for the benefit of the heirs, is admissible, in evidence on sci. fa. to revive a judgment on such bond, to show payment in part.—Campbell v. Hamilton, Case No. 2,359.

A payment which might have been pleaded to the original scire facias to revive a judgment cannot be given in evidence on a second scire facias.—Wilson v. Hurst, Case No. 17,809.

A sci. fa. to revive a judgment, if conformable to the judgment, cannot be amended.—Brown v. Gilles, Case No. 2,007.

A scire facias to revive a judgment is not a new action.—Fitzhugh v. Blake, Case No. 4,840.

The remedy for a defective return of a sci. fa. against terre-tenants is a motion to quash the return. But such return may be amended.—Mandeville v. McDonald, Case No. 9,013.

If some of the terre-tennants named in the sci. fa. are returned "nihil," an alias sci. fa. must issue.—Baker v. French, Case No. 767.

Upon a sci. fa. to revive a judgment the citizenship of the parties thereto is immaterial.—Penn v. Klyne, Case No. 10,936.

XVII. PAYMENT, SATISFACTION, AND DISCHARGE.

When discharged in bankruptcy, see "Bankruptcy," § 632.

§ 73. Persons to whom payment may be made.

Payment to the judgment creditor before notice of an assignment of the judgment is valid.—The Lulie D., Case No. 8,602.

Where the debtor hears rumors of an assignment of the judgment, not understanding who was the assignee, and applies to the assignee for information on that point, who declines to tell him, he may then safely pay the original judgment creditor.—The Lulie D., Case No. 8,602.

§ 74. Payment of erroneous judgment.

Money paid on an erroneous judgment may after reversal be recovered back in an action for money had and received. Such recovery may be had though a venire de novo is awarded.—Bank of Washington v. Bank of United States, Case No. 947; Same v. Neale, Id. 951.

§ 75. What constitutes satisfaction.

Discharge of the debtor from imprisonment without the consent and against the will of the plaintiff, under a state law reserving to the creditors certain rights as to future-acquired property, will not operate as a satisfaction of the judgment.—Griswold v. Hill, Case No. 5,836.

The recovery of a judgment in one court in an action on a judgment of another court is no satisfaction thereof.—Griswold v. Hill, Case No. 5,836.

Where a judgment for money was on condition that plaintiff indemnify defendant against certain claims, which he refused to do, and defendant paid claims in excess of the judgment, *held*, that satisfaction must be entered.—Medford v. Dorsey, Case No. 9,390.

An administrator who gives a mortgage to secure a decree requiring him to pay money, and afterwards sells the land, the mortgage not having been recorded, is liable on the mortgage, and not on the decree.—Coates v. Muse,. Case No. 2,918.

Assignee of judgment who advanced money to one of several joint debtors to pay the same, and took assignment as security, cannot maintain action against other debtors.—Arnott v. Webb, Case No. 562.

A forthcoming bond which is forfeited is a satisfaction of the judgment on which the execution issued, and no further proceedings can be founded thereon.—United States v. Graves, Case No. 15,250.

Where defendants, by the misrepresentation of their agent, procured the deputy clerk to receive an assignment of a judgment and depreciated paper in payment of a judgment, for which he gave a receipt, the plaintiffs are not bound by it, and may issue their execution.—Welddes v. Edsell, Case No. 17,375.

§ 76. Agreements for satisfaction.

Matter of defense, though not pleaded in action in which judgment was recovered, is, if the subject of cross action against party recovering such judgment, a sufficient consideration for agreement to satisfy the judgment.—Cavender v. Grove, Case No. 2,530.

Agreement for full satisfaction of judgment in consideration of payment of less than amount of judgment is not a full satisfaction.—Cavender v. Grove, Case No. 2,530; The Lulie D., Id. 8,602.

A release of a judgment procured by false representations of the debtor's interest in real estate will be set aside, and the judgment revived, if the creditor acts with due diligence, and tenders back the amount received.—Van Renssellaer v. Kelly, Case No. 16,873.

A compromise by complainant with some of several judgment debtors as to their portion of the debt does not release the others.—Molyneaux v. Marsh, Case No. 9,703.

§ 77. Entry of satisfaction.

Where a bond running to the United States is taken in satisfaction of a judgment in which a special agent is entitled to a share, and judgment is afterwards obtained upon such bond, the United States may enter satisfaction of such judgment, without payment made, and without consent of the special agent.—United States v. Bacon, Case No. 14,492.

On a motion to enter satisfaction burden is on judgment creditor who executed satisfaction of judgment to show that it was void.—Cavender v. Grove, Case No. 2,530.

Satisfaction of a judgment which is the foundation of a judgment obtained in another jurisdiction will not be entered of record where the creditor is entitled to continue the latter in force under the local law.—Griswold v. Hill, Case No. 5,836.

§ 78. Vacating entry of satisfaction.

The purchaser of all the property of a railroad under a trust deed junior to judgment liens held by him, *held* entitled to maintain a bill to set aside satisfactions of the judgments entered by him, where the trust deed and his purchase were subsequently declared void.—Hay v. Alexandria & W. R. Co., Case No. 6,254; Same v. Washington & A. R. Co., Id. 6,255a.

XVIII. ACTIONS ON JUDGMENTS.

§ 79. Domestic judgments.

A provision of a state statute requiring leave of court to enable a party to sue upon a judgment rendered in any court of the state is not applicable to the federal circuit court.—Phelps v. O'Brien County, Case No. 11,078.

In an action in the federal court on a state court judgment of another state, the statute of limitation of the place of the action may be pleaded in bar.—Randolph v. King, Case No. 11,560.

The statute of limitations of the state where a judgment was obtained cannot be pleaded to a suit thereon in another state.—Egberts v. Dibble, Case No. 4,307.

The Ohio statute of limitations barring actions founded upon a specialty or any agreement, contract, or promise in writing after 15 years, and all other actions after 4 years, is inapplicable to a judgment.—Todd v. Crumb, Case No. 14,073.

Cause of action to recover back money paid on an erroneous judgment arises upon reversal, although a venire de novo is ordered, and the statute commences to run from such time.—Bank of Washington v. Neale, Case No. 951.

The limitation of 12 years in Act Md. 1715, c. 23, § 6, does not apply to judgments which have been revived by sci. fa. within the 12 years.—Digges v. Eliason, Case No. 3,904.

Sufficiency of plea in action on an assigned judgment.—United States v. Bruan, Case No. 14,675.

Plea of nul tiel record not allowed after plea of not guilty and issue, to debt on a judgment, suggesting a devastavit.—Bastable v. Wilson, Case No. 1,097.

The plea of nul tiel record brings up the validity of the judgment and the description of it, as set forth in the declaration.—Jacquette v. Hugunon, Case No. 7,169.

Upon the plea of nul tiel record to debt on a judgment of another state, the seal of the court must be annexed to the record itself. The certificate is no part of the record.—Turner v. Waddington, Case No. 14,263.

A record which does not contain a writ, or show a service, nor an appearance of the party, nor any issue nor any act done by attorney, is not admissible, although it states that "the parties appeared by their attorneys."—Buford v. Hickman, Case No. 2,114a.

§ 80. Foreign judgments.

A judgment on an attachment, being a proceeding in rem, will not support an action out of the state.—Thompson v. Emmert, Case No. 13,953.

French law suspending suits for debts contracted for negroes *held* to apply to an action between French subjects on a foreign judgment for the purchase price of negroes.—Conframp v. Bunel, Case No. 3,098.

A judgment in France, based upon a local law designed to regulate the domestic relations of residents, and to protect the public against pauperism, is not enforceable by action in this country.—De Brimont v. Penniman, Case No. 3,715.

A judgment founded upon the statutory obligation to make an allowance to a son-in-law in need comes within such rule.—De Brimont v. Penniman, Case No. 3,715.

A state may pass a law barring the right of action, from lapse of time, on the record of a judgment of another state.—Randolph v. King, Case No. 11,560.

Where a judgment is superseded in the court in which rendered, action on the judgment in another state will be stayed.—Dawson v. Daniel, Case No. 3,668.

An averment that the court which rendered the judgment was a court of general jurisdiction, duly created by the state laws, is sufficient on demurrer, without alleging that it had jurisdiction of the person of defendant, either by service or process, appearance, or otherwise.—Tenney v. Townsend, Case No. 13,832.

A general averment that the parties declared against were defendants to the suit in which the decree was rendered is sufficient on demurrer.—Sevier v. White, Case No. 12,681.

Payment on a judgment cannot be proved under the plea of nul tiel record.—Tunstall v. Robinson, Case No. 14,238a.

A judgment of a United States court is admissible, when authenticated, as provided for judgments of state courts. 1 Stat. 122.—Buford v. Hickman, Case No. 2,114a.

Nil debet is no plea to debt on a judgment of another state.—Bastable v. Wilson, Case No. 1,097; Burnham v. Webster, Id. 2,178.

XIX. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 81. Necessity of pleading and proving prior adjudication.

A prior judgment between parties not nominally the same must be alleged and proved to be between privies in interest, or it is no bar.—Greely v. Smith, Cases Nos. 5,749, 5,750.

A prior decree in admiralty, when set up as a bar, should be given in evidence, and not be made the basis of a summary motion to prevent further hearing.—Reed v. The Fanny, Case No. 11,645a.

§ 82. Sufficiency of plea.

A prior judgment of nonsuit between the same parties on the same subject must be alleged to have been on the merits or the point in controversy, in order to prevent another recovery.—Greely v. Smith, Cases Nos. 5,749, 5,750.

In a plea of a former judgment, in an action at law, it is a sufficient description of the cause of action in the first action to allege that it was identical with that stated in the complaint in the action pending.—Wythe v. Salem, Case No. 18,121.

A former judgment is not pleaded with a profert, but a profert is tendered in reply to the plea or replication of nul tiel record.—Burnham v. Webster, Case No. 2,178.

In pleading a record, its precise words need not be observed, but the record produced must conform strictly to the plea in matters of description, though it is not necessary that they should have been stated.—Whitaker v. Bramson, Case No. 17,526.

A plea of a foreign judgment must either contain an allegation of jurisdiction, or set out sufficient of the proceedings to show it.—Burnham v. Webster, Case No. 2,178.

§ 83. Issues and proof.

Although a party under a plea of former recovery be precluded from giving the record in evidence because of variance, yet he may avail himself of it under the general issue.—Whitaker v. Bramson, Case No. 17,526.

§ 84. Admissibility of evidence.

A record of a court of general jurisdiction, collaterally introduced as evidence, and showing on its face jurisdiction in that court, cannot be contradicted by parol evidence.—Lathrop v. Stewart, Case No. 8,112.

Proof outside of the record is not admissible to contradict it where it would affect the rights of third persons acquired under the decree.—Riggs v. Collins, Case No. 11,824.

Where a foreign judgment is pleaded in bar to a suit on a note, plaintiff may show that the note was withdrawn, in the trial abroad, and not passed upon by the jury, where such evidence does not contradict the recitals of the record.—Burnham v. Webster, Case No. 2,179.

A judgment against "James R." *held* admissible in evidence against "Joseph R." on proof that notice of the suit was given the latter, and that he attended the taking of depositions therein.—Stevelie v. Read, Case No. 13,389.

JUDICIAL NOTICE.

In civil actions, see "Evidence," §§ 1–8.
In criminal prosecutions, see "Criminal Law," § 51.

JUDICIAL POWER.

See "Constitutional Law," § 2; "Courts," § 2; "Extradition," § 3.

JUDICIAL SALES.

§ 1, Confirmation. § 2, Setting aside. § 3, Title, rights, and liability of purchaser and his sureties. § 4, Bonds for purchase price. § 5, Collateral attack of sale. § 6, Resale.

Deeds as evidence, see "Evidence," § 43.
Effect of, on maritime lien, see "Maritime Liens," §§ 44, 45.
Of property in admiralty, see "Admiralty," §§ 78, 109.
—— of decedent, see "Executors and Administrators," §§ 37–39.
—— of infant, see "Guardian and Ward," § 7.
On execution, see "Execution," §§ 14–20.

§ 1. Confirmation.
A sale under the direction of a court of chancery is not final until a report is made to and confirmed by the court.—Smith v. Arnold, Case No. 13,004.

§ 2. Setting aside.
A judicial sale will be set aside by the court if not fairly made.—Bank of Alexandria v. Taylor, Case No. 854.

Where no fraud or unfairness is alleged, a court will not set aside a judicial sale on the ground of inadequacy of price.—West v. Davis, Case No. 17,422.

§ 3. Title, rights, and liability of purchaser and his sureties.
A purchaser at a chancery sale of lands becomes a party to the suit, and is subject to the orders of the court.—Smith v. Arnold, Case No. 13,004.

A sale by a trustee under a decree of court will not pass title to land in the actual adverse possession of a third person at the time of the decree.—Carroll v. Dowson, Case No. 2,452.

The court will presume, in favor of titles derived under judicial proceedings, that every act necessary to confer jurisdiction was done unless the record shows that it was not done.—Kibbe v. Dunn, Case No. 7,753.

A court of equity which decrees a sale of real estate has authority, in Washington county, D. C., to cause the purchaser under its decree to be put in possession by a writ of injunction, and, if that be disobeyed, by a writ of habere facias possessionem.—Oneale v. Caldwell, Case No. 10,515.

The purchaser at a judicial sale, who has paid the money to the judgment creditor, cannot, on discovering a defect of title, call on him for repayment, but his remedy, if any, is against the judgment debtor.—United States v. Duncan, Case No. 15,003.

A purchaser on a sale under a decretal order in equity will not be let off from his purchase by submission to a forfeiture of his deposit.—Wood v. Mann, Case No. 17,954.

The principal and surety in a covenant for payment of the purchase price on a master's sale in chancery have no claim upon the rents and profits of the estate except from the time when the conveyance is completed.—Wood v. Mann, Case No. 17,954.

In the case of a covenant with surety to pay the purchase money given by the purchaser on a sale under a decretal order, a court of equity will by attachment compel performance as against both principal and surety.—Wood v. Mann, Case No. 17,954.

The surety in a covenant by the purchaser at a sale under a decretal order to pay the purchase money cannot take any exceptions to the title where the principal has failed to do so.—Wood v. Mann, Case No. 17,954.

Where the purchaser neglects to pay the purchase money, and suffers the property to be sold for taxes, the court, upon the petition of the trustee, will order so much of it to be resold as will pay the taxes and redeem the residue.—Hearne v. Barry, Case No. 6,303.

§ 4. Bonds for purchase price.
Where bonds for deferred portions of the purchase price are made payable to a marshal of the court, he has a right to collect them, and will be considered as a trustee for the creditor.—Wallis v. Thornton, Case No. 17,111.

But he has no right to discount legal interest, and receive only a part of the debt.—Wallis v. Thornton, Case No. 17,111.

Bonds given for deferred installments of the purchase price are within the terms of the decree directing the officer to bring the "proceeds" of sale into court.—Wallis v. Thornton, Case No. 17,111.

§ 5. Collateral attack of sale.
The regularity of proceedings under which a vessel was sold cannot be inquired into in trover in another district court for her possession.—Barker v. Parkenhorn, Case No. 993.

§ 6. Resale.
On the resale of lots on default of the purchaser, some bringing more and some less than at the first sale, the indorser on the purchase-money notes is entitled to the surplus of one to make good the deficiency of the others.—Smith v. Arden, Case No. 13,003.

JURISDICTION.

Of particular courts, see "Courts."
Of United States, see "United States," § 2.
See further, references under "Courts."

JURY.

§ 1, Right to trial by jury—In general. § 2, —— Civil cases. § 3, —— Criminal cases. § 4, —— Waiver of right. § 5, Qualification of jurors and exemptions. § 6, Drawing and selecting venire—Statutory provisions. § 7, —— Manner of drawing or selecting. § 8, —— Number. § 9, —— Time of drawing. § 10, Summoning talesmen. § 11, Second venire. § 12, Discharging jurors. § 13, Compensation. § 14, Fines for absence. § 15, Competency of jurors—Relationship to parties. § 16, —— Formation and expression of opinions upon merits. § 17, —— Service on prior or similar action or prosecution. § 18, —— Opposition to punishment prescribed for offense. § 19, —— Interest as taxpayer or resident. § 20, —— Alienage. § 21, Challenge to the array. § 22, Challenge for cause—Nature, sufficiency, and right of challenge. § 23, —— Time. § 24, —— Trial and evidence. § 25, Peremptory challenges—Right to challenge. § 26, —— Number of challenges. § 27, —— Time and order of challenge. § 28, Impaneling for trial. § 29, Swearing jury.

See, also, "Embracery"; "Grand jury."
Competency of jurors as witnesses, see "Witnesses," § 25.
Custody and conduct, see "Criminal Law," § 96; "Homicide," § 9; "Trial," § 21.
Disqualification of as ground of new trial, see "Criminal Law," § 101; "New Trial," § 6.
Impeaching verdict or finding by jurors, see "New Trial," § 22.
Instructions in civil actions, see "Trial," §§ 16–20.
—— in criminal prosecutions, see "Criminal Law," §§ 94, 95.
Misconduct as ground of new trial, see "Criminal Law," § 101.
Questions for jury in civil actions, see "Trial," § 12.
—— in criminal prosecutions, see "Criminal Law," § 93.
Taking case or question from jury at trial, see "Trial," §§ 12–15.
Trial by jury in admiralty, see "Admiralty," § 98.
—— in bankruptcy, see "Bankruptcy," § 579.
—— in equity, see "Equity," § 102; "Patents," § 262.
Verdict in civil actions, see "Trial," §§ 22, 23.
—— in criminal prosecutions, see "Criminal Law," §§ 97–99.

§ 1. Right to trial by jury—In general.
The provision securing the right of trial by jury applies only to criminal cases and civil cases where the right is to be tried at law; not to mere collateral questions of damages, when no suit is pending and the rights of both

parties admitted.—Bonaparte v. Camden & A. R. Co., Case No. 1,617.

§ 2. —— Civil cases.

The constitutional right of trial by jury applies only to actions at common law. In suits in equity an inquiry by the jury depends upon the discretion of the court.—Ely v. Monson & B. Mfg. Co., Case No. 4,431; Motte v. Bennett, Id. 9,884.

Proceeding in rem in a case of admiralty and maritime jurisdiction is not a suit at common law, and does not require jury trial.—Clark v. United States, Case No. 2,837.

Denial of a jury, by a justice, in a case involving over $10, is an error for which his judgment will be vacated.—Miles v. James, Case No. 9,543a.

The federal courts cannot deprive parties of the right of trial by jury by referring the issues of fact to referees.—United States v. Rathbone, Case No. 16,121.

In a proceeding in the federal district court against property seized as forfeited under the internal revenue laws, to which a claim is interposed, the claimant has a constitutional right to a trial by a jury.—United States v. One Hundred and Thirty Barrels of Whisky, Case No. 15,938; Same v. Fourteen Packages of Pins, Id. 15,151.

A suit to recover the penalty against the master of the vessel for the importation of merchandise not included in the manifest is a suit at common law, and he is entitled to a trial by jury.—United States v. The Queen, Case No. 16,107.

In an action of tort in the federal court, where defendant suffers a default, plaintiff has no constitutional right to have the damages assessed by a jury, but such assessment may be made by the court.—Raymond v. Danbury & N. R. Co., Case No. 11,593.

§ 3. —— Criminal cases.

The legislature cannot make the right to a trial by jury, in a criminal case, dependent on giving a bond, with surety, for the payment of the penalty and costs.—Greene v. Briggs, Case No. 5,764.

Act June 17, 1870, establishing a police court in the District of Columbia, is unconstitutional in so far as it provides for a trial of felonies without a jury.—In re Dana, Case No. 3,554.

§ 4. —— Waiver of right.

The right to a trial by jury is secured by the constitution of the United States, and every reasonable presumption will be made against the waiver of such right.—United States v. Rathbone, Case No. 16,121.

The constitutional right to trial by jury may be waived by the party.—United States v. Rathbone, Case No. 16,121.

A jury may be waived in a civil case in the circuit court, on the filing of a stipulation with the clerk.—Hearn v. Equitable Safety Ins. Co., Case No. 6,299.

The provisions of Act March 3, 1865, as to waiving a jury, do not extend to district courts.—Blair v. Allen, Case No. 1,483.

§ 5. Qualification of jurors and exemptions.

Qualifications of jurors in the circuit court for the District of Columbia sitting in Alexandria county.—Young v. Marine Ins. Co., Case No. 18,162.

The disqualification of grand and petit jurors prescribed by Rev. St. § 820, is absolute, and not discretionary.—United States v. Hammond, Case No. 15,294.

An alien cannot be a petit juror in the District of Columbia, because he cannot be a freeholder.—United States v. Johnston, Case No. 15,490.

A juror cannot object to serve because he is an alien.—Lingan v. Marbury, Case No. 8,371.

See, also, post, § 15.

§ 6. Drawing or selecting venire—Statutory provisions.

See, also, post, § 28.

The provision that jurors shall be drawn from such parts of the district as the court shall direct (Act Sept. 24, 1789, § 29) is not repealed by Act July 20, 1840.—United States v. Stowell, Case No. 16,409.

Jurors for the federal courts may be selected by the national officers as nearly as may be in the same manner as they are selected by the state officers, under Act July 20, 1840.—United States v. Gardner, Case No. 15,187.

In the designation of jurors in the federal courts, a minute adherence to the state practice on that subject is not required by Act July 20, 1840.—United States v. Collins, Case No. 14,837; Same v. Tallman, Id. 16,429; Same v. Pike, Id.

As to what is a substantial compliance with the state practice in the selection of jurors.—United States v. Collins, Case No. 14,837.

Act June 1, 1872, declaring that the federal courts shall conform as near as may be to the practice, pleadings, and modes, and forms of proceeding prevailing in the state courts, has no reference to the designation or selection of jurors.—United States v. Gardner, Case No. 15,187.

The state court practice in summoning jurors, does not become the practice of the federal courts until expressly adopted.—Alston v. Manning, Case No. 266.

In forming a jury the federal court need not adopt the mode required by the state laws, when, in the opinion of the court, it is impracticable to do so.—United States v. Price, Case No. 16,088.

The state regulations for the procurement of grand and petit jurors to serve in the federal courts, as well as their qualifications and exemptions, are adopted by Acts Sept. 24, 1789, § 29; May 13, 1800; July 20, 1840.—United States v. Reed, Case No. 16,134.

§ 7. —— Manner of drawing or selecting.

The rule of the circuit court for the Southern district of New York of Nov. 11, 1867, in regard to the designation and selection of jurors, is a proper provision.—United States v. Tallman, Case No. 16,429; Same v. Pike, Id.

The deputy marshal and deputy clerk are competent officers to superintend the drawing of jurors, and certify the names drawn to the clerk and marshal.—United States v. Matthews, Case No. 15,741b.

A rule adopted requiring the clerk and marshal to select jurors from the state at large, and draw the names from the box to be inserted in the venire.—United States v. Woodruff, Case No. 16,758.

The national legislature has constitutional power to prescribe the qualifications of jurors, and the manner in which they shall be selected and summoned. It may make the judicial system of the United States complete for the independent exercise of all its functions.—Charge to Grand Jury, Treason, Case No. 18,274.

Where the local law requires jury ballots to contain the names, additions, etc., of jurors, a ballot or panel giving only an initial letter of the Christian name is good ground of challenge.—United States v. Matthews, Case No. 15,741a.

The middle letter of a name is not regarded in New York as an essential part of the name; and a mistake therein is no ground of objection to a juror, where his residence and occupation are correctly given, and there is no claim that the prisoner has been misled.—United States v. Matthews, Case No. 15,741a.

Proper practice in case of a loss by the marshal of a special jury list struck by the parties.—Hall v. Perott, Case No. 5,942.

§ 8. —— Number.

The number of jurors to be selected for the federal courts is left to the discretion of the court, to be determined by rule.—United States v. Gardner, Case No. 15,187.

Act Sept. 24, 1789, c. 20, § 29, in referring to the state laws, applies only to the mode of selecting jurors, and not to the number to be summoned.—United States v. Dow, Case No. 14,990; Same v. Insurgents, Id. 15,443.

The number of jurors to be summoned in such case is to be determined under the common law, by a consideration of all the circumstances.—United States v. Insurgents, Case No. 15,443.

§ 9. —— Time of drawing.

It is no objection to the verdict that the venire was issued and served before the indictment was returned, where the panel was returned for the trial of all causes pending at the term.—United States v. Cornell, Case No. 14,868.

§ 10. Summoning talesmen.

Court has power to order a tales in special jury cases.—Anonymous, Case No. 443.

Under Rev. St. § 804, persons may be accepted as "bystanders" after exhaustion of the panel, though not present when summoned by the marshal, where they appear at the time they are returned as present, and their names are placed on the panel, and their ballots in the wheel.—United States v. Loughery, Case No. 15,631.

§ 11. Second venire.

Under Act July 20, 1840, the federal courts may, in case of deficiency of jurors, order a second venire.—United States v. Matthews, Case No. 15,741b.

Before a jury is made up, incompetent jurors, who have been summoned, may be discharged, and others summoned in their places.—United States v. Dickinson, Case No. 14,957a.

§ 12. Discharging jurors.

A juror who has a case at issue at the same term will be discharged.—Case of Claggett, Case No. 2,779.

After the jury is sworn in a capital case, and the cause has been opened, the court, without the prisoner's consent, cannot discharge a juror at his own request.—United States v. Randall, Case No. 16,117.

Where a juror is taken ill during the opening address in a civil action, he may be discharged, and another drawn from the panel in his stead.—Foote v. Silsby, Case No. 4,916.

Effect of discharge, see "Criminal Law," § 34.

§ 13. Compensation.

If the verdict be below the jurisdiction of the court, the jurors are not entitled to their fees.—Skinner v. McCaffrey, Case No. 12,924.

Jurors living at a distance, and not receiving mileage at adjournment, are entitled to a per diem for those days during which the jury stands adjourned, as well as for those to which it stands adjourned and on which the jurors appear and answer to their names.—Parker v. Kempton, Case No. 10,741.

§ 14. Fines for absence.

The court will at a subsequent term order a fine against an absent juror to be struck out, where the clerk neglected to enter a similar order made at a previous term.—United States v. Smith, Case No. 16,334.

Jurors escaping from their room may be fined for their contempt.—Offutt v. Parrott, Case No. 10,453.

§ 15. Competency of jurors—Relationship to parties.

See, also, ante, § 5.

In an action against an insurance company a nephew of a stockholder is not competent.—Young v. Marine Ins. Co., Case No. 18,163.

§ 16. —— Formation and expression of opinions upon merits.

Persons who have deliberately formed and delivered an opinion on the guilt of an accused are disqualified to serve as jurors.—United States v. Burr, Case No. 14,692g; Same v. Wilson, Case No. 16,730.

A man must not only have formed, but declared, an opinion, to disqualify him as a juror.—United States v. Burr, Case No. 14,693.

One who has formed an opinion as to the crime, which may be removed by instructions of the court, is competent.—United States v. Hanway, Case No. 15,299.

A person who had expressed an unfavorable opinion against persons who had engaged in the transaction, but had not formed or expressed any opinion as to the guilt or innocence of the prisoner, *held* competent.—United States v. Hanway, Case No. 15,299.

An opinion formed and delivered, not upon a full case, but upon a point so essential as to go far towards a decision of the whole case, and to have a real influence on the verdict, will disqualify the person as a juror.—United States v. Burr, Case No. 14,692g.

One who, without forming or expressing any opinion as to the matter to be tried, had "formed an opinion that the laws had been outraged." is competent.—United States v. Hanway, Case No. 15,299.

Where there was a doubt as to the competency of a juror, he having made up his mind on the law, the court recommended his withdrawal.—United States v. Hanway, Case No. 15,299.

A formed and expressed opinion on the book in which alleged libelous passages occur will not disqualify a juror in a prosecution for seditious libel.—United States v. Callender, Case No. 14,709.

A person who has come to a conclusion as to the offense charged from reading newspaper accounts, though he has not expressed an opinion, either as to the offense or that defendant was engaged therein, is incompetent.—United States v. Hanway, Case No. 15,299.

In a suit on a life insurance policy, where the defense is suicide, it is a good cause of challenge that the juror considers the fact of suicide conclusive evidence of insanity.—The Hiawatha, Case No. 6,450.

The forming and delivering of an opinion that a person indicted for treason entertained the alleged treasonable designs, and retained them, and was prosecuting them, when the act charged was alleged to have been committed, is good cause of challenge.—United States v. Burr, Case No. 14,692g.

Impressions from reading newspapers will not disqualify jurors in criminal cases, though opinions formed will disqualify.—Anonymous, Case No. 469.

Where defendant accepts a juror with knowledge that he has had a conversation with a third person about the case, he cannot afterwards object to a verdict on that account.—United States v. Smith, Case No. 16,341.

A challenge for cause is properly overruled where the juror has formed no fixed opinion re-

specting guilt, though he has read, in a newspaper, matter concerning the case.—United States v. McHenry, Case No. 15,681.

§ 17. —— Service on prior or similar action or prosecution.

A juror who has sat on the trial of a person indicted for the same offense as defendant is not competent.—United States v. Smith, Case No. 16,342b.

It is no objection to a juror that he has been one of the jury in another cause against the same defendant for a different offense.—United States v. Watkins, Case No. 16,649.

On separate trials on a joint indictment it is no cause of challenge that a juror was sworn on the first trial, and found a verdict of guilty.—United States v. Wilson, Case No. 16,730.

§ 18. —— Opposition to punishment prescribed for offense.

The juror is incompetent where he has conscientious scruples against finding a verdict which would lead to capital punishment.—United States v. Hewson, Case No. 15,360; Same v. McMahon, Id. 15,699; Same v. Wilson, Id. 16,730; Same v. Ware, Id. 16,641.

§ 19. —— Interest as taxpayer or resident.

Citizens of municipality not competent in an action of debt for penalty of a by-law of the corporation.—Alexandria v. Brockett, Case No. 181.

§ 20. —— Alienage.

It is no ground of challenge that a juror is an alien.—Queen v. Hepburn, Case No. 11,503. But see Hollingsworth v. Duane, Case No. 6,618.

An alien is not entitled to a jury de medietate linguæ in Washington county, D. C.—United States v. McMahon, Case No. 15,699.

A foreigner in Virginia is entitled to a jury de medietate linguæ.—United States v. Carnot, Case No. 14,726; Same v. Cartacho, Id. 14,738.

It is a good cause of challenge to a juror that he voluntarily joined the Confederate army. Rev. St. § 820.—United States v. Butler, Case No. 14,700.

§ 21. Challenge to the array.

It is discretionary with the court to give, or not to give, any directions as to the place from which jurors shall be summoned; and it is no ground of challenge to the array that the marshal summoned the jurors according to his own will, where there was no application for directions.—United States v. Price, Case No. 16,088.

It is a good ground of challenge to the array that the jury was summoned without any designation by the court of the part of the district from which they were to be summoned, and not according to the mode of forming juries to serve in the highest courts of law in the state.—United States v. Coit, Case No. 14,829.

The array cannot be challenged on the ground of impartiality of the sheriff because a partial juror has been returned.—United States v. Callender, Case No. 14,709.

An objection that persons summoned as "bystanders" were not then present in court should be taken as ground of challenge to the array, before the polls are drawn.—United States v. Loughery, Case No. 15,631.

§ 22. Challenge for cause—Nature, sufficiency, and right of challenge.

Any party to a cause, civil or criminal, may challenge for the causes enumerated in Act June 17, 1862, § 1.—United States v. Blodgett, Case No. 18,312.

The prosecution may challenge a juror for cause.—United States v. Burr, Case No. 14,693.

A challenge for favor, without cause assigned will not be submitted to triors.—United States v. Wilson, Case No. 16,730.

The court will not ask a juror, before he is sworn, whether he has formed and expressed an opinion, but will leave the party to challenge for favor.—United States v. Johnson, Case No. 15,484.

§ 23. —— Time.

The objection that a juror is an alien should be taken at the time of impaneling the jury.—Hollingsworth v. Duane, Case No. 6,618.

After a juror is sworn, he cannot be challenged, except for a cause subsequently arising.—United States v. Peaco, Case No. 16,018; Same v. Watkins, Id. 16,649.

Though neither party has a right of challenge after a juror is sworn, the court, to protect the administration of justice, may, at any stage of the case, investigate an objection to the impartiality of the jury, and may withdraw the case if a juror is found unfit.—United States v. Morris, Case No. 15,815.

§ 24. —— Trial and evidence.

Practice stated as to the calling of jurors, and challenging, and trying of challenges.—United States v. Watkins, Case No. 16,649.

The two jurors first sworn in a cause are the proper triors of a challenge for favor.—Joice v. Alexander, Case No. 7,435.

The court will not permit counsel to argue to the triors upon a challenge for favor.—Joice v. Alexander, Case No. 7,435.

A challenge for favor will be tried by the jurors already sworn.—Queen v. Hepburn, Case No. 11,503; Reason v. Bridges, Id. 11,617.

It is not a principal cause of challenge that the juror has had conversation with some of the parties, but it is evidence for the consideration of triors upon a challenge for favor.—Young v. Marine Ins. Co., Case No. 18,163.

Evidence as to the prevailing opinion of individuals of the religious sect to which the juror belongs is inadmissible on trial of a challenge for favor.—Reason v. Bridges, Case No. 11,617.

The challenged juror cannot be examined as a witness to the triors.—Joice v. Alexander, Case No. 7,435.

The jury cannot be asked generally as to their conscientious scruples on certain questions. The inquiry must be made of the individual members.—Driskell v. Parish, Case No. 4,087.

Form of oath to be administered to talesmen on the principal panel when challenged for favor.—United States v. Haskell, Case No. 15,321.

If, under Act June 17, 1862, jurors be challenged by a party other than the government, the challenge may be disposed of by allowing those who deem themselves disqualified under section 1 to retire from the panel without any sworn evidence of their incompetency.—United States v. Blodgett, Case No. 18,312.

§ 25. Peremptory challenges—Right to challenge.

Peremptory challenges in criminal cases in the federal courts are regulated by the common law.—United States v. Reed, Case No. 16,134.

The United States may challenge a juror peremptorily until the panel is exhausted, after which they can only challenge for cause.—United States v. Wilson, Case No. 16,730.

Query, whether in the federal courts, in New York state, the government has the right of peremptory challenge where the panel is not exhausted by the challenges of the prisoner.—United States v. Douglass, Case No. 14,989.

Query, whether Act July 20, 1840, is applicable only to the mode of selecting the jury, or affects the questions involved in the right of challenging peremptorily or for cause.—United States v. Douglass, Case No. 14,989.

No peremptory challenges are allowed where a jury has already been struck on both sides.—Blanchard v. Brown, Case No. 1,507.

No right of peremptory challenge exists in the circuit court for the Eastern district of New York, on the trial of an indictment for misdemeanor.—United States v. Devlin, Case No. 14,953.

As to the right of peremptory challenges on trials for various offenses under Act April 30, 1790, c. 36.—United States v. Dow, Case No. 14,990.

The right to peremptory challenge *held* not to exist where the offense was not a capital offense.—Drayton v. United States, Case No. 4,074; United States v. Carrigo, Id. 14,735; Same v. Cottingham, Id. 14,872; Same v. Randall, Id. 16,118; Same v. Shive, Id. 16,278; Same v. White, Id. 16,675.

Upon a trial for manslaughter, defendant is entitled to peremptory challenges.—United States v. Craig, Case No. 14,882; Same v. McLaughlin, Id. 15,697.

On trial of an indictment for counterfeiting a bank note under the Virginia laws defendant is entitled to a peremptory challenge.—United States v. Wood, Case No. 16,753.

On a trial for bigamy in Alexandria, the prisoner is entitled to a peremptory challenge.—United States v. Lambert, Case No. 15,554.

One tried for larceny is entitled to peremptory challenges.—United States v. Gee, Case No. 15,196; Same v. Summers, Id. 16,416. CONTRA, see United States v. Krouse, Case No. 15,544; Same v. McPherson, Id. 15,703; Same v. Toms, Case No. 16,532.

§ 26. —— Number of challenges.

On an indictment for murder, 20 peremptory challenges are allowed.—United States v. Hewson, Case No. 15,360.

A person indicted for murder on the high seas is entitled to only 20 peremptory challenges.—United States v. Russel, Case No. 16,209.

In felony cases in Virginia the prisoner is entitled to 20 peremptory challenges.—United States v. Browning, Case No. 14,673.

On a trial for larceny, *held*, that the prisoner was entitled to a peremptory challenge of 20 jurors, under Act Va. Nov. 13, 1792.—United States v. Peter, Case No. 16,034.

One charged with casting away a vessel on the high seas, with intent to prejudice the underwriters, has a right to challenge 35 jurors.—United States v. Johns, Case No. 15,481.

§ 27. —— Time and order of challenge.

Peremptory challenges of jurors need not be made at the same time, but the parties may alternate.—Driskell v. Parish, Case No. 4,087.

The right of peremptory challenge need not be exercised until the opportunity of rejecting for cause is afforded; and, in presenting jurors for challenge, the government must first exercise its right.—United States v. Butler, Case No. 14,700.

The government cannot ask a juror to stand aside until the panel is exhausted before challenging for cause or peremptorily.—United States v. Butler, Case No. 14,700.

Where the statute gives a right to each party to challenge peremptorily two jurors, plaintiff may be allowed to exercise the right after he has once expressed himself as satisfied with the jury, and after defendant has used his challenges.—Jones v. Van Zandt, Case No. 7,502.

§ 28. Impaneling for trial.

The jury is to be composed of the first 12 men whose names remain upon the panel after the challenges are exhausted.—United States v. White, Case No. 16,682.

§ 29. Swearing jury.

If a juror is wrongly named on the panel, he cannot be sworn.—United States v. Wilson, Case No. 16,730.

A juror will not be allowed to make affirmation in lieu of oath, on the ground that he is a Methodist, where it is not contrary to the principles of that religious society to take an oath.—Bryan's Case, Case No. 2,063.

JUSTICES OF THE PEACE.

§ 1, Liabilities—Civil liability. § 2, —— Criminal liability. § 3, Civil jurisdiction and authority—In general. § 4, —— Amount in controversy. § 5, —— Actions against executors and administrators. § 6, —— Replevin and detinue. § 7, —— Attachment and arrest. § 8, Procedure in civil cases—Process. § 9, —— Pleading. § 10, —— Judgment. § 11, —— Execution. § 12, Appeal and error—Decisions reviewable. § 13, —— Notice of appeal. § 14, —— Bonds and liabilities thereon. § 15, —— Transcripts. § 16, —— Trial and review. § 17, Certiorari.

§ 1. Liabilities—Civil liability.

A justice of the peace is not liable in damages for judicial acts, and for ministerial acts only in case of intentional or gross negligence.—Gannon v. Donn, Case No. 5,211.

The justice is not liable for taking a supersedeas on Sunday, and from a minor.—Gannon v. Donn, Case No. 5,211.

Liability for false imprisonment, see "False Imprisonment," §§ 1, 2.

§ 2. —— Criminal liability.

It is an indictable offense for a justice to demand any fees other than those established by law.—Mattingly v. United States, Case No. 9,295.

A justice is not liable for discharging a prisoner who has been committed for trial on a charge of felony, or for taking money in lieu of bail, unless he acted contemptuously, willfully, and with evil intent.—United States v. Faw, Case No. 15,078.

An indictment against a justice for taking insufficient bail need not state in what respect the bail was insufficient, nor set out the security taken.—United States v. Clark, Case No. 14,803.

§ 3. Civil jurisdiction and authority—In general.

The justice has no jurisdiction where the law conferring jurisdiction, so far as it respects the process, is unconstitutional.—Greene v. Briggs, Case No. 5,764.

An authority which may be exercised by an individual magistrate may be exercised by many jointly.—Ex parte Burford, Case No. 2,148.

An order made by a justice upon a matter not within his jurisdiction is void.—Greene v. Briggs, Case No. 5,764.

§ 4. —— Amount in controversy.

A debt of $50 on which interest is due is not recoverable before a justice in the District of Columbia.—Milburn v. Burton, Case No. 9,541.

Where a debt in an amount above the jurisdiction is settled by giving separate notes within the jurisdiction, separate suits may be maintained thereon after all become due.—Moore v. Hough, Case No. 9,766.

Separate actions may be brought on notes held against the same person, though their aggregate amount exceeds the jurisdiction of the justice.—Thecker v. Milburn, Case No. 13,876.

A creditor cannot, without the consent of the debtor, relinquish part of his claim so as to bring it within the jurisdiction of a justice of the peace.—Burton v. Varnum, Case No. 2,220; Greenough v. Langtree, Id. 5,785; Cazenove v. Darrel, Id. 2,539.

The creditor may, if the debtor does not object, give a sufficient credit on the debt to bring it within the jurisdiction of the justice.—Maddox v. Stewart, Case No. 8,934; Porter v. Rapine, Id. 11,288.

Plaintiff may relinquish interest upon his demand, so as to bring it within the jurisdiction of the justice.—Homans v. Moore, Case No. 6,655.

In Indiana the plaintiff may reduce his demand to bring it within the jurisdiction of a justice of the peace.—Witt v. Hereth, Case No. 17,921.

A justice of the peace in Washington, D. C., has jurisdiction upon a bond given by a common prostitute as security for good behavior where the penalty does not exceed $20.—Patten v. Washington, Case No. 10,813.

A justice of the peace in Washington, D. C., has jurisdiction of penalties, under by-laws, not exceeding $50.—Hall v. Washington, Case No. 5,953.

§ 5. —— Actions against executors and administrators.

Justice of peace in District of Columbia has no jurisdiction of suits against administrators.—Adams v. Kincaid, Case No. 58; Ritchie v. Stone, Id. 11,864.

But under Act March 1, 1823, he has jurisdiction in such an action.—Ennis v. Holmead, Case No. 4,492.

§ 6. —— Replevin and detinue.

A justice of the peace in Alexandria county, D. C., has jurisdiction in detinue.—Maynadier v. Duff, Case No. 9,349.

A justice may have jurisdiction where the title to a chattel comes incidentally in question, as where a bond in suit is to be void if a certain chattel is not the property of a certain person.—Moore v. Waters, Case No. 9,780.

§ 7. —— Attachment and arrest.

Jurisdiction of justice of the peace in Virginia to issue an attachment.—Sears v. Noon, Case No. 12,590.

A justice of the peace in Alexandria county, D. C., has no power to issue a cap. ad resp. or warrant of arrest for a small debt before judgment.—Ex parte Minor, Case No. 9,643.

§ 8. Procedure in civil cases—Process.

A woman sued for a small debt *held* bound to appear and answer, on notice by an officer of the time and place.—O'Neil v. Hogan, Case No. 10,529.

The only process a justice of the peace is authorized to issue is a capias, the service of which is an arrest.—Ex parte Dexter, Case No. 3,854.

Where process issued beyond the limits of the township is not within the exception of the statute limiting process to the township, it is utterly void, and no justification to the officer acting under it.—Leadbetter v. Kendall, Case No. 8,157a.

Plaintiff can only recover upon the cause of action stated in the warrant.—Foy v. Talburt, Case No. 5,020.

A bond or writing obligatory cannot be given in evidence where the summons describes the cause of action as a note of hand.—Madding v. Peyton, Case No. 8,933a.

§ 9. —— Pleading.

In suits originating before justices of the peace, no formal pleadings are necessary.—Davis v. Pitman, Case No. 3,647a.

A justice of the peace may reject a plea of misnomer in abatement.—Hall v. Washington, Case No. 5,953.

§ 10. —— Judgment.

A judgment of a justice of the peace, being in part for a matter not within his jurisdiction, is void in toto.—Foy v. Talbert, Case No. 5,020.

A justice's judgment in an action of debt, for an amount within his jurisdiction, against the surety on a constable's official bond, is not absolutely void, though the proper remedy was by action on the bond, which was for an amount beyond the jurisdiction.—Mickum v. Edds, Case No. 9,531.

The expression, "I give judgment," includes the technical and formal words of a judgment, and is sufficient.—Deadrick v. Harrington, Case No. 3,694b.

A judgment of a justice of the peace cannot be seized and sold under a fi. fa. issued by a justice of the peace.—Bowen v. Howard, Case No. 1,723.

An unsatisfied judgment of a justice of the peace in Alexandria county is no bar to execution upon a supersedeas in Washington county on the same cause of action.—Curry v. Lovell, Case No. 3,496.

§ 11. —— Execution.

A justice of the peace cannot issue an execution as on a supersedeas upon the mere indorsement on the back of the original judgment that it is superseded.—Thomas v. Summers, Case No. 13,912.

A ca. sa. on a justice judgment will not be quashed because defendant has applied for the benefit of the Maryland insolvent laws.—Mattingly v. Smith, Case No. 9,293.

§ 12. Appeal and error—Decisions reviewable.

An appeal will not lie to the circuit court of the District of Columbia from the judgment of a justice of the peace on a trial by jury.—Davidson v. Burr, Case No. 3,602; Denny v. Queen, Id. 3,807; Maddox v. Stewart, Id. 8,934; Sherburne v. Semmes, Id. 12,760; Smith v. Chase, Id. 13,022.

But if the justice had not jurisdiction, his judgment may be reversed upon appeal, although the cause was tried by a jury.—Cross v. Blanford, Case No. 3,429.

No appeal lies from the judgment of a justice of the peace for a penalty for violating a by-law of Georgetown.—Boothe v. Georgetown, Case No. 1,651.

An appeal to the circuit court of the District of Columbia for the county of Washington lies from the judgment of a justice of the peace for the penalty of a by-law of the corporation of Washington.—Washington v. Eaton, Case No. 17,228.

No appeal lies from a judgment of the justice, imposing a fine for profane swearing in his presence.—Howard v. United States, Case No. 6,763.

No appeal lies from a judgment of a justice of the peace in the District of Columbia unless the debt or demand exceed the sum of five dollars.—Owner v. Washington, Case No. 10,635; Thornton v. Same, Id. 14,001.

§ 13. —— Notice of appeal.

If an appeal from a justice of the peace is not taken on the day of trial, the opposite party

is entitled to notice thereof, before a default can be taken against him.—Sinclair v. McElmurry, Case No. 12,895a; Kirk v. Armstrong, Id. 7,838a.

The notice must be given at least 10 days before the next sitting term of the court authorized to try the same.—Kirk v. Armstrong, Case No. 7,838a.

The 10-days notice required by Act March 1, 1823, § 7, was for the benefit of the appellant, not of the appellee.—Washington v. Eaton, Case No. 17,228.

Where due notice of appeal was not given, the appeal may be dismissed, with costs, but a judgment on the merits cannot be rendered for the other party.—Jacobs v. Jacobs, Case No. 7,161a.

§ 14. —— Bonds, and liabilities thereon.
A bond on appeal from a judgment of the justice of the peace, conditioned on payment if the judgment of the justice is affirmed or more recovered on a trial de novo, is discharged where a judgment for a less sum is recovered.—Swanson v. Ball, Case No. 13,676a.

Where no proceedings are had for two terms after the death of appellant pending the appeal, the sureties in the appeal bond are not liable for appellant's failure to prosecute the appeal with effect.—Jeffers v. Forrest, Case No. 7,251.

The surety on a bond on appeal from a justice of the peace (Act Ark. 1818, p. 27) is equally subject to judgment with appellant; but a sci. fa. against the surety is irregular where judgment was taken against the principal only.—Hodge v. Plott, Case No. 6,561a.

§ 15. —— Transcripts.
After the justice has certified a transcript on appeal, defects cannot be supplied.—Jacobs v. Jacobs, Case No. 7,161a.

§ 16. —— Trial and review.
Upon appeal from the justice's judgment, the cause is to be tried de novo.—Minifie v. Duckworth, Case No. 9,633; Taylor v. Hogan, Id. 13,794a.

It is no ground for reversing the judgment of a justice rendered in a specialty that neither the plaintiff nor his agent appeared at the trial.—Taylor v. Hogan, Case No. 13,794a.

Unless it appears that a jury was required, and refused by the justice, the judgment will not be reversed.—Deadrick v. Harrington, Case No. 3,694b.

§ 17. Certiorari.
Certiorari from the circuit court of the District of Columbia to a justice of the peace is the proper remedy, where the latter is proceeding in a case in which he has no jurisdiction.—Kennedy v. Gorman, Case No. 7,702.

Where a justice renders no judgment, his proceedings are a nullity, and may be set aside on certiorari.—Camp v. Price, Case No. 2,347a.

Certiorari may be issued by the circuit court of the District of Columbia to a justice of the peace, in a case of forcible entry and detainer.—Holmead v. Smith, Case No. 6,630.

The writ will not lie to bring up proceedings of justices of the peace under Act Md. 1793, c. 43, against tenants holding over.—Lenox v. Arguelles, Case No. 8,244.

JUSTIFIABLE HOMICIDE.

See "Homicide," § 4.

JUSTIFICATION.

Of actionable words, see "Libel and Slander," §§ 11, 12.

K

KIDNAPPING.

§ 1, Nature and elements of offense. § 2, Indictment.

§ 1. Nature and elements of offense.
Act March 2, 1831, § 17, does not apply to negroes kidnapped out of the District of Columbia, and brought within it.—United States v. Henning, Case No. 15,349.

§ 2. Indictment.
In an indictment under Act March 2, 1831, § 17, it is not necessary to aver that defendant was a "free person."—United States v. Henning, Case No. 15,349.

KNOWLEDGE.

Effect of ignorance of cause of action on limitation, see "Limitation of Actions," § 14.
Of custom, see "Customs and Usages," § 4.

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L

LACHES.

As a defense or ground of denial of relief in equity, see "Cancellation of Instruments," § 6; "Equity," §§ 18–21, 135; "Injunction," §§ 11, 27, 32; "Judgment," § 42; "Mortgages," § 33; "Patents," §§ 192, 219, 240; "Reformation of Instruments," § 5; "Specific Performance," §§ 13, 14; "Trusts," § 46.
—— in admiralty, see "Admiralty," § 44; "Maritime Liens," §§ 47, 48; "Seamen," §§ 130, 136, 171.
As ground of discharge of surety, see "Principal and Surety," § 8.
Effect on vendor's lien, see "Vendor and Purchaser," § 36.
In performing contract, see "Contracts," § 32.

LANDLORD AND TENANT.

§ 1, Creation and existence of relation. § 2, Leases and agreements in general. § 3, Terms for years. § 4, Tenancies at will. § 5, Taxes, improvements, repairs, and alterations. § 6, Injuries to premises. § 7, Eviction. § 8, Rent and advances—Rights and liabilities. § 9, —— Actions. § 10, —— Liens. § 11, —— Distress. § 12, Re-entry and recovery of possession by landlord.

See, also, "Ground Rents"; "Use and Occupation."
Effect of assignment in bankruptcy, see "Bankruptcy," § 193.
Leases of mines, see "Mines and Minerals," § 13.
—— of railroads, see "Railroads," §§ 26–28.
—— of vessels, see "Shipping," § 36.
Proof of claims in bankruptcy, see "Bankruptcy," § 377.

§ 1. Creation and existence of relation.

A stranger who obtains possession through a tenant by purchase of the land cannot dispute the landlord's title.—Lockwood v. Walker, Case No. 8,451.

§ 2. Leases and agreements in general.

A letting for five years by an informal paper, merely reciting a verbal lease, is not valid in Ohio as a lease for three years, but is wholly void.—United States v. Inlots, Case No. 15,441a.

An unrecorded lease for 10 years is good for 7 years under Act Md. 1766, c. 14.—Van Ness v. Hyatt, Case No. 16,867.

A lease by the owner of a race track to be used for races, and for booths and stands for gambling, and for grossly immoral purposes, is invalid and he cannot enforce the same.—Holmead v. Maddox, Case No. 6,629.

Construction of agreement of lease and of the possession taken under it, and the rights of the parties determined in the case of conflict as to the ownership of property.—Jenkins v. Eldredge, Case No. 7,268.

An agreement for a lease will be construed as a present demise, if no future formal lease be contemplated, and possession be taken under it.—Jenkins v. Eldredge, Case No. 7,268.

The provision that, in default of the payment of the yearly rent, the lease is to be void, and the property is at once to revest in the lessor without notice to the lessee in the same manner as if the lease had not been given, *held* to constitute a condition, and not words of limitation.—Wildman v. Taylor, Case No. 17,654.

An assignment of rents with a power of attorney to collect them as they become due is enforceable in equity, though the assignor die before they are collected.—Taylor v. Moore, Case No. 13,798.

§ 3. Terms for years.

A lease is canceled by the bankruptcy of the lessee, where, by its term, it cannot be assigned without the landlord's written consent.—In re Breck, Case No. 1,822.

A holding over on an annual rental is evidence of a new demise for a year.—Hoof v. Ladd, Case No. 6,669.

A tenant for five years, who was refused a renewal because the property was likely to be taken for public use, but who was allowed to hold over, *held* not to have entered on a new term for five years, or even for one year, so as to be entitled to compensation for the unexpired time.—United States v. Inlots, Case No. 15,441a.

A re-entry and reletting by the landlord for breach of covenants terminates the tenancy, and the landlord cannot recover for the loss sustained by reletting at the lower rent.—Ex parte Houghton, Case No. 6,725.

A lessee cannot abandon for want of repairs if he has underlet part of the premises for a term not yet expired.—Slacum v. Brown, Case No. 12,934.

Receipt by the lessor of rent from an undertenant of part of the premises is no evidence of consent to an abandonment by the lessee for want of repairs.—Slacum v. Brown, Case No. 12,934.

To work a forfeiture under a lease for nonpayment of rent, there must be a demand of the precise sum due.—Wildman v. Taylor, Case No. 17,654.

A bankrupt's assignment is not within the condition of a lease forfeiting it on an assignment by the lessee.—Allen v. Bennett, Case No. 214.

A renting for three years, the agreement to be void if the premises are condemned for public use, ceases on condemnation.—United States v. Inlots, Case No. 15,441a.

§ 4. Tenancies at will.

A lease for 20 years, not acknowledged or recorded, is not a lease at will.—Semmes v. McKnight, Case No. 12,653.

A tenancy from year to year is not a tenancy at will.—Parrott v. Barney, Case No. 10,773a.

§ 5. Taxes, improvements, repairs, and alterations.

Under a lease of premises to one who covenanted to continue the business carried on therein for half the profit, the lessee is entitled, at the end of the term, to a return of the fixtures and machinery, or their value, where they have not been worn out, or to new articles or machinery purchased to replace them.—Perkins v. Currier, Case No. 10,985.

Under a reservation of $20 rent, "clear of all taxes and charges," the tenant is liable for the taxes.—Semmes v. McKnight, Case No. 12,653.

A covenant in a lease to pay for new erections on the land runs with the land, and an assignment by the lessee of all his right, title, and interest conveys his right to compensation therefor.—Hunt v. Danforth, Case No. 6,887.

A covenant to pay for improvements erected by the tenant does not constitute a lien upon the premises for their value.—The Confiscation Cases, Case No. 3,097.

The building must be restored to its former condition where it is injuriously affected by al-

terations permitted subject to the condition that the lessee would surrender the premises in as good state as reasonable use would permit.—In re Jewell, Case No. 7,302.

§ 6. Injuries to premises.

When waste is committed by a stranger during the term of the tenant, an action on the case may be maintained therefor, either against the tenant who suffered the waste or the stranger who committed it.—Parrott v. Barney, Case No. 10,773a.

A tenant at will who commits voluntary waste is liable, not as a tenant, but as a trespasser; but for mere permissive waste he is not liable.—Parrott v. Barney, Case No. 10,773a.

A covenant to surrender the premises at the expiration of the term in as good condition as the reasonable wear thereof will permit, damages by the elements excepted, does not protect the tenant from liability for waste resulting from accidents occurring without his fault.—Parrott v. Barney, Case No. 10,773.

Such a lessee is liable for injury caused by the explosion of nitroglycerin packed in cans in a wooden case, received by it as an express company without knowledge of its contents.—Parrott v. Barney, Case No. 10,773.

But such lessee is not liable for injury to adjoining premises by the explosion, as it is not guilty of negligence.—Parrott v. Barney, Case No. 10,773.

The California practice act (section 250), giving an action to the person aggrieved against a tenant who may commit waste, includes permissive waste.—Parrott v. Barney, Case No. 10,773a.

An allegation that the defendants held certain premises as tenants thereof to the plaintiffs under a demise to them for a certain rent imports a tenancy for a term.—Parrott v. Barney, Case No. 10,773a.

A tenant for 99 years, renewable forever, with leave to purchase at a stipulated sum, may be restrained from cutting and selling young and green wood.—Thruston v. Mustin, Case No. 14,013.

The landlord is entitled to reimbursement for injuries to his building, caused by the removal of the tenant's machinery, on cancellation of the lease.—In re Breck, Case No. 1,822.

The right of action for breach of covenant is not impaired by the fact that the alterations make the building more convenient to the tenant to whom it was relet by the lessor before the expiration of the lease.—In re Jewell, Case No. 7,302.

A casualty happening against the will, and without the negligence or other default of the tenant, is, as to him, an inevitable casualty.—Hodgson v. Dexter, Case No. 6,565.

A covenant in a lease requiring the tenant to occupy the premises for a specific purpose, as an express office, does not impose on the landlord, and exempt the tenant from, all the risks incident to such business not resulting from the wrongful acts or negligence of the tenant.—Parrott v. Barney, Case No. 10,773.

§ 7. Eviction.

A lessee evicted by a third person claiming under the lessor, who fraudulently represented that he had title, may recover damages from the latter.—Morrison v. Alexander, Case No. 9,840.

The court will not interfere in a summary way for the restoration of the premises to the tenant after the landlord has been let into possession by a hab. fac. poss.—Camac v. Allwine, Case No. 2,328.

Where leased property is condemned, the lessee is entitled to such part of the damages as his unexpired term is fairly worth above the amount of rent to be paid.—United States v. Inlots, Case No. 15,441a.

The landlord cannot maintain a suit against a third person for expelling his tenant.—Pitman v. Davis, Case No. 11,184a.

A judgment against the casual ejector is not authorized where the notice is defective because the tenants are not named therein.—Lytle v. Fenn, Case No. 8,651.

A judgment against the casual ejector may be set aside even after the expiration of the term.—Lytle v. Fenn, Case No. 8,651.

§ 8. Rent and advances—Rights and liabilities.

Under a provision that the lease should terminate if the lessee should be declared bankrupt, unless within 10 days from the date of the petition some sufficient person should become surety for the rent, *held*, that a mortgage given to secure the rent covered the rent up to the time the keys were surrendered, though two months after the lessee became bankrupt.—In re Yeaton, Case No. 18,133.

Where rent is payable quarterly, plaintiff cannot recover for a quarter unexpired at the time of an eviction.—Bank of Columbia v. Galloway, Case No. 868.

The same principle applies where the rent is payable yearly.—Bank of Columbia v. Galloway, Case No. 868.

On a holding over under a lease with a fixed annual rental, the landlord may recover at the rate stipulated in the lease upon a count in indebitatus assumpsit for a greater sum.—Dermott v. Tucker, Case No. 3,818.

The tenant on holding over under a written lease is bound for the rent therein stipulated.—Baker v. Root, Case No. 780.

Arrears of ground rent bear interest from the time they become payable.—Newman v. Keffer, Case No. 10,177.

Interest does not accrue on rent until demand made therefor.—Wise v. Ressler, Case No. 17,912.

A lessor cannot recover, in an action for use and occupation, the rent of his tenant after his title ceased by a sale, though the tenant did not attorn to the vendee.—Blake v. Grammer, Case No. 1,496.

A person who agreed to rent premises and pay the rent for another is liable, though he did not occupy the premises.—Moore v. Dove, Case No. 9,757.

Rent is discharged by the taking the note of a third person therefor, and giving time of payment thereon until the maker becomes insolvent.—Josse v. Shultz, Case No. 7,551.

Rent payable in foreign coin is computed at so much of the current coin as, at the rate of exchange, will equal in value the foreign coin in the country where issued.—Newman v. Keffer, Case No. 10,177.

To warrant recovery of double rent for holding over, the lease must be for a specific term.—Nixdorff v. Wells, Case No. 10,280.

A renting at $60 a year, payable monthly, is not for a specific term, and double rent cannot be recovered for holding over.—Nixdorff v. Wells, Case No. 10,280.

Liability of assignee in bankruptcy for rent, see "Bankruptcy," § 293.

§ 9. —— Actions.

Where the lessee has repudiated a parol lease, but has enjoyed the premises for the term named, the lessor may sue thereon, or may recover the rent on a count for use and occupation.—Scott v. Hawsman, Case No. 12,532.

The statute commences to run against a claim for a balance of rents against one who holds an

absolute conveyance of property to secure a debt, from the time the grantor has knowledge of repayment of the debt by rents received.—Amory v. Lawrence, Case No. 336.

In an action of covenant for rent the defendant cannot plead that his lessor had not paid the ground rent according to his covenant.—Gill v. Patton, Case No. 5,429.

Want of title in fee in the plaintiff is no bar to an action for an installment of rent upon a lease with leave to purchase the fee simple, where defendant has not been evicted.—Crampton v. Van Ness, Case No. 3,348.

There can be no set-off against avowry for rent.—Roach v. Burgess, Case No. 11,873.

The plea of no rent arrear admits the demise as laid in the avowry.—Greer v. Nourse, Case No. 5,793.

Upon the plea of "no rent arrear," the tenant may give evidence of work done and goods sold and delivered to the landlord, without notice of set-off.—Fendall v. Billy, Case No. 4,725.

Avowry is prima facie evidence of amount of rent.—Alexander v. Harris, Case No. 168.

In debt by the lessor against the lessee's assignee, plaintiff need not show an assignment by recorded deed. Act Dec. 13, 1792.—Cooke v. Myers, Case No. 3,174.

A lease for 99 years, not acknowledged and recorded, is not good for 7 years, but is evidence of the rate of renting, in an action for use and occupation.—Brohawn v. Van Ness, Case No. 1,920.

A receipt for one year's rent is evidence that the rent for the preceding years has been paid.—Jenkins v. Calvert, Case No. 7,263.

In an action of covenant for rent the landlord cannot recover interest.—Gill v. Patton, Case No. 5,430.

Judgment by motion, on notice, cannot be obtained on a bond given to secure rent upon an attachment, on a suggestion that the tenant is about to remove.—Simpson v. Legg, Case No. 12,883.

§ 10. —— Liens.

The landlord has no lien in Louisiana on the insurance moneys where goods of his tenant are destroyed by fire.—In re Reis, Case No. 11,684.

The landlord of an assignor for the benefit of creditors is entitled to his rent out of the proceeds of a sale by the trustee, turned over to an assignee in bankruptcy.—In re Bowne, Case No. 1,741.

A stipulation providing for the right of removal at the end of the term of fixtures put in by the lessee on condition only that he has performed all his covenants creates a valid lien for rent on trade fixtures annexed to the freehold, but does not apply to mere furniture.—Ex parte Morrow, Case No. 9,850.

A landlord does not lose his lien by a note taken for rent, which is not paid at maturity.—In re Bowne, Case No. 1,741.

A landlord, by hiring out, in another state, property distrained for rent, does not lose his lien.—Calvert v. Stewart, Case No. 2,327.

Goods not upon the premises may be attached (in Virginia) to secure rent not due.—Brocket v. Johns, Case No. 1,915.

See, also, "Bankruptcy," § 254.

§ 11. —— Distress.

The landlord may distrain for rent under a lease for 20 years not acknowledged or recorded.—Semmes v. McKnight, Case No. 12,653.

An assignment by the lessor during the term without attornment does not prevent the lessor from distraining.—White v. Cross, Case No. 17,546.

A distress for rent is not lawful unless there was an express contract for a certain rent.—United States v. Williams, Case No. 16,710.

Acceptance of draft on tenant for rent, no bar to distress if draft not paid.—Alexander v. Turner, Case No. 176.

Landlord evicting tenant from part of premises cannot distrain for rent.—Baker v. Jeffers, Case No. 772.

A negotiable note received on account of rent *held* no bar to a distress for the whole rent due before its maturity.—Griffin v. Woodward, Case No. 5,818.

Slave of third person, hired to lodger, cannot be distrained for rent due by boarding-house keeper.—Beall v. Beck, Case No. 1,161.

Goods fraudulently removed by the tenant, though not secretly, may be followed and distrained by the landlord.—Jenkins v. Calvert, Case No. 7,263.

Goods conveyed by the tenant to secure the payment of an accommodation note made by the landlord and indorsed by a third person are not subject to distress while the third person remains liable as indorser.—Law v. Stewart, Case No. 8,130.

Chairs left with a painter for repairs are not liable to distress for his rent.—Mauro v. Botelor, Case No. 9,311.

Goods of the tenant levied upon under execution, though not removed from the premises, are not subject to distress for rent.—Remington v. Linthicum, Case No. 11,696.

The landlord may distrain after the death of the lessee.—McLaughlin v. Riggs, Case No. 8,872.

A distress for rent, laid on the last day of the term, at noon, *held* too soon.—Johnson v. Owens, Case No. 7,402.

The appraisement made at the time of levying a distress is prima facie evidence of the value of the goods distrained.—Semmes v. Sprigg, Case No. 12,657.

Costs do not accrue, upon levying a distress for rent, unless the goods are sold.—Wright v. Waters, Case No. 18,100.

A bailiff cannot lawfully force himself into a house by the outer door, although partially opened by one within, to make a distress for rent.—United States v. Stott, Case No. 16,408.

In an action upon a replevin bond for goods distrained for rent, evidence that the landlord was indebted to the defendant at the time the rent was due by the tenant cannot be given under a plea of set-off.—Lenox v. Gorman, Case No. 8,246.

A constable is not justified in breaking into a dwelling house by a warrant from a justice of the peace to search for goods clandestinely removed by the tenant to deprive his landlord of his remedy by distress for rent.—Wells v. Hubbard, Case No. 17,397.

§ 12. Re-entry and recovery of possession by landlord.

Landlord *held* entitled to recover in ejectment without demand, where rent was in arrear, under a lease giving a right of re-entry for nonpayment of rent.—Bradley v. Conner, Case No. 1,774.

LAND OFFICE.

See "Public Lands," §§ 46–49.

LARCENY.

§ 1, Nature and elements of offense—Nature of property. § 2, —— The trespass in taking. § 3, —— The intent. § 4, Indictment—Joint and separate in-

dictment. § 5, —— Jurisdictional averments. § 6, —— The taking. § 7, —— Description of property. § 8, —— Variance. § 9, Evidence—Presumptions and burdens of proof. § 10, —— Admissibility. § 11, —— Weight and sufficiency. § 12, Trial. § 13, Sentence and punishment. § 14, Restoration of property to owner.

See, also, "Embezzlement"; "False Pretenses"; "Receiving Stolen Goods"; "Robbery."
Of mail, see "Post Office," §§ 12, 23.
Venue, see "Criminal Law," § 21.

§ 1. Nature and elements of offense—Nature of property.

Logs in a fence are not the subject of larceny, the fence being in law annexed to the freehold.—United States v. Smith, Case No. 16,325; Same v. Wagner, Id. 16,630.

Bank notes are not goods and chattels, and cannot be the subject of larceny at common law.—United States v. Carnot, Case No. 14,726; Same v. Bowen, Id. 14,628.

Quære: Whether stealing a bank note is larceny, within the act of April 30, 1790, § 16.—United States v. Murray, Case No. 15,842.

Under Act 1790 "personal goods," in such statute, do not include choses in action.—United States v. Davis, Case No. 14,930.

The phrase "personal goods of another," in Act April 30, 1790, § 16, embraces the personal goods of the United States.—United States v. Maxon, Case No. 15,748.

Foreign and domestic coin and bank bills are "personal goods," within Act 1790, c. 36, § 16, relating to larceny on the high seas.—United States v. Moulton, Case No. 15,827.

Property abandoned is not, within the meaning of Act March 3, 1825, § 9, against plundering or stealing property from or belonging to a vessel in distress or wrecked, lost or abandoned.—United States v. Smiley, Case No. 16,317.

§ 2. —— The trespass in taking.

Stealing wood in collusion with the owner's slave is larceny.—United States v. Walker, Case No. 16,632.

A person who procures goods under the false pretense that the owner had sent him for them, and appropriates them for his own use, is not guilty of larceny.—United States v. Robertson, Case No. 16,174.

A workman is guilty of larceny where goods delivered to him for a special purpose are taken away by him with intent to steal them.—United States v. Strong, Case No. 16,411; Same v. Clew, Id. 14,819.

An indictment for larceny on the high seas for taking the ship's provisions, and selling them to steerage passengers, *held* sustainable, under Act April 30, 1790, § 16.—United States v. Holland, Case No. 15,378.

A driver of a coach, who, with knowledge of the ownership of goods left therein by the owner by mistake, takes and converts them with intent to steal them, is guilty of larceny.—United States v. Pearl. Case No. 16,022.

"Plunder," as used in Act 1825, c. 65, § 9, includes the criminal taking of the goods of another by open force, or by secret fraud, and furtively, from a vessel in distress, etc., and also an embezzlement by the master and others.—United States v. Pitman, Case No. 16,051.

§ 3. —— The intent.

Where property is taken from the owner openly and in his presence, and in the presence of others, with a felonious intent to steal the same, it is larceny.—Esline v. United States, Case No. 4,528.

Inducing slaves to go aboard a vessel under a promise to be transported into a free state *held* not larceny.—Drayton v. United States, Case No. 4,074.

The animus furandi and the fact that the taking was without the consent of the owner are essential elements in the crime of larceny.—Weston v. United States, Case No. 17,457.

A person who takes and carries away muskets with intent to appropriate them, or any of them. to his own use, or permanently to deprive the owner of them, is guilty of larceny; otherwise where the taking was with the sole intent to prevent the use of them upon himself or his associates.—United States v. Durkee, Case No. 15,009.

§ 4. Indictment—Joint and separate indictment.

The theft by the same persons, at the same time, of goods belonging to different persons, may be the subject of joint or separate indictments, at the option of the district attorney.—United States v. Beerman, Case No. 14,560.

Two persons jointly concerned in the same theft may be separately indicted, but after conviction of one, on the trial of the other, it must be shown that the theft was joint.—United States v. Holland, Case No. 15,377.

§ 5. —— Jurisdictional averments.

An indictment for larceny under Act 1790, c. 9, must aver that the act was committed in a place under the sole and exclusive jurisdiction of the United States.—United States v. Davis. Case No. 14,930.

§ 6. —— The taking.

Sufficiency of indictment under Act Md. 1729, c. 4, § 3, for breaking into and stealing goods from a warehouse.—United States v. Gassaway, Case No. 15,190.

§ 7. —— Description of property.

An indictment alleging articles stolen to belong to owners unknown is good on its face, and the objection that the owners were in fact known must be taken to the evidence at the trial for a variance, or by special plea.—United States v. Stetson, Case No. 16,390.

The goods of the wife, in her separate shop, where not kept for her separate use, must be averred to be the goods of the husband.—United States v. Murphy, Case No. 15,838.

But where the goods stolen were property of the wife living by herself, her husband not contributing to her support, they may be charged as her property.—United States v. Parsons, Case No. 16,001.

A dead man cannot be the owner of goods, and it is therefore insufficient to allege them to be the goods of one A. B., deceased.—United States v. Mason, Case No. 15,738.

Averment that coins stolen were the "goods and chattels" of the prosecutor is sufficient averment of ownership.—Beckley v. United States, Case No. 1,211.

An indictment charging the stealing of "notes of some bank established by a charter from the government of the United States, or of some individual state of the United States," in the language of the act, is not sufficient.—United States v. Porte, Case No. 16,070.

Value of stolen coins need not be averred.—Beckley v. United States, Case No. 1,211.

"One silver coin of the value of fifty cents" is a sufficient description of the property stolen.—United States v. Rigsby, Case No. 16,163; Same v. Barry, Id. 14,530.

An indictment for stealing "sundry pieces of silver coin of the value of twenty-five dollars" is too vague.—United States v. Kurtz, Case No. 15,546.

In an indictment, under the penitentiary act for the District of Columbia, for stealing a

bank note, it is unnecessary to aver that it is a note "for the payment" of money or other valuable thing.—United States v. McDaniel, Case No. 15,666.

An indictment for stealing "a mulatto boy, * * * the property, goods, and chattels of T.," is insufficient, where it does not aver that he was a slave.—United States v. Godley, Case No. 15,221.

§ 8. —— Variance.
Proof that goods stolen were the property of a deceased person, in the possession and management of A., will support an indictment for the larceny of goods of A.—United States v. Barlow, Case No. 14,521.

In an indictment for larceny a note at 60 days with interest is not admissible under an averment of a note at 60 days without interest.—United States v. Lee, Case No. 15,586.

§ 9. Evidence—Presumptions and burden of proof.
Possession of stolen property, and failure to show how it was acquired, or inconsistent accounts of its acquisition, create a presumption of guilt.—United States v. Keene, Case No. 15,512.

§ 10. —— Admissibility.
Upon an indictment for stealing a bank check it is not necessary to produce the check itself in order to admit parol evidence that it was presented at the bank.—United States v. Wilson, Case No. 16,733.

In larceny, satisfaction to the owner of the stolen goods is admissible; but if made merely to avoid imprisonment and not under a consciousness of guilt, it is not evidence against the accused.—United States v. Hunter, Case No. 15,424.

§ 11. —— Weight and sufficiency.
Upon the trial of an indictment for stealing a note of the Bank of the United States, no proof of its genuineness need be given other than by producing it.—United States v. Byers, Case No. 14,705.

Where there is a reasonable presumption that the taking of the property was felonious, and against the will of the true owner, although such owner be unknown, a conviction will be sustained.—United States v. Davis, Case No. 14,931.

On a prosecution for stealing bank notes (Act March 2, 1831, § 9), it is unnecessary to produce the notes at the trial; and if they have been recovered by the owner, and passed away, their contents and purport may be proved by parol.—United States v. Lodge, Case No. 15,622.

An indictment for larceny *held* not sustained on proof of a loan of money by the witness to the confederate of the prisoner, who won it from him by gambling.—Pye v. United States, Case No. 11,488.

§ 12. Trial.
Where defendant, indicted for larceny for taking ship's provisions and selling them to steerage passengers, acted in the capacity of cook and steward for the vessel, it is a question for the jury whether the taking originally was felonious.—United States v. Holland, Case No. 15,378.

§ 13. Sentence and punishment.
A slave convicted of larceny in Alexandria county, D. C., sentenced to be burnt in the hand and whipped.—United States v. Nathan, Case No. 15,857.

A slave convicted of larceny is to be punished by whipping, although not charged as a slave in the indictment.—United States v. Nelson, Case No. 15,863.

Horse stealing in the District of Columbia *held* punishable as an ordinary larceny, under Act April 30, 1790.—United States v. Black, Case No. 14,601.

§ 14. Restoration of property to owner.
Stolen bank notes, received in good faith in the course of business, will not be ordered to be restored to the person from whom stolen.—United States v. Read, Case No. 16,125.

LAW REPORTS.

See "Reports."

LAWS.

See "Constitutional Law"; "Statutes."
Of nations, see "International Law."

LAYS.

Of seamen, see "Seamen," §§ 146–153.

LEASES.

See "Landlord and Tenant."
Of government lands, see "Public Lands," § 3.

LEGACIES.

See "Wills."

LEGISLATIVE POWER.

See "Constitutional Law," § 2; "Municipal Corporations," § 6.

LEGISLATURE.

See "Statutes."
Construction of statute by, see "Courts," § 76.
Lobbying contracts, see "Contracts," § 12.

LEGITIMACY.

See "Bastards," § 1.

LETTERS.

See "Literary Property," §§ 2, 3.
As evidence, see "Evidence," § 54.
Copies of as evidence, see "Evidence," § 22.
Copyright, see "Copyrights," § 12.
Presumption of receipt from mailing, see "Evidence," § 11.

LETTERS PATENT.

For inventions, see "Patents."
For public lands, see "Mines and Minerals," § 9; "Public Lands," §§ 50–54.

LEVEES.

§ 1, Bonds. § 2, Levee taxes.

§ 1. Bonds.
A county is not liable on the bonds of a levee district issued to pay for building levees.—Boro v. Phillips County, Case No. 1,663.

Failure or refusal of county court to assess a tax on lands of a levee district for the expense of building levees will not make county liable to general judgment for the district's bonds.—Boro v. Phillips County, Case No. 1,663.

§ 2. **Levee taxes.**

Construction of Act Miss. Nov. 29, 1865, for the assessment and enforcement of levee taxes.—Rouse v. Hampton, Case No. 12,088.

Special assessments may be imposed on districts for purposes of building levees, etc., the benefit being special.—Boro v. Phillips County, Case No. 1,663.

Redemption of land sold under Act Miss. Nov. 27, 1875, for levee taxes.—O'Reilly v. Holt, Case No. 10,563.

LEVY.

Of attachment, see "Attachments," § 8.
Of execution, see "Execution," § 8.
Of taxes, see "Taxation," § 9.

LIBEL.

In admiralty, see "Admiralty," § 80

LIBEL AND SLANDER.

I. WORDS AND ACTS ACTIONABLE AND LIABILITY THEREFOR.

§ 1, Words actionable—In general. § 2, —— Charging crime. § 3, —— Affecting business or professional standing. § 4, —— Imputing unchastity. § 5, Construction of words used. § 6, Presumption of malice. § 7, Presumption of damages. § 8, Persons liable.

II. PRIVILEGED COMMUNICATIONS AND MALICE THEREIN.

§ 9, Communications privileged. § 10, Malice.

III. JUSTIFICATION AND MITIGATION.

§ 11, What constitutes justification—In general. § 12, —— Truth of communication. § 13, Mitigation.

IV. ACTIONS.

§ 14, Rights of action and defenses. § 15, Pleading — Complaint or declaration. § 16, —— Demurrer. § 17, —— Answer or plea. § 18, Issues and proof. § 19, Evidence—Presumptions. § 20, —— Admissibility. § 21, —— Sufficiency. § 22, Damages. § 22a, Trial. § 23, Costs.

V. CRIMINAL RESPONSIBILITY.

§ 24, Offenses. § 25, Prosecutions and punishment — Indictment. § 26, —— Evidence. § 27, —— Questions for jury.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 1. **Words actionable—In general.**

A publication without justification or lawful excuse, and calculated to injure the reputation of another, and expose him to hatred or contempt, is a libel.—Whitney v. Janesville Gazette, Case No. 17,590.

It is actionable libel to charge defendant with such matters "as induce an ill opinion to be had of the plaintiff," as to charge him with maliciously devising slanderous accusations against a third person.—Kerr v. Force, Case No. 7,730.

It is not actionable to call a white man a "yellow negro," "a villain and a liar."—Johnson v. Brown, Case No. 7,375.

Mere words of disgrace are not actionable unless written and published.—Johnson v. Brown, Case No. 7,375.

It is libelous to charge one with fraudulently deceiving another as to a fact, so as to induce him to indorse a note for a larger sum than he intended.—Kerr v. Force, Case No. 7,730.

§ 2. —— **Charging crime.**

Any publication, the tendency of which is to degrade and injure another person, or to bring him into contempt, ridicule, or hatred, or which accuses him of a crime punishable by law, or of an act odious or disgraceful in society, is a libel.—Dexter v. Spear, Case No. 3,867.

The words, "He gets his living by thieving," are actionable.—Rutherford v. Moore, Case No. 12,173.

§ 3. —— **Affecting business or professional standing.**

Words not in themselves importing anything injurious may be shown, by other matter alleged, to have been spoken with intent to affect plaintiff's credit and standing as a merchant.—Beardsley v. Tappan, Case No. 1,188.

A critical article, in which the words "swindler," "humbug," and "fraud" are applied to the author of a work of art, is libelous per se.—Spooner v. Daniels, Case No. 13,244a.

It is actionable per se to charge a director of the bank with being a swindler.—Forrest v. Hanson, Case No. 4,943.

§ 4. —— **Imputing unchastity.**

Words charging plaintiff, a single woman, with incontinence, are not actionable, without an allegation of special damage.—Keiler v. Lessford, Case No. 7,649.

A false publication concerning one that there are "suits pending against him to the effect that he has put himself in unlawful relations with the wives of other men" is libelous per se.—Broad v. Deuster, Case No. 1,908.

The words "crim. con." and "flagrante delicto" defined.—Gibson v. Cincinnati Enquirer, Case No. 5,392.

§ 5. **Construction of words used.**

The rule for construing words in a libel differs from that in construing averments in a plea. In the former, the words are to be understood in the sense which the author intended to convey, as evinced by all the circumstances; in the latter, especially in pleas of justification, words are taken most strongly against the pleader.—Kerr v. Force, Case No. 7,730.

The words are to be taken in their ordinary sense, and if directly calculated to degrade a man in the estimation of his acquaintances, and to injure his business character, they are actionable per se, without proof of malice or special damages.—Whitney v. Janesville Gazette, Case No. 17,590.

The expressions, "unfairly and secretly computed," "unjustly and unfairly attempted," and "artfully and purposely framed," used in a plea of justification in regard to the official act of a cashier, do not necessarily imply moral obliquity.—Kerr v. Force, Case No. 7,730.

§ 6. **Presumption of malice.**

Where a publication is libelous, and is knowingly made, the law presumes it malicious, unless it is proved to be published on an innocent or justifiable occasion.—Dexter v. Spear, Case No. 3,867.

§ 7. **Presumption of damages.**

Although words injurious to a man in his trade are actionable per se, plaintiff must prove the special damages claimed.—Beardsley v. Tappan, Case No. 1,188a.

§ 8. **Persons liable.**

One proprietor of a newspaper is responsible for the act of his co-proprietor in publishing a libelous article.—McDonald v. Woodruff, Case No. 8,770.

The publisher is equally responsible with the author of a libel.—Dexter v. Spear, Case No. 3,867.

Even though he had no personal knowledge of the publication.—Spooner v. Daniels, Case No. 13,244a.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

§ 9. Communications privileged.

Official communications between government officials are privileged, and neither the sending such communication nor retaining a copy amounts to a publication.—Gardner v. Anderson, Case No. 5,220.

The character of one who is the constructor and manager of a proposed railroad is open to public discussion; but statements and inferences must have reasonable grounds, and not be actuated by express malice.—Crane v. Boston Advertiser, Case No. 3,352a.

Communications made by a mercantile agency, through its clerks and agents, to its customers as to the pecuniary ability and standing of merchants are not privileged.—Beardsley v. Tappan, Case No. 1,189.

Access by the clerks generally of a mercantile agency to books of mercantile reports prevents them from being privileged.—Beardsley v. Tappan, Case No. 1,188a.

An account of an assault and battery, if correctly given as an item of news, is not libelous, but the writer cannot add reflections on the personal and business character of the aggressor unless the strictures are true.—Whitney v. Janesville Gazette, Case No. 17,590.

§ 10. Malice.

Malice inferred from persistency in keeping libelous matter on defendant's mercantile books after notice of its falsity.—Beardsley v. Tappan, Case No. 1,188a.

"Malice" in the sense of the law, means "willfulness."—Dexter v. Spear, Case No. 3,867.

Where a paper written to prevent the appointment of a party to office states that his reputation is bad, and there was probable cause for writing the paper, plaintiff cannot recover for libel.—Clark v. Ford, Case No. 2,820.

III. JUSTIFICATION AND MITIGATION.

§ 11. What constitutes justification—In general.

Belief of the author in the truth of a libelous charge is not justification.—Kerr v. Force, Case No. 7,730.

Honesty of motive is not a sufficient defense for the making of false specific charges against plaintiff by a public journal.—Smith v. Tribune Co., Case No. 13,118.

The fact that the libelous article was copied from another paper, and so appeared on its face, is no justification.—McDonald v. Woodruff, Case No. 8,770.

It is no justification or excuse for a newspaper libel that the publisher did not personally know the person libeled.—Dexter v. Spear, Case No. 3,867.

It is no justification that defendant received his information from his slave, as no action will lie against a slave.—Atkinson v. Patton, Case No. 614.

Liberty of the press does not sanction libels.—Arnold v. Clifford, Case No. 555.

§ 12. —— Truth of communication.

The truth of the publication is a good answer, but the justification, to be complete, must be co-extensive with the libel.—Whitney v. Janesville Gazette, Case No. 17,590.

That plaintiff has committed the offense of embezzlement is no defense to a libel charging that he would commit such offense if intrusted with public moneys.—Cook v. Tribune Ass'n, Case No. 3,165.

A breach of trust, accompanied by falsehood, does not amount to swindling unless there was an intent to defraud.—Forrest v. Hanson, Case No. 4,943.

An averment that plaintiff falsely, fraudulently, and unlawfully altered a note, so as to materially change its terms, is a good plea in justification of a charge of forgery.—Kerr v. Force, Case No. 7,730.

The words, "He is a lying, slanderous rascal," are libelous; and that plaintiff stated what was not true is no justification, unless plaintiff acted maliciously.—Snowdon v. Lindo, Case No. 13,152.

That plaintiff knowingly falsified his books as postmaster to defraud the government is no defense to a charge that plaintiff is a full-blown scoundrel and knave, and, if intrusted with money, would convert it to his own use.—Cook v. Tribune Ass'n, Case No. 3,165.

That plaintiff, as postmaster, had the appointment of his clerks, who abstracted letters and stole their contents, is no defense to a libel charging that he, by natural affinity, gathered about him scamps, and employed them to steal public money.—Cook v. Tribune Ass'n, Case No. 3,165.

§ 13. Mitigation.

General current reports as to the truth of libelous matter may be considered in mitigation of damages.—Beardsley v. Tappan, Case No. 1,188a.

Defendant, in mitigation of damages, may give evidence of the ground of his belief of the truth of the slanderous charge.—Cooke v. O'Brien, Case No. 3,177.

Proof of the authority for and the truth of a statement may be shown only in mitigation of damages.—Romayne v. Duane, Case No. 12,028.

In an action for words spoken in relation to plaintiff's credit, defendant may give evidence in mitigation of damages of the general reputation of plaintiff's want of punctuality in payment of his debts.—Turner v. Foxall, Case No. 14,255.

Defendant may attack plaintiff's general character in respect to the subject-matter of the charge in order to reduce the damages.—Wright v. Schroeder, Case No. 18,091.

IV. ACTIONS.

§ 14. Rights of action and defenses.

An action for libel in respect to plaintiff's business cannot be maintained when such business is unlawful; as, for instance, acting as agent for a lottery.—Dauphin v. Times Pub. Co., Case No. 3,584a.

§ 15. Pleading—Complaint or declaration.

The declaration for a libel must set out the very words; it is not sufficient to give the substance and effect.—Whitaker v. Freeman, Case No. 17,527a.

A declaration for a libel, charging an attempt to put two votes in a ballot box at a corporate election, must aver the by-law under which the election was held.—McClean v. Fowle, Case No. 8,691.

The whole of the libel must be considered in determining whether the averments in the declaration are sufficient to make the libel appli-

cable to the plaintiff.—Cook v. Tribune Ass'n, Case No. 3,165.

Special damage to one's business may be shown where the publication is libelous per se, though the words were not published concerning the business; and the names of customers lost need not be alleged.—Broad v. Deuster, Case No. 1,908.

An innuendo is not necessary to connect words actionable per se with extrinsic facts.—Broad v. Deuster, Case No. 1,908.

An innuendo cannot extend the sense of the words spoken beyond their usual and natural import except by connecting them with other matter alleged.—Beardsley v. Tappan, Case No. 1,188.

A declaration in slander may be amended by adding a new charge, on payment of costs and continuance.—Dougherty v. Bentley, Case No. 4,024.

§ 16. —— Demurrer.

Upon demurrer to a declaration in slander, if any of the words are actionable judgment must be for plaintiff.—Edds v. Waters, Case No. 4,275.

If some of the several matters pleaded to a declaration for libel be good justifications of what they profess to justify, and others be not, plaintiff must demur to the latter, and plead over to the former. If he demur to the whole as one plea, and one of the matters should be good justification, the demurrer must be overruled.—Kerr v. Force, Case No. 7,730.

§ 17. —— Answer or plea.

If a plea to a declaration for libel be good justification of what it purports to justify, plaintiff cannot treat it as a nullity, and take judgment by nil dicit for the whole matter of his declaration. He must demur or reply to the plea, and take judgment by default for what remains unanswered.—Kerr v. Force, Case No. 7,730.

A plea of not guilty puts in issue the question whether the proof supports the innuendoes.—Smith v. Tribune Co., Case No. 13,118.

An allegation that plaintiff, in order to avoid arrest for participation in an offense, feigned insanity, and took refuge in a lunatic asylum, is a material part of a libel.—Smith v. Tribune Co., Case No. 13,118.

A special plea to a declaration founded upon a libel charging plaintiff personally as corrupt and dishonest, which imputes criminality only to plaintiff's clerks and employés, is bad.—Cook v. Tribune Ass'n, Case No. 3,165.

Irrelevant matter in a plea of justification will not vitiate it, even on special demurrer.—Barrows v. Carpenter, Case No. 1,058.

The matter alleged in a plea of justification must, in every respect, correspond with the imputation complained of in the declaration.—Kerr v. Force, Case No. 7,730.

A plea in justification does not require the same degree of certainty and precision as an indictment. It is sufficient if it contain a clear and distinct statement of the facts constituting the ground of defense.—Kerr v. Force, Case No. 7,730.

A plea or pleas in justification must be as broad as the libel, and answer every material part of the declaration.—Smith v. Tribune Co., Case No. 13,118.

A plea in justification, which merely reiterates the words of the libel, with an averment that they are true, is not good unless they are so precise as to contain within themselves everything that can be inferred from them.—Kerr v. Force, Case No. 7,730.

Plea in justification must state the substantial facts which constitute the elements of the charge, when it is general.—Barrows v. Carpenter, Case No. 1,058.

A plea in justification of a libel charging moral turpitude is defective, unless it sets forth acts of moral turpitude.—Kerr v. Force, Case No. 7,730.

If the declaration avers that the words used amount to a charge of forgery, and if they are capable of that construction under the circumstances stated, the defendant, in his plea of justification, must show a clear case of forgery.—Kerr v. Force, Case No. 7,730.

Amendment of answer allowed to permit denial of statements in complaint as to manner and amount of damages.—Goodyear Dental Vulcanite Co. v. White, Case No. 5,601.

Plaintiff in slander may have leave to withdraw his general replication and file a general demurrer, and the court will give defendant leave to change his plea.—McGill v. Sheehee, Case No. 8,796.

§ 18. Issues and proof.

Actionable words spoken in the second person will not support an averment of words spoken in the third person.—Rutherford v. Moore, Case No. 12,173; Birch v. Simms, Id. 1,427.

Words spoken of one of the plaintiffs cannot be given in evidence to support an averment of words spoken of both plaintiffs.—Davis v. Sherron, Case No. 3,652.

Words spoken by each defendant separately, out of the presence of each other, will not support an averment of words spoken jointly by defendants.—Davis v. Sherron, Case No. 3,652.

Under a plea of justification, no evidence in mitigation of damages can be given.—Mayo v. Blair, Case No. 9,354.

Under a plea of justification, the truth of the libel, with the innuendoes, must be proved as laid.—Mayo v. Blair, Case No. 9,354.

Evidence which would amount to justification is admissible, though justification is not pleaded, but in such case it can only go to reduce damages.—Spooner v. Daniels, Case No. 13,244a.

Facts in justification stated in plaintiff's testimony are available to defendant, though he failed to plead them.—Hogan v. Brown, Case No. 6,581.

The fact that the libelous article was copied from another paper, and so appeared on its face, is admissible in mitigation of damages, under the general issue.—McDonald v. Woodruff, Case No. 8,770.

Under a plea of not guilty, defendants cannot prove the truth of the libel, even in mitigation of damages.—Mayo v. Blair, Case No. 9,354.

Plaintiff cannot prove special damage not stated in the declarations.—Kelly v. Huffington, Case No. 7,671.

The truth of the publication, when relied on either in bar or mitigation, must be specially pleaded.—Barrows v. Carpenter, Case No. 1,058.

§ 19. Evidence—Presumptions.

The plaintiff is presumed to be of good character until the contrary is shown, and it is only his general reputation which is in issue.—Whitney v. Janesville Gazette, Case No. 17,590.

See, also, ante, §§ 6, 7.

§ 20. —— Admissibility.

Plaintiff's character being put in issue in an action for libel, plaintiff may give evidence of his character before it is attacked by defendant.—Romayne v. Duane, Case No. 12,028.

Plaintiff cannot offer evidence of his general good character to disprove the truth of the words, nor to support his own character, until it is attacked by defendant.—Wright v. Schroeder, Case No. 18,091.

Where the nature of the charge is such that the evidence given by the defendant in support of the plea of justification, though insufficient to prove that, has, if believed in part or in whole, a legitimate tendency to affect the general character of the plaintiff on the subject of the charge, he may reply by evidence of general good character in that particular.—Wright v. Schroeder, Case No. 18,091.

Other libelous articles in defendant newspaper are admissible to show reckless conduct in publishing libels.—Gibson v. Cincinnati Enquirer, Case No. 5,392.

If mitigating circumstances are offered in evidence, to repel the presumption of malice it must be shown that the defendant knew of them at the time of making the charge.—Whitney v. Janesville Gazette, Case No. 17,590.

Where defendant pleads not guilty and a justification, the admission of the libel contained in the latter plea cannot be used either to estop defendant to insist on his denial, or as evidence to prove the publication on the issue joined on the former plea.—Whitaker v. Freeman, Case No. 17,527a.

§ 21. —— Sufficiency.

Standing publication of a libel contained in book of mercantile reports is shown by proof that the books were not in defendant's exclusive possession, but accessible to his clerks.—Beardsley v. Tappan, Case No. 1,188a.

Degree of proof required where the truth is set up in justification of a charge of crime.—Baker v. Kansas City Times Co., Case No. 773.

Plaintiff, while not required to prove the exact words used, must show them in substance and effect.—Beardsley v. Tappan, Case No. 1,188a.

Plaintiff may recover, though he failed to prove the special damage laid in the declaration.—Kelly v. Huffington, Case No. 7,671.

All the facts stated in a plea of justification must be substantially proved.—Forrest v. Hanson, Case No. 4,943.

§ 22. Damages.

The amount of damages for a libel depends upon the degree of malice.—McDonald v. Woodruff, Case No. 8,770.

Plaintiffs suing as a partnership, for injuries to their business by libelous mercantile reports, cannot have damages for individual libel unless it affected the business of the firm.—Beardsley v. Tappan, Case No. 1,188a.

Where a libelous writing is actuated by general malice, exemplary damages may be awarded, though defendant has no personal acquaintance with plaintiff.—Spooner v. Daniels, Case No. 13,244a.

A verdict for $3,875 against a newspaper having a large circulation, for libel in charging plaintiff with adultery, *held* not excessive.—Gibson v. Cincinnati Enquirer, Case No. 5,392.

§ 22a. Trial.

The construction of the alleged libelous words, under the circumstances stated in the declaration, is a question for the court. Whether defendant used them in that sense is a question for the jury, which cannot arise upon a plea of justification.—Kerr v. Force, Case No. 7,730.

A jury trying a case of seditious libel are not concerned as to the constitutionality of the law (Act July 14, 1798), but are restricted to the question whether defendant published the writing, and with intent to make the government odious and contemptible.—Lyon's Case, Case No. 8,646.

See, also, ante, §§ 13, 22.

§ 23. Costs.

In actions for slander, or trespass vi et armis, the plaintiff, recovering less than $10, can recover only two-thirds of the costs of suit. Geyer, Dig. Ark. 260.—Hill v. Patterson, Case No. 6,497a.

A verdict for one cent damages carries full costs.—Forrest v. Hanson, Case No. 4,943.

V. CRIMINAL RESPONSIBILITY.

§ 24. Offenses.

To sustain a prosecution for a seditious libel against the president (Act July 14, 1798), there must clearly appear an intent to defame him, to bring him into contempt and disrepute, and excite against him the hatred of the good people of the United States.—United States v. Cooper, Case No. 14,865.

Actual hostilities, captures of vessels, and a prohibition of intercourse, although there has been no declaration of war, renders the statement "in time of peace" false, within the meaning of the act.—United States v. Cooper, Case No. 14,865.

A justification relied upon in defense of a seditious libel must be as broad as the charge.—United States v. Haswell, Case No. 15,324.

§ 25. Prosecution and punishment—Indictment.

Venue, see "Criminal Law," § 21.

An indictment alleging that defendant composed a libel in the District of Columbia, and published it in Michigan, and that it was afterwards published in the District of Columbia, is not sufficient to charge an offense there.—In re Buell, Case No. 2,102.

Where the libel is founded upon a book, it is sufficient to set out the passages complained of without giving its title.—United States v. Callender, Case No. 14,709.

§ 26. —— Evidence.

Libelous papers subsequently published or found unpublished in the defendant's possession are admissible, on an indictment for seditious libel, to show his intent.—Crandell's Trial, Case No. 3,350; United States v. Crandell, Id. 14,885.

Admissibility and sufficiency of evidence to prove publication of a seditious libel.—United States v. Crandell, Case No. 14,885.

Sufficiency of evidence to sustain a conviction under the sedition act of July 14, 1798, for the publication of a libel against the president.—United States v. Cooper, Case No. 14,865.

The proof of justification must extend to the whole charge.—United States v. Callender, Case No. 14,709.

An allegation of "tenor and effect" requires proof of the substance only, and not the precise words.—United States v. Callender, Case No. 14,709.

§ 27. —— Questions for jury.

On a prosecution for seditious libel (Act 1798), it is for the court to assess the fine in case of conviction.—United States v. Callender, Case No. 14,709.

LICENSES.

For mining, see "Mines and Minerals," § 14.
Injuries to licensees, see "Railroads," § 69.
Of auctioneers, see "Auctions and Auctioneers," § 1.
Of ferry, see "Ferries."
Of physicians and surgeons, see "Physicians and Surgeons."
Of pilots, see "Pilots."
Of vessels, see "Shipping," § 5.
Payment of fees under protest, see "Payment," § 28.
To make, use, or sell patented article, see "Patents," §§ 150–159.
To sell intoxicating liquors, see "Intoxicating Liquors," § 1.

§ 1. In respect of real property.
Where a license to use property for specific purposes under a contract perpetual in its purport is not specially restricted, and is coupled with an interest necessary to the possession and enjoyment of the rights acquired, the license is not revocable.—United States v. Baltimore & O. R. Co., Case No. 14,510.

The proviso in an act authorizing the improvement of a river that certain mill dams shall not be altered, nor the water running thereto diverted or obstructed, *held* not a grant of the water, but a mere license, revocable at pleasure.—Rundle v. Delaware & R. Canal, Case No. 12,139.

LIENS.

§ 1, Creation and existence. § 2, Enforcement and priorities.

See, also, "Maritime Liens"; "Mechanics' Liens."
Condition precedent to creditors' suit, see "Creditors' Suit," § 6.
Effect of assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 12.
—— of discharge in bankruptcy, see "Bankruptcy," § 622.
—— of proceedings in insolvency, see "Insolvency," § 8.
—— of repeal of lien law, see "Statutes," § 15.
Subrogation to rights of lienors, see "Subrogation," § 1.

Liens acquired by particular remedies or proceedings.

See "Attachments," § 9; "Creditors' Suit," § 10; "Execution," § 7; "Garnishment," § 4; "Judgment," §§ 52–61; "Taxation," § 10.

Particular classes of liens.

Equitable liens, see "Bankruptcy," § 259.
For customs duties, see "Customs Duties," § 59.
For demurrage, see "Shipping," § 222.
For freight, see "Carriers," § 36; "Shipping," §§ 60–64, 189.
For general average contribution, see "Shipping," § 242.
For pasturage of stock, see "Animals," § 1.
For penalties, see "Shipping," § 15.
For pilotage fees, see "Pilots," § 10.
For rent, see "Landlord and Tenant," § 10.
For salvage, see "Salvage," § 57.
For services, see "Master and Servant," § 2.
For taxes, see "Internal Revenue," § 17.
For towage, see "Towage," § 8.
For wharfage, see "Wharves," § 6.
Mortgage, see "Chattel Mortgages," § 14; "Mortgages," § 12.
Of agent, see "Principal and Agent," § 16.
Of attorney, see "Attorney and Client," § 6.
Of factor, see "Factors," § 18.
Of master of vessel, see "Shipping," § 91.
Of pledgee, see "Pledges."
Of seamen, see "Seamen," §§ 121–131.
Of United States, see "United States," §§ 16–20.
Of vendor, see "Sales," § 40; "Vendor and Purchaser," §§ 32–38.
On bankrupt's property, see "Bankruptcy," §§ 251–286, 296–302.
On bank stock, see "Banks and Banking," § 4.
On claim for services for collection, see "United States," § 25.
On homestead, see "Homestead," § 5.
On proceeds of sale in admiralty, see "Salvage," § 71.
On property captured as prize of war, see "War," § 77.
On railroads, see "Railroads," §§ 31–54, 63.
On saw mills, see "Logs and Logging."

§ 1. Creation and existence.
By the common law, liens exist only where the party has actual or constructive possession of the goods; but in the maritime law, and in equity, liens exist independently of possession. —Ex parte Foster, Case No. 4,960.

A mere promise to pay out of a particular fund when received, the promisor retaining control of such fund, and no notice being given to the person who is to pay, creates no lien or charge upon such fund.—Ex parte Tremont Nail Co., Case No. 14,168.

Privileged liens are stricti juris, and are not to be extended argumentatively to cases not within the law which confers them.—The Sam Slick, Case No. 12,282.

A contract to deliver 300 hides, then in the vat, to the plaintiff, as security to indemnify him for his responsibility for a debt due by the defendants, which has since been satisfied, will not constitute a lien upon the hides, in favor of the plaintiff, to indemnify him for his responsibility for another debt of the defendants, for which the plaintiff is liable, where the rights of a third person have intervened.—Talbot v. McPherson, Case No. 13,728.

The rule of the maritime law giving a lien on the vessel for labor or material in building or repairing does not obtain at common law.—The Calisto, Case No. 2,316.

A person who finds and rescues lumber from a raft broken up by a high wind has no lien thereon for his services, and the owner may recover the property in an action of replevin.—Tome v. Four Cribs of Lumber, Case No. 14,083.

An equitable lien is valid (in Massachusetts), although no remedy for its enforcement is provided by the state jurisprudence.—Fletcher v. Morey, Case No. 4,864.

A lien in equity is not a property in the thing, nor does it constitute a right of action for the thing; but is a charge upon the thing.—Ex parte Foster, Case No. 4,960.

A son improving his father's lands during the latter's life is entitled to no lien upon his father's death intestate; nor does payment of his father's debts give him a lien.—McCauley v. McCauley, Case No. 8,689.

Advances to the master to enable a ship detained in France to prosecute her homeward voyage are not a lien on the compensation awarded under the French convention.—Mason v. Cutts, Case No. 9,237.

Agreement by mill owners to improve water power, each party's share of the expense to be a lien on his estate, gives each party who pays more than his share a lien for the excess.—Clarke v. Southwick, Case No. 2,863.

§ 2. Enforcement and priorities.
An equitable lien cannot be enforced against money, or its representative, unless the money, or a specific substitute for it, can be identified. —Drake v. Taylor, Case No. 4,067; Sullivan v. Portland & K. R. Co., Id. 13,596.

Where a lien, or equitable claim, constituting a charge in rem, is a matter of agreement, it will be enforced in equity against the party himself, or his personal representatives, or persons claiming under him, or assignees in bankruptcy.—Fletcher v. Morey, Case No. 4,864.

An agent having a lien upon a fund for his services may sue in equity to enforce his rights therein against a third person receiving the same with notice, without regard to his claim against the principal.—Dowell v. Cardwell, Case No. 4,039.

Where mill owners agreed to improve the water power, each party's share of the expense to be a lien on his estate, such lien is not barred in less time than is sufficient by the local law to bar an action to foreclose a mortgage.—Clarke v. Southwick, Case No. 2,863.

The lien given by an act which provides that it shall have priority over mortgages placed on the property "subsequent to the passage of" the act takes precedence of a mortgage placed within the 90 days after the passage of the act which a general statute provides shall elapse before acts of the legislature shall take effect.—Walker v. Mississippi Val. & W. Ry. Co., Case No. 17,079.

Where there are two liens on the same land of different date, which also cover other lands in the state, the court will order the lands to be sold, reserving the application of the proceeds for the order of the court.—United States v. Duncan, Case No. 15,005.

Enforcement in admiralty, see "Admiralty," §§ 3, 29.
—— in equity, see "Equity," § 5.

LIFE ESTATES.

See, also, "Curtesy"; "Dower"; "Remainders."
Creation by will, see "Wills," §§ 36, 37.
Merger of life estate and remainder, see "Estates."

§ 1. Relation of life tenant to remainder-man.

The tenant for life is bound to keep down the interest on an incumbrance on the entire estate, but not to pay any part of the principal.—Bourne v. Maybin, Case No. 1,700.

A tenant for life and a remainder-man in fee contribute to discharge a mortgage according to the relative value of their respective interests; the value of the estate of the tenant for life being calculated by the common tables.—Foster v. Hilliard, Case No. 4,972.

The same principle applies where a mortgagee devises the mortgaged estate to one for life, remainder over in fee.—Foster v. Hilliard, Case No. 4,972.

The purchase money, on a sale made jointly by persons having independent interests, will be divided according to their respective interests, in the absence of other countervailing circumstances.—Foster v. Hilliard, Case No. 4,972.

A tenant for life of real estate is bound, as between himself and the reversioner, to pay taxes thereon, and he cannot set up against the latter a title under a tax sale for taxes due during his tenancy.—Patrick v. Sherwood, Case No. 10,804.

On a sale by a tenant for life with the consent of the guardian of minor remainder-men in fee, *held*, that the value of the estate in the former was to be ascertained by the common tables at the time of the sale, and was unaffected by the fact of his death shortly after the sale.—Foster v. Hilliard, Case No. 4,972.

By the law of New York (1 Rev. St. p. 739, § 145) a tenant for life does not, by conveying in fee, forfeit his life estate.—Patrick v. Sherwood, Case No. 10,804.

The vested estates, interests, and rights saved by 1 Rev. St. N. Y. p. 750, § 11, are such as vested by a forfeiture incurred before the statute took effect, and a conveyance in fee made by tenant for life after the statute took effect does not work a forfeiture of his life estate.—Patrick v. Sherwood, Case No. 10,804.

A lease by a tenant for life or during widowhood, for a certain number of years, is valid to the extent of the interest of the lessor.—Waldron v. Chasteney, Case No. 17,058.

A tenant for life may cut down timber trees for the purpose of making necessary repairs on the estate, and sell them and purchase boards with the proceeds, if this be the most economical mode of making the repairs.—Loomis v. Wilbur, Case No. 8,498.

LIFE INSURANCE.

See "Insurance."

LIGHTS.

Of vessel, see "Collision," §§ 78–87.

LIMITATION.

Of claim of patent, see "Patents," §§ 126–137.
Of indebtedness, see "Counties," § 5; "Municipal Corporations," § 26.

LIMITATION OF ACTIONS.

I. STATUTES OF LIMITATION.

§ 1, Constitutionality of statutes. § 2, Nature of statutes. § 3, Construction in general. § 4, What law governs. § 5, Application of state statutes by federal courts. § 6, Agreements to waive statute or for different limitation. § 7, Repeal of statutes. § 8, Limitations applicable to particular actions.

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IV. PLEADING, EVIDENCE, AND TRIAL.

§ 26, Pleading. § 27, Raising defense by demurrer. § 28, Evidence. § 29, Province of court and jury.

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Proof in bankruptcy of claims barred by limitation, see "Bankruptcy," § 373.

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See "Cancellation of Instruments," § 6; "Ejectment," § 7.
By or against assignees in bankruptcy, see "Bankruptcy," §§ 348–353.
—— banks, see "Banks and Banking," § 14.
—— corporations, see "Corporations," § 54.
—— counties, see "Counties," § 3.
—— executors and administrators, see "Executors and Administrators," § 45.
—— heirs, see "Descent and Distribution," § 3.
—— seamen, see "Seamen," §§ 136, 171.
—— stockholder of bank, see "Banks and Banking," § 5.
—— United States, see "United States," § 31.
Criminal prosecutions, see "Criminal Law," §§ 25–28, 46; "Customs Duties," § 125; "Internal Revenue," § 100.
Foreclosure, see "Mortgages," § 33.
For forfeiture, see "Customs Duties," § 100.
For infringement of patents, see "Patents," §§ 192, 219.
For penalties, see "Customs Duties," § 119.

For rent, see "Landlord and Tenant," § 9.
In admiralty, see "Admiralty," § 44.
On bill or note, see "Bills and Notes," § 86.
On insurance policy, see "Insurance," § 170.
To annul will, see "Wills," § 16.
To enforce liability of stockholder, see "Corporations," § 33.
—— trust, see "Trusts," § 46.
To establish or confirm grant, see "Public Lands," § 88.
To recover duties or charges paid, see "Customs Duties," § 69.

I. STATUTES OF LIMITATION.

§ 1. Constitutionality of statutes.

Retrospective limitation laws are constitutional which do not deprive parties of a reasonable time for prosecuting their claims before being barred.—Piatt v. Vattier, Case No. 11,117; Society for Propagation of the Gospel v. Wheeler, Id. 13,156; Wright v. Scott, Id. 18,092; Barker v. Jackson, Id. 989; Pereles v. Watertown, Id. 10,980.

A statute of limitation allowing nine months' time in which to commence action upon causes accruing four years before *held* not unconstitutional.—Samples v. Bank, Case No. 12,278.

Nine months and a half allowed in a statute of limitations for bringing suit in causes of action accrued over four years prior thereto *held* reasonable.—Marsh v. Burroughs, Case No. 9,111.

An act (Act Wis. April 3, 1872) limiting to one year suits on municipal bonds, issued before its passage, for negotiation in a foreign market, is unconstitutional, as fixing an unreasonable time.—Pereles v. Watertown, Case No. 10,980.

The repeal of the provision of a limitation law excepting the time of the debtor's absence from the state, without allowing any time to sue after his return, *held* unconstitutional.—Johnson v. Bond, Case No. 7,374.

Act N. Y. 1788, *held* not invalid as applying to existing actions.—Bockee v. Crosby, Case No. 1,593.

When a cause of action is once fully barred by the statute of limitation, the legislature has no authority to again revive it by lengthening the period of limitation or excepting certain cases from the operation of the statute.—Talbott v. Wright, Case No. 13,733.

§ 2. Nature of statutes.

The object of statutes of limitation is to suppress fraudulent and stale claims set up at great distances of time, when all the proper vouchers and evidence are lost, or the facts have become obscured from the lapse of time or other causes.—Spring v. Gray, Case No. 13,259.

Statutes of limitation are founded on sound policy, and should not be evaded by a forced or astute construction.—Roberts v. Pillow, Case No. 11,909.

§ 3. Construction in general.

Construction of Act Ark. Jan. 14, 1843.—Boyle v. Arledge, Case No. 1,758.

Construction of the statutes of limitations of Ohio of 1804, 1810, 1824, 1826.—Piatt v. Vattier, Case No. 11,117.

Construction of the limitation laws of Ohio of February 25, 1824, February 22, 1830, February 18, 1831, February 28, 1846, March 22, 1849, and Code, tit. 2, § 7.—Pruseux v. Welch, Case No. 11,456.

Construction of the limitation law of Pennsylvania of March 26, 1785, § 3.—Penn v. Ingham, Case No. 10,933.

Construction of the Pennsylvania limitation laws of 1785, 1800, and 1813.—Fellows v. Pedrick, Case No. 4,724.

Though the court may think the legislature would have excepted a case out of a statute of limitations had it been foreseen, the court cannot except it.—The Sam Slick, Case No. 12,282.

Statutes of limitation will be construed to operate prospectively only, unless the contrary intention clearly appears.—Vaughan v. East Tennessee V. & G. R. Co., Case No. 16,898.

§ 4. What law governs.

The statute of the state where the suit is brought governs.—Ames v. Le Rue, Case No. 327; Amory v. Lawrence, Id. 336; Jones v. Hays, Id. 7,467; Le Roy v. Crowninshield, Id. 8,269.

Where a bond has run for the full term of the statute in the state where it was executed, and the parties continued to reside, it is barred in another state.—Gilpin v. Plummer, Case No. 5,451.

A debt contracted in Indiana and barred by the laws of the state to which the debtor subsequently removed, is barred in Indiana, though it would not have been barred if the debtor had remained in such state.—Talbott v. Wright, Case No. 13,733.

The Indiana statute of 1852 gives full effect to the statutes of other states, and places debtors removing to Indiana in the same condition as if still in the place of the contract.—Maryland v. Todd, Case No. 9,220.

The statute of limitations is not a bar to a British debt contracted before the treaty of peace.—Dunlop v. Alexander, Case No. 4,166.

A British subject who, before the treaty of 1794, took a bond in the name of a citizen of the United States, cannot avoid the statute of limitations by claiming the benefit of the clause which removed all legal impediments in the recovery of British debts.—Auld v. Hoyl, Case No. 652.

The immunity from suit arising when a cause is barred by limitation is a personal immunity, which follows the person of the debtor into whatever state or territory he may go.—Talbott v. Wright, Case No. 13,733.

§ 5. Application of state statutes by federal courts.

State statutes of limitation are applied in the federal courts, unless congress has otherwise provided.—Martin v. Smith, Case No. 9,164; Nicolls v. Rodgers, Id. 10,260; Price v. Yates, Id. 11,418.

Under Rev. St. § 721, state statutes of limitations are applicable to actions in the national courts, except where the laws of the United States otherwise provide.—Sayles v. Oregon Cent. Ry. Co., Case No. 12,423.

The federal court adopts the same rules in regard to the statute which prevail in the state courts.—Nicolls v. Rodgers, Case No. 10,260.

But state statutes of limitation have no application to cases affecting statutory rights, cognizable exclusively by the federal courts. Such rights can be affected only by laws of congress. —Wetherill v. New Jersey Zinc Co., Case No. 17,464.

§ 6. Agreements to waive statute or for different limitation.

A promise without consideration of a collector of customs not to plead the statute of limitations is neither enforceable in law nor equity. —Andrae v. Redfield, Cases Nos. 367, 368.

Parties cannot, by a contract, agree upon a limitation different from the statute, within which suit shall be brought, or the right to sue be barred.—French v. Lafayette Ins. Co., Case No. 5,102.

§ 7. Repeal of statutes.

Act April 30, 1790, § 32, limiting suits for penalties to two years, is repealed by implication

by Act Feb. 28, 1839, § 4, which extends the time to five years.—Stimpson v. Pond, Case No. 13,455.

§ 8. Limitations applicable to particular actions.

The California statute applies to both equitable and legal remedies. It is directed to the subject-matter, and not to the form, of the action, or the tribunal before which it is prosecuted.—Hardy v. Harbin, Case No. 6,060.

The statute of limitations does not apply to accounts between merchants, though the dealings between the parties ceased long before suit brought.—Wilson v. Mandeville, Case No. 17,820.

A contract between shipowners and a shipper to receive half profits in lieu of freight is not a case of merchant's accounts, within the exception of the statute.—Spring v. Gray, Case No. 13,259.

The two-years limitation law (Act March 3, 1863, § 7), relating to acts of omission or commission during the Civil War, under authority of the president or congress, is inapplicable to assumpsit.—Britton v. Butler, Case No. 1,903.

Where a bank has suspended payment, and its bills have ceased to circulate as money, the statutes apply to them as to other contracts.—Samples v. Bank, Case No. 12,278.

The act of defendant in compelling the indorsement and payment of a captured draft, drawn upon a citizen of a state in rebellion, *held* a wrong done under color of authority as a military officer, and within the two-years limitation.—Britton v. Butler, Case No. 1,904.

Actions of formedon are within the statute of Rhode Island for quieting possessions, and 20 years' possession under the statute is a good bar.—Inman v. Barnes, Case No. 7,048.

A formedon in descender is not within the proviso of the statute of possessions of Rhode Island.—Inman v. Barnes, Case No. 7,048.

Rents or profits in the hands of one who holds an absolute conveyance of property as security for a debt, is a debt or liability not under seal.—Amory v. Lawrence, Case No. 336.

The statute of limitation is not applicable to a suit by a vendor of land, who has retained title as security, to subject the land to the satisfaction of the purchase money.—Randall v. Jaques, Case No. 11,553.

II. COMPUTATION OF PERIOD OF LIMITATION.

§ 9. Accrual of right of action or defense.

Time of accrual of right of action for money received.—Astor v. Girard, Case No. 595.

In the case of an unliquidated demand, where the parties have come to a settlement, and determined the sum due by mutual agreement, the limitation begins to run from the time of such settlement.—Ex parte Storer, Case No. 13,490.

In Maine, in the case of a mutual and open account current, where the party sleeps on a demand without entering it on his account until the period of limitation is elapsed, the account is barred.—Ex parte Storer, Case No. 13,490.

§ 10. Performance of condition and demand.

Where a subcontractor was to receive his pay when the contractor received his, his cause of action against the contractor did not accrue until the contractor had made final settlement with the owner.—Chew v. Baker, Case No. 2,663.

Non assumpsit within five years, etc., is not a good plea to an action of assumpsit upon a promise to collect money and account for it, as the cause of action does not arise until the money has been received by defendant and demanded by plaintiff.—Gardner v. Peyton, Case No. 5,234.

§ 11. Personal disabilities and privileges.

Where the statute has once begun to run it will continue to run over all subsequent disabilities.—Harris v. McGovern, Case No. 6,125; Roberts v. Moore, Id. 11,905.

The exception in favor of one who was under disability "at the time such right or title accrued" does not permit the tacking of disabilities.—Lewis v. Barksdale, Case No. 8,317.

The statute runs in favor of an insolvent debtor, notwithstanding his discharge.—Denny v. Henderson, Case No. 3,806.

The inability of an heir to sue to recover real estate pending administration is not a disability, within the meaning of section 191 of the California probate act.—Meeks v. Vassault, Case No. 9,393.

Inability of the creditor to proceed against the real estate of decedent until the personal was exhausted, or a deficiency ascertained, is no bar in equity to the statute of limitations.—Hayman v. Keally, Case No. 6,265.

Where a right of action to recover land accrues during the minority of the owner, the statute of limitations of California does not begin to run until the owner attains majority.—Le Roy v. Reeves, Case No. 8,272.

A grantee from the owner, after obtaining his majority, may maintain an action against a disseisor entering during the minority of the owner, at any time within five years after the disability terminates.—Le Roy v. Reeves, Case No. 8,272.

In trespass, the infancy of some joint plaintiffs does not prevent the plea of limitations as to the others.—Marsteller v. McClean, Case No. 9,138.

The Oregon statute of limitations upon actions to recover real property does not run against a woman to whom the right to sue accrues during coverture, until the removal of such disability; and this whether the action concerns her separate property or otherwise.—Wythe v. Smith, Case No. 18,122.

In trespass the coverture of some joint plaintiffs does not prevent the plea of limitations by others.—Marsteller v. McClean, Case No. 9,138.

The fact that one of several coheirs is barred by the statute will not affect the right of the others who were under disability.—Lewis v. Barksdale, Case No. 8,317.

§ 12. Death and administration.

If the statute begins to run in the lifetime of the intestate, it is not interrupted by his death, and the want of administration.—Hayman v. Keally, Case No. 6,265.

The statute will not operate as against the claim of a decedent until administration granted.—Lewis v. Broadwell, Case No. 8,319.

Act N. C. 1789, c. 23, § 4, requiring creditors of decedents to bring their actions within three years, is inapplicable where there is no executor or administrator of the estate.—Grubb v. Clayton, Case No. 5,849a.

A clause in a will directing all the testator's debts to be paid, and appropriating the rents of his real estate, does not take the case at law out of the statute of limitations, when the plaintiff does not seek his remedy under the will.—Wilson v. Turberville, Case No. 17,843.

Actions by and against administrators, see "Executors and Administrators," § 45.

§ 13. Absence, nonresidence, and imprisonment.

The statute of limitations in Indiana does not run against nonresidents; but the complainants may be barred by lapse of time.—Bowman v. Wathen, Case No. 1,740.

The limitation law became effective as to nonresidents by Act Ark. Jan. 14, 1843.—Boyle v. Arledge, Case No. 1,758.

After a claim has been once barred under such act, defendant's liability is not revived by its repeal.—Sohn v. Waterson, Case No. 13,161.

The exception in favor of persons out of the state when the cause of action accrued, *held* to apply as well to persons who are never in the state as to those who were temporarily absent.—Hobart v. Upton, Case No. 6,547; Chomqua v. Mason, Id. 2,693.

The return into a state after a departure must be such as will give the plaintiff opportunity, by the exercise of reasonable diligence, to serve process.—Dorr v. Swartwout, Case No. 4,010.

In order to set the statute to running in favor of a defendant who was out of the state when the cause of action accrued, his coming into the state must either be of a permanent character, or, if not so, it must be brought to plaintiff's knowledge, or, if not, then his stay must be of such a nature that plaintiff, by reasonable diligence, can ascertain it.—Wood v. Ward, Case No. 17,965.

It is a good rejoinder to plaintiff's reply to the plea of limitation that defendant was beyond seas during the time covered by the plea, that defendant was within the jurisdiction for four days during such time, to plaintiff's knowledge.—Patriotic Bank v. Webster, Case No. 10,811a.

In the absence of positive provision, the statute, after it has commenced to run, is not suspended by defendant's removal from the state.—Maryland v. Todd, Case No. 9,220.

Where claims had still six years to run under the statute, without regard to a proviso in favor of nonresidence, the repeal of the proviso will be given effect as to the nonresident owners.—Lewis v. Broadwell, Case No. 8,319.

Act Kan. Feb. 10, 1859, limiting to two years actions on contracts made and judgments rendered out of the state, does not begin to run in favor of a person who was not a resident when it was passed, until he comes into the state.—Sohn v. Waterson, Case No. 13,161.

Under the Ohio statute, if, when a cause of action accrues against a person, he is out of the state, the period of limitation does not begin to run until he comes into the state.—Wood v. Ward, Case No. 17,965.

And where the cause of action did not accrue until demand made, and defendant removes from the state before demand, the statute is no bar.—Lee v. Cassin, Case No. 8,184.

"Persons beyond seas" means persons not residents of the state.—Pruseux v. Welch, Case No. 11,456.

A person in Alexandria county, D. C., is not "beyond seas" in respect to persons residing in Washington county.—Suckley v. Slade, Case No. 13,588.

The state of Delaware is "beyond seas," in regard to the District of Columbia, within the meaning of the statute of limitations.—Ferris v. Williams, Case No. 4,750.

The county of Alexandria is not "beyond seas" as to the county of Washington in the District of Columbia.—Bank of Alexandria v. Dyer, Case No. 847.

Action on note *held* barred in 13 years, notwithstanding frequent absences of defendant from the state.—McDaniel v. Milam, Case No. 8,744a.

A second departure from the state is not to be considered in computing the running of the statute, under 2 Rev. St. N. Y. 297, § 27.—Dorr v. Swartwout, Case No. 4,010.

The statute of limitations of a state does not run against one who, immediately upon coming within the state, is cast into prison, and detained there during her stay.—Wood v. Ward, Case No. 17,965.

Where, immediately after a cause of action arises, plaintiff, while temporarily in another state, is seized and imprisoned, and returns to the state where the cause of action arose immediately upon his release, the statute of limitations does not commence to run until his return to the state.—Wood v. Ward, Case No. 17,965.

§ 14. Fraud and concealment of cause of action.

In an action for fraud and deceit in a sale, it is a good reply to a plea of the statute of limitations that there was a fraudulent concealment of the deceit until within six years.—Sherwood v. Sutton, Case No. 12,782.

Fraud which will prevent the running of limitations is secret or concealed fraud,—a concealment of the cause of action.—Martin v. Smith, Case No. 9,164.

In cases of fraud the statute will operate from the time the fraud is discovered.—Dunlevy v. Mowry, Case No. 4,165; Main v. Mills, Id. 8,974; Mitchell v. Thompson, Id. 9,669; Piatt v. Vattier, Id. 11,117.

An objection to the running of the statute in an action for the recovery of land founded upon the allegation that defendant's possession was obtained by fraud can only be made by the party injured by the fraud.—Pruseux v. Welch, Case No. 11,456.

Where plaintiff has been negligent in discovering or attacking fraud, the statute will run from the commencement of his laches, notwithstanding the fraud.—Martin v. Smith, Case No. 9,164.

§ 15. War.

A declaration of war by competent authority suspends the running of the statute of limitations.—Jackson Ins. Co. v. Stewart, Case No. 7,152; ——— v. Lewis, Id. 8,315.

A statute of limitation of a state in rebellion does not run during the war, as against a debt due a citizen of another state in rebellion.—Brown v. Hiatt, Case No. 2,011; Gooding v. Varn, Id. 5,539.

Act June 11, 1864, which suspends the running of the statute of limitations during the Rebellion, is not itself a statute of limitation, and is not within the provisions of a state constitution (Tex. art. 12) declaring statutes of limitation suspended.—Graydon v. Sweet, Case No. 5,733.

The suspension of the federal court in Mississippi by reason of the Rebellion suspended the running of limitations as to persons having a right to pursue their remedies in that court.—Whitfield v. Allison, Case No. 17,571.

The Georgia statutes (Act Dec. 14, 1861; Act Oct. 1, 1865) suspending the statute of limitations, however defective in point of original authority, were ratified by the state constitution of 1868.—Davie v. Hatcher, Case No. 3,610.

Only those cases in which the statute had fully run before the passage of such retroactive legislation are within the control of Act Ga. March 16, 1869, declaring such legislation null and void in certain cases.—Davie v. Hatcher, Case No. 3,610.

The suspension of the statute of limitations provided for by Act June 11, 1864, did not continue in Georgia after the president's proclamation April 2, 1866, though no term of the federal court was held and no clerk appointed, until six

months later.—United States v. Muhlenbrink, Case No. 15,831.

The period of a war, during which a party is absent, will be excepted in computing the time. —Delancey v. McKeen, Case No. 3,749.

After the Act of July 13, 1861, declaring the inhabitants of Arkansas to be in a state of insurrection, the period during which such insurrection existed is not to be counted as a part of the limitations for suit in Oregon.—Chappelle v. Olney, Case No. 2,613.

A citizen of a loyal state, during the Civil War, is not entitled to the benefit of both the suspension of the statute of limitations by reason of his residence, and the suspension under a state statute (Act Miss. Dec. 31, 1862) of actions of ejectment.—Healy v. Mothershed, Case No. 6,296.

The Civil War was no ground for suspension of legal remedies and acts of limitation in Alabama, as between citizens of the Confederate States.—Lockhart v. Horn, Care No. 8,445.

§ 16. Commencement of action or other proceeding.

The commencement of a suit, to defeat the statute of limitations, must be the same suit to which the plea is pleaded.—Delaplaine v. Crowninshield, Case No. 3,756.

Where an action is dismissed for want of jurisdiction, a new one may be brought within one year. Gen. St. Mass. c. 97, § 5.—Caldwell v. Harding, Case No. 2,302.

A bill filed after the two-years limitation has expired is not an amendment of a suit for the same cause of action, filed before the two years, and subsequently dismissed.—Clark v. Hackett, Case No. 2,823.

An amendment asserting a new title will be considered, as regards the statute of limitations, as a new bill.—Holmes v. Trout, Case No. 6,645; Miller v. McIntire, Id. 9,582.

Amendments must introduce a new cause of action.—McGlinchy v. United States, Case No. 8,803.

Amendment of declaration as to defendants not served will not authorize plea of statute of limitations.—Bell v. Davis, Case No. 1,249.

Where a judgment by default in a suit commenced before plaintiff's demand was barred was set aside after the statute period had elapsed, *held*, that defendant was not entitled to the benefit of the statute.—Isaacs v. Price, Case No. 7,097.

The commencement of a suit in equity within the limitation, which was subsequently discontinued, will not excuse the delay.—Hall v. Hudson, Case No. 5,935.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

§ 17. Elements of knowledge or new promise in general.

In order to remove the bar of the statute, there should either be an express promise to pay, or an admission of the debt, in such terms as imply liability and willingness to pay.—Georgia Insurance & Trust Co. v. Ellicott, Case No. 5,354; Cadmus v. Polhamus, Id. 2,282a; Kampshall v. Goodman, Id. 7,605. CONTRA, see Cowan v. Magauran, Case No. 3,292.

§ 18. Construction of new promise or acknowledgment.

Anything added, going to negative a promise or acknowledgment, must be considered as qualifying every other expression.—Read v. Wilkinson, Case No. 11,611.

The action in the case of a debt taken out of the statute by an acknowledgment is on the new promise, and it can be enforced only under its conditions, and in the terms proposed.—Kampshall v. Goodman, Case No. 7,605.

§ 19. Promise to pay when able.

A promise to pay in consideration of forbearance, when defendant should be able, is good, and is to be construed until he is able.—Lonsdale v. Brown, Case No. 8,494.

A promise to pay "when able" will take the case out of the statute, without proof of ability to pay.—Davis v. Van Zandt. Case No. 3,656. CONTRA, see McCormick v. Walker, Case No. 8,728; In re Cornwall, Id. 3,250.

Where the promise is to pay when able, and plaintiff sues before defendant is able, he cannot afterwards resort to the promise.—Craig v. Brown, Case No. 3,330.

§ 20. Offer to compromise.

An offer to compromise a debt will not take the case out of the statute.—Ash v. Hayman, Case No. 572; Bank of Columbia v. Sweeny, Id. 882; Neil v. Abbott, Id. 10,088.

§ 21. Conditional promise.

A new promise, if conditional, cannot be given in evidence in a suit founded upon the old debt. —Lonsdale v. Brown, Cases Nos. 8,492, 8,494.

A conditional promise to pay will not remove the bar of the statute unless the condition is performed.—Read v. Wilkinson, Case No. 11,611.

A promise to pay if the creditor will prove his demand is sufficient to take the case out of the statute.—Read v. Wilkinson, Case No. 11,611.

Expression of a willingness to pay a barred debt if a certain set-off is allowed is not an acknowledgment.—Nicholls v. Warfield, Case No. 10,234.

§ 22. Acknowledgment to or on behalf of a third person.

Casual acknowledgment of debt to a stranger is sufficient to take it out of the statute.—Bank of Columbia v. Moore, Case No. 876; Cadmus v. Polhamus, Id. 2,282a.

A promise to a third person to pay a debt in a different manner from the original contract is not sufficient to take the case out of the statute. —Craig v. Brown, Case No. 3,330.

A promise by a debtor to a bankrupt creditor, acting in behalf of the assignee of an account, to settle the same, is sufficient to take a suit thereon by said assignee out of the statute.—Leach v. Coyle, Case No. 8,156.

An acknowledgment of liability for excess duties paid made by an ex-collector of customs will not take the case out of the statute as against him, unless made with reference to his individual liability.—Dorr v. Swartwout, Case No. 4,010.

An offer after commencement of suit, made to plaintiff's agent, to pay the debt, upon terms which he is not authorized to accept, will not take the case out of the statute.—Hamilton v. Carnes, Case No. 5,977.

§ 23. Requirement of writing.

Written acknowledgment required to remove the bar in Kansas.—Barlow v. Barner, Case No. 998.

A case may be taken out of the statute of limitations of California by a written acknowledgment and promise to pay signed by the party. —Palmer v. Andrews, Case No. 10,683.

§ 24. Particular instances of new promise and acknowledgment.

The reply, "I will put up your wages for you," to the demand of an employé, "I want to see my money," *held* sufficient to take the case out of the statute as to all the wages to which the

promise applied.—Penaro v. Flournoy, Case No. 10,916.

An acknowledgment of a note, and that it had not been paid, coupled with a statement that payment would be resisted, *held* sufficient to take the case out of the statute.—Rhodes v. Hadfield, Case No. 11,748.

Admission by a debtor on production of his note that it is as good as money is sufficient evidence of new promise.—Arnold v. Dexter, Case No. 557.

The statement by the maker of a note that he will "attend" to it is sufficient to remove the bar.—Bank of Alexandria v. Clarke, Case No. 844.

A promise to pay in consideration of forbearance "for a short time" will not sustain the action.—Lonsdale v. Brown, Case No. 8,494.

The admission of the receipt of goods, coupled with a claim of payment, will not take the case out of the statute.—Reynolds v. Calvert, Case No. 11,728.

An admission of mutual, unliquidated accounts, on which each party claims a balance to be now due to him, takes a case out of the statute of limitations.—Ellis v. Jarvis, Case No. 4,403.

A promise to account, though the debtor adds that he owes nothing, will amount to a promise to pay if it appears on the account that anything is due.—Read v. Wilkinson, Case No. 11,611.

A statement by the debtor "that there were other bills on which his name was, and, even if he was to pay this, he could not pay all," *held* an acknowledgment.—Cowan v. Magauran, Case No. 3,292.

A letter stating that the writer could have availed himself of the insolvent laws, but preferred paying all debts as soon as possible, "not omitting A's claim," not sufficient acknowledgment.—Archer v. Poor, Case No. 509.

The formal renewal of a note given by a husband to his wife's brother, in trust for the wife, with privilege of renewal for one year, is unnecessary in order to prevent the running of the statute of limitations.—Bechtel's Case, Case No. 1,204.

List of debts filed on application for benefit of insolvent law *held* not an acknowledgment of the debt.—Georgia Insurance & Trust Co. v. Ellicott, Case No. 5,354.

A declaration by defendants at the time of serving the writ that they would pay the debt is not sufficient to take the case out of the statute, where the writ did not specify the cause of action nor its amount, and the same was not mentioned to them.—Young v. Wetzell, Case No. 18,176.

An acknowledgment, accompanied by a refusal to pay, unless compelled by law, will not take the case out of the statute of limitations.—Jenkins v. Boyle, Case No. 7,262.

§ 25. Part payment.

A case may be taken out of the statute of California by a part payment.—Palmer v. Andrews, Case No. 10,683.

A payment of part of a debt by the executor within the limitation does not take the case out of the statute as to heirs and devisees.—Gilpin v. Plummer, Case No. 5,451.

IV. PLEADING, EVIDENCE, AND TRIAL.

§ 26. Pleading.

The defendant cannot avail himself of the statute of limitations upon the general issue.—Neale v. Walker, Case No. 10,072; Gardner v. Lindo, Id. 5,231; McIver v. Moore, Id. 8,831.

Not guilty within three years is a good plea in trover.—Barnard v. Tayloe, Case No. 1,008.

Where statute of limitations is pleaded, plaintiff cannot obtain benefit of exception in favor of merchants' accounts without setting them up in his replication.—Clarke v. Mayfield, Case No. 2,858.

Where the statute is pleaded to two counts in a declaration, it is sufficient if it is good as to one.—Chew v. Baker, Case No. 2,663.

In an action on a time note, non assumpsit infra tres annos is bad on general demurrer; it ought to be actio non accrevit.—Bank of Columbia v. Ott, Case No. 879; Ferris v. Williams, Id. 4,750; Union Bank of Georgetown v. Eliason, Id. 14,355.

A plea of the statute filed with a general answer to a bill in equity must contain averments negativing the special matter stated in the bill which would avoid the operation of the statute. It is not sufficient that such matters are negatived in the answer.—Stearns v. Page, Case No. 13,339.

To a plea of the statute of limitations interposed by an administrator at the trial term plaintiff can make only one replication.—Offut v. Hall, Case No. 10,447.

Sufficiency of replication to plea of statute of limitations alleging absence from state.—Andreae v. Redfield, Case No. 368; Jones v. Hays, Id. 7,467.

To avoid the bar of the statute in an action based on fraud complainant must allege ignorance of the fraud, and when it was discovered.—Carr v. Hilton, Case No. 2,437.

An allegation in a replication that defendant corporation was out of the state when the cause of action accrued is a sufficient legal answer to the plea that the action did not accrue within six years; but otherwise with an allegation that defendant "is" a corporation existing under the law of another state.—Blossburg & C. R. Co. v. Tioga R. Co., Case No. 1,563.

§ 27. Raising defense by demurrer.

An objection that a declaration shows that the cause of action is barred by the statute of limitations cannot be taken by demurrer.—Wilkinson v. Pomeroy, Case No. 17,675.

§ 28. Evidence.

Less strictness of proof is required to establish a promise before the statute has run than to prove a new promise after the debt has become barred.—In re Reed, Case No. 11,635.

§ 29. Province of court and jury.

Whether the evidence of a promise to pay a debt barred by the statute is sufficient to take the case out of the statute is a question of law for the court. Its credibility and application to the debt in suit is a question of fact for the jury.—Penaro v. Flournoy, Case No. 10,916.

LIMITATION OF LIABILITY.

See "Carriers," §§ 27–32; "Insurance," § 128; "Shipping," §§ 174–178, 244–255; "Telegraphs and Telephones," § 4; "Towage," § 24.

LIMITED PARTNERSHIP.

See "Partnership," §§ 54–59.

LIQUIDATED DAMAGES.

See "Damages," § 7.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIS PENDENS.

§ 1, What constitutes. § 2, Right to file. § 3, Necessity. § 4, Operation and effect.

Another action pending, see "Abatement and Revival," § 2.
Effect of bankruptcy, see "Bankruptcy," §§ 506, 507.
Ground of continuance, see "Continuance," § 13.
Right of assignee of parties, see "Bankruptcy," § 211.

§ 1. What constitutes.
An order for examination in proceedings in aid of execution, without an order restraining the disposal of property, does not operate as a lis pendens.—Gregory v. Hewson, Case No. 5,801.

§ 2. Right to file.
The right to file a lis pendens is statutory, and cannot be impaired by the court.—Platt v. Matthews, Case No. 11,218a.

§ 3. Necessity.
In the case of a suit in relation to real estate, pending in the federal court in Virginia, the lis pendens need not be recorded, as required by Code Va. 1873, c. 182, § 5, to render a purchase invalid as against plaintiff.—Rutherglen v. Wolf, Case No. 12,175.

§ 4. Operation and effect.
The law of lis pendens is applicable only to persons whose rights were acquired after the suit was instituted against the persons under whom they claimed.—Consolidated Fruit-Jar Co. v. Whitney, Case No. 3,133.

The pendency of a suit cannot operate as a notice, until after the service of process or publication.—Dunn v. Games, Case No. 4,176.

LITERARY PROPERTY.

§ 1, Rights of property in general. § 2, Subjects of literary property. § 3, Right to reproduce in general. § 4, Publication and abandonment or dedication to the public. § 5, Suits in equity—Injunction.

See, also, "Copyrights."

§ 1. Rights of property in general.
Cases on the subject of literary property, especially in dramatic compositions, reviewed at great length by Cadwalader, District Judge.—Keene v. Wheatley, Case No. 7,644.

An author has a common-law right in his manuscript, and is entitled to an injunction to restrain its publication.—Bartlett v. Crittenden, Cases Nos. 1,076, 1,082.

But the common law gives protection to the author for his manuscript only.—Bartlett v. Crittenden, Case No. 1,076.

The author's rights at common law have not been taken away or limited by any existing act of congress.—Crowe v. Aiken, Case No. 3,441.

§ 2. Subjects of literary property.
The writer of a letter has the property therein, and may control its use, and is entitled to an injunction to restrain an improper use thereof by the addressee.—United States v. Tanner, Case No. 16,430; Folsom v. Marsh, Id. 4,901.

§ 3. Right to reproduce in general.
No private person has the right to publish official letters, addressed to the government, without its sanction.—Folsom v. Marsh, Case No. 4,901.

The spectators have no right to secure the reproduction of a play by phonographic or other means independent of memory.—Crowe v. Aiken, Case No. 3,441.

No restrictive notice is necessary to spectators to secure the author's rights.—Crowe v. Aiken, Case No. 3,441.

The proof that a play was reproduced from memorizing it by a spectator must be so clear as to negative any other conclusion.—Crowe v. Aiken, Case No. 3,441.

Additions to a play made by an actor while in the employ of the owner, in adapting the play to the performance by him, belong to the owner.—Keene v. Wheatley, Case No. 7,644.

The proprietor of the play will be protected against the communication by such actor to others of his unwritten additions, though they are not the subject of literary property.—Keene v. Wheatley, Case No. 7,644.

The purchaser on an unconditional sale of an uncopyrighted painting has a right to reproduce the same by chromo, lithograph, etc., without obtaining the consent of the author.—Parton v. Prang, Case No. 10,784.

§ 4. Publication and abandonment or dedication to the public.
Representation of a play upon the stage is not, at common law, a publication depriving the author of his exclusive right to control the literary production.—Crowe v. Aiken, Case No. 3,441.

But it is a publication entitling others to represent the play so far as they are enabled to do so by memorizing the same.—Keene v. Wheatley, Case No. 7,644.

The representation of a play on a stage in England, there, by statute, made a publication, cannot affect the rights of the author or his assignees at common law in the United States.—Crowe v. Aiken, Case No. 3,441.

Irrespective of statute, an author has no exclusive right to multiply copies or control subsequent issues after the first publication of his work.—Boucicault v. Fox, Case No. 1,691; Same v. Wood, Id. 1,693.

While the author on communicating the contents of his manuscript may restrict its use as he pleases, an unqualified publication by printing and offering copies for sale is a dedication to the public.—Parton v. Prang, Case No. 10,784; Bartlett v. Crittenden, Id. 1,076.

It is not an abandonment to the public to use one's manuscripts to instruct others who are permitted to take copies.—Bartlette v. Crittenden, Case No. 1,082.

Copies so taken for purposes of instruction cannot be applied to any other purpose.—Bartlette v. Crittenden, Case No. 1,082.

§ 5. Suits in equity—Injunction.
A representation, from an unauthorized copy, of a foreign author's play existing in manuscript only, will be restrained at the suit of an assignee of the rights in this country, notwithstanding a public representation of the play by such assignee.—Keene v. Wheatley, Case No. 7,644.

Defendants cannot claim hardship from an injunction after the book is printed, where they were given notice not to print.—Bunkley v. De Witt, Case No. 2,134.

LITTORAL RIGHTS.

See "Navigable Waters," § 18.

LIVERY STABLE KEEPERS.

See "Nuisance," § 1.

LIVE STOCK.

See "Animals."
Carriage of, see "Carriers," § 37.
Injuries to, see "Railroads," § 72.

LOAN COMPANIES.

See "Building and Loan Associations."

LOANS.

See "Bailment," § 1; "Building and Loan Associations."
By bank, see "Banks and Banking," §§ 11, 18.
To corporation, see "Corporations," § 44.
To counties, see "Counties," § 5.

LOCAL ACTIONS.

See "Venue," § 1.

LOCAL LAWS.

See "Statutes," §§ 7, 8.

LOCAL PREJUDICE.

Ground for removal of cause, see "Removal of Causes," § 23.

LOCATION.

Of grant, see "Public Lands," §§ 71, 85.
Of mining claims, see "Mines and Minerals," §§ 2–8.
Of railroads, see "Railroads," §§ 15–19.

LOGS AND LOGGING.

Condemning land for boom, see "Eminent Domain," § 1.
Obstruction of navigation by booms, see "Navigable Waters," § 10.

§ 1. Liens.
The legislature has no power to make a lien given on sawmills in favor of employés and persons furnishing logs paramount to that of prior judgments and mortgages.—Townsend Sav. Bank v. Epping, Case No. 14,120.

LOST INSTRUMENTS.

§ 1, Establishment of lost instruments. § 2, Actions on lost instruments—Right to maintain in general. § 3, —— Indemnity.

Admission of secondary evidence, see "Evidence," § 24.
Records, see "Records," § 3.
Wills, see "Wills," § 14.

§ 1. Establishment of lost instruments.
After great lapse of time, strict proof of a destroyed deed under which the parties claim may be dispensed with.—Lewis v. Baird, Case No. 8,316.

Sufficiency of evidence to prove the loss of a promissory note to permit evidence of its contents to be given.—Vuyton v. Brenell, Case No. 17,026.

A deed will not be presumed as between parties who do not sustain the relation of vendor and purchaser.—Ransdale v. Grove, Case No. 11,570.

§ 2. Actions on lost instruments—Right to maintain in general.
The bona fide holder of half of a bank note may recover its amount on accounting for its mutilation, or proving loss of the other half.—Bullet v. Bank of Pennsylvania, Case No. 2,125.

The owner, voluntarily destroying a promissory note, can neither recover upon the note, nor upon the debt for which it was given.—Booth v. Smith, Case No. 1,649.

Securities in the hands of officers of a rebel state, carried from the capital on its occupation by the federal forces, and held within the lines of the enemy, are lost, within the meaning of the law authorizing a recovery on instruments lost, without producing them.—Union Bank v. New Orleans, Case No. 14,351.

Where the locus of such securities is known, a recovery may be had by the owner without advertising them as required by law.—Union Bank v. New Orleans, Case No. 14,351.

§ 3. —— Indemnity.
Owner losing half of bank note may recover on whole note on offering security to bank.—Armat v. Union Bank, Case No. 535.

The payee of a lost inland bill of exchange is not liable to the indorsee unless the latter has offered indemnity against the lost bill and demanded a new bill from the drawer.—Riggs v. Graeff, Case No. 11,826.

LOTTERIES.

§ 1, Regulation and prohibition. § 2, Contracts prohibited.

Mailable matter, see "Post Office," § 14.
Taxation, see "Internal Revenue," § 33.

§ 1. Regulation and prohibition.
If the business of selling lottery tickets is lawful, a municipal corporation cannot restrain it; if unlawful, it cannot license it.—Nicholls v. Georgetown, Case No. 10,228.

A scheme for the disposal of town lots, by the terms of which a purchaser has a chance of obtaining one of the reserved or prize lots as a part of the consideration, is a lottery and subject to tax as such.—United States v. Olney, Case No. 15,918.

Construction of statutes relating to lotteries as applicable to the city of Washington, D. C.—United States v. Gorman, Case No. 15,237.

Rights of holders of tickets in Washington lottery.—Washington v. Young, Case No. 17,241; Clark v. Washington, Id. 2,839; Shankland v. Same, Id. 12,703; McCue v. Same, Id. 8,735.

§ 2. Contracts prohibited.
A lottery for the sale of lots or lands is within the prohibition of Act Md. 1792.—Hawkins v. Cox, Case No. 6,243.

Lottery tickets cannot be sold in the District of Columbia for a lottery authorized by a state law.—Thompson v. Milligan, Case No. 13,969.

A conveyance of land lying in New Jersey, founded on a lottery consideration, is void, within the lottery act of that state, although the lottery was contrived and drawn in another state.—Ridgeway v. Underwood, Case No. 11,815.

LUMBER.

See "Logs and Logging."

LUNATICS.

See "Insane Persons."

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M

MAINTENANCE.

See "Champerty and Maintenance."

MALICE.

See "Libel and Slander," § 10; "Malicious Prosecution," § 4.

MALICIOUS PROSECUTION.

§ 1, Nature of prosecution. § 2, Who liable. § 3, Want of probable cause. § 4, Malice. § 5, Actions—Defenses. § 6, —— Pleading. § 7, —— Issues and proof. § 8, —— Evidence. § 9, —— Damages. § 10, —— Questions for jury.

See, also, "False Imprisonment."

§ 1. Nature of prosecution.

A person who institutes bankruptcy proceedings when he is not a creditor, and no act of bankruptcy has been committed, is liable to an action.—Sonneborn v. Stewart, Case No. 13,176.

A ca. sa. upon a judgment is good cause of arrest, and a declaration for a malicious arrest, showing such cause, is bad on demurrer.—Breckenridge v. Auld, Case No. 1,824.

Demanding excessive bail where plaintiff has a good cause of action or holding to bail where there is no cause of action, if done vexatiously, will sustain an action for malicious prosecution.—Ray v. Law, Case No. 11,592.

An action for malicious prosecution is the proper remedy for an arrest on an affidavit false in fact which is sufficient on its face.—Norman v. Manciette, Case No. 10,300.

The remedy for maliciously suing out an attachment is not confined to an action on the attachment bond.—Preston v. Cooper, Case No. 11,395.

§ 2. Who liable.

A private corporation may be liable to an action for malicious prosecution.—Copley v. Grover & Baker Sewing-Mach. Co., Case No. 3,213.

§ 3. Want of probable cause.

Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused was guilty.—Munns v. De Nemours, Case No. 9,926.

In an action for malicious prosecution founded on a charge of larceny, it is not necessary for the defendant to fix the crime of larceny on the plaintiff. If, by his folly or his fraud, he exposes himself to a well-grounded suspicion that he was guilty, the prosecution was founded on probable cause, which is a sufficient defense.—Wilmarth v. Mountford, Case No. 17,774.

Probable cause of action in a suit upon the failure to recover in which an action for a malicious prosecution is instituted is a sufficient answer to such a suit.—Ray v. Law, Case No. 11,592.

§ 4. Malice.

Malice, in the sense of the law, does not presuppose personal hatred or revenge, but may, under certain circumstances, be implied either from a total want of probable cause, or from gross and culpable omission to make suitable and reasonable inquiries.—Wiggin v. Coffin, Case No. 17,624.

Any act is malicious which is wrongfully and willfully done, with a consciousness that it is not according to law or duty.—Wiggin v. Coffin, Case No. 17,624.

The failure of the plaintiff to recover in a suit instituted by him does not establish the fact that the action was vexatious or unfounded.—Ray v. Law, Case No. 11,592.

It seems that the advice of counsel is not a protection unless the party gave a full and true statement of facts within his knowledge, and acted upon it in good faith for an honest purpose.—Munns v. De Nemours, Case No. 9,926.

Want of probable cause is evidence of malice.—Burnap v. Albert, Case No. 2,170; Blunt v. Little, Id. 1,578.

See, also, post, § 9.

§ 5. Actions—Defenses.

It is no defense that defendant's oath did not in law authorize the magistrate to grant the warrant if the defendant personally availed himself of it.—Johnson v. Daws, Case No. 7,382.

§ 6. —— Pleading.

Declaration must allege termination of proceedings.—Barrell v. Simonton, Case No. 1,041.

§ 7. —— Issues and proof.

Under the general issue, defendant may show probable cause for the prosecution.—Sheehee v. Resler, Case No. 12,739.

§ 8. —— Evidence.

Plaintiff must show both malice and want of probable cause on the part of the prosecutor.—Breckenridge v. Auld, Case No. 1,824; Burnap v. Albert, Id. 2,170; Lewis v. Spalding, Id. 8,334; Munns v. De Nemours, Id. 9,926; Murray v. McLane, Id. 9,964; Preston v. Cooper, Id. 11,395; Wiggin v. Coffin, Id. 17,624; Zantzinger v. Weightman, Id. 18,202.

The advice of counsel is only admissible in evidence when given before the commencement of the suit, and accompanied with a statement of the facts upon which it was given.—Blunt v. Little, Case No. 1,578.

In an action for malicious attachment the official return of the attachment is not conclusive, but may be contradicted by parol.—Mott v. Smith, Case No. 9,882.

In an action for a malicious prosecution the records of other actions brought by defendant against plaintiff are inadmissible.—Ray v. Law, Case No. 11,592.

The record in the action in which plaintiff was held to bail, where the date of the return of the writ was misstated in the declaration, *held* not admissible in support of the count for damages, but admissible as evidence of malice on the other counts.—Munns v. De Nemours, Case No. 9,926.

Evidence is admissible of loss in the public estimation in consequence of the prosecution, but not in consequence of reports circulated by defendant.—Zantzinger v. Weightman, Case No. 18,202.

See, also, ante, § 4.

§ 9. —— Damages.

Want of probable cause for instituting bankruptcy proceedings is evidence of malice sufficient to sustain the action and to permit a recovery of actual damages, but exemplary damages are recoverable only where actual malice is shown.—Sonneborn v. Stewart, Case No. 13,176.

Plaintiff cannot set up a claim to punitive damages where he was guilty of gross fraud in the transaction out of which the charge of crime arose.—Munns v. De Nemours, Case No. 9,926.

A verdict for $1,500 will be set aside as excessive where plaintiff admitted that defendant acted without bad motives, although rashly and improperly.—Wiggin v. Coffin, Case No. 17,624.

§ 10. —— Questions for jury.

The existence of malice is a question of fact for the jury.—Munns v. De Nemours, Case No. 9,926.

Probable cause is a mixed question of law and fact. Whether the circumstances alleged are true is a question of fact. Whether, if true, they amount to probable cause, is a question of law.—Munns v. De Nemours, Case No. 9,926; Murray v. McLane, Case No. 9,964.

MANDAMUS.

§ 1, Nature and grounds in general. § 2, Subjects and purposes of relief—Acts and proceedings of courts and judges. § 3, —— Acts and proceedings of public officers and boards. § 4, —— Acts and proceedings of municipality. § 5, —— Acts and proceedings of private corporations. § 6, Jurisdiction. § 7, Proceedings and relief. § 8, Costs.

As auxiliary to removal proceedings, see "Removal of Causes," § 45.
To compel operation of railroads, see "Railroads," § 66.

§ 1. Nature and grounds in general.

A mandamus will not be granted where the right of the applicant is not clear, or where he has an adequate legal remedy equivalent to a specific remedy.—United States v. Bank of Alexandria, Case No. 14,514.

The propriety of issuing the writ is determined, not by the office of the person to whom it is directed, but by the nature of the thing to be done.—United States v. Kendall, Case No. 15,517.

Construction of Rev. Code Iowa, c. 153, in relation to the "action of mandamus."—Rusch v. Des Moines County, Case No. 12,142.

§ 2. Subjects and purposes of relief—Acts and proceedings of courts and judges.

The writ will not issue to a court where there has been an apparently honest exercise of discretion confided by law.—Ladd v. Tudor, Case No. 7,975.

Mandamus is the proper remedy where the federal circuit court refuses to entertain jurisdiction by quashing the service of the original process.—Schollenberger v. Forty-Five Foreign Insurance Companies, Case No. 12,475a.

Mandamus will not lie from a circuit to a district court, requiring it to expunge amendments improperly made in the record returned to the circuit court on error.—Smith v. Jackson, Case No. 13,064.

The federal circuit court has no power by mandamus to compel the district court to set aside its decree in admiralty, or to grant a rehearing, or to allow an appeal after expiration of the time therefor.—The Enterprise, Case No. 4,500.

Mandamus is the proper remedy for failure or refusal of the county court to assess a tax, as provided by law, on lands made liable for local improvement.—Boro v. Phillips County, Case No. 1,663.

Quære, whether mandamus will lie from a federal court to a state judge.—Ladd v. Tudor, Case No. 7,975.

A court of equity cannot enforce the performance of a judicial function. The proper remedy in such case is by mandamus.—Tobey v. County of Bristol, Case No. 14,065.

§ 3. —— Acts and proceedings of public officers and boards.

Mandamus will not lie to the head of an executive department to compel the performance of an act not merely ministerial, but involving the exercise of judgment.—McElrath v. McIntosh, Case No. 8,781; Ex parte Reeside, Id. 11,656.

The circuit court of the District of Columbia has authority to issue mandamus requiring an officer of the United States to perform a ministerial duty involving a clear right of an individual, who is without other specific legal remedy.—United States v. Kendall, Case No. 15,517.

The federal circuit court has power to issue a mandamus to a collector commanding him to grant a clearance.—Gilchrist v. Collector of Charleston, Case No. 5,420.

Under Rev. St. § 716, a federal court may issue mandamus to compel the collector of a port to allow a merchant, sued for duties, an inspection of customhouse books and papers.—United States v. Hutton, Case No. 15,433.

A mandamus will not lie to the executive officers to compel the reinstatement of a person to his rank and position in the army register.—Ex parte Schaumburg, Case No. 12,441.

A mandamus should not be issued to the secretary of the treasury commanding him to pay to a judge of the territory his salary for the unexpired term of the office from which he had been removed by the president, and another person appointed thereto.—United States v. Guthrie, Case No. 15,271a.

A mandamus will not lie to compel the commissioner of the general land office to issue a patent for more land than he had adjudged petitioner entitled to.—United States v. Hendricks, Case No. 15,347a.

The circuit court of the District of Columbia has no jurisdiction to compel the superintendent to deliver certain documents to the public printer for printing.—United States v. Seaman, Case No. 16,245a.

The court refused the writ to compel the marshal to pay witness fees to the petitioner, an attorney of the court.—United States v. Seldon, Case No. 16,249a.

After the registry list has passed from the register to the commissioners of election, the latter cannot be controlled by mandamus, their duties being judicial, and not ministerial.—United States v. McCormick, Case No. 15,663a.

§ 4. —— Acts and proceedings of municipality.

Mandamus will lie to compel the city of Washington, D. C., to pay to the county treasurer one-half the expense of erecting a bridge over Rock creek. Act July 1, 1812, § 11.—United States v. Washington, Case No. 16,646.

Mandamus will not lie to the mayor, aldermen, and common council of Washington City to compel them to make regulations relative to the erection of private wharves.—Kennedy v. Washington, Case No. 7,708.

Cities being clearly within the spirit of Act Pa. April 15, 1834, mandamus may issue thereunder to enforce a judgment against a city although counties and townships only are mentioned therein.—Evans v. Pittsburg, Case No. 4,567; Same v. Pittsburgh, Id. 4,568.

Where the corporation by general levy has not provided sufficient revenues to meet the debt, the court may by mandamus compel a special levy.—Ex parte Parsons, Case No. 10,774.

Where a city exhausts its revenues in defraying current expenses, mandamus will lie to com-

pel it to pay matured. outstanding bonds.—United States v. Sterling, Case No. 16,388.

The federal circuit courts have power to issue writs of mandamus to enforce judgments against public corporations.—Evans v. Pittsburg, Case No. 4,567; Same v. Pittsburgh, Id. 4,568.

A demand of payment and a refusal are not a condition precedent to the issuance of a mandamus to compel such payment.—United States v. Elizabeth, Case No. 15,041a.

Where a warrant on the treasurer of a county to pay a judgment creditor is refused payment, mandamus will issue to enforce the collection of a tax to pay such judgment, and the creditor is not bound to wait his turn among other warrant holders.—United States v. Vernon County Court, Case No. 14,877.

A mandamus will issue from the federal court to compel the levy and collection of a tax to pay a judgment obtained in such court against a municipal corporation.—Aspinwall v. County Com'rs, Case No. 593; Jenkins v. Board of Sup'rs of Culpeper County, Id. 7,261; Ex parte Parsons, Id. 10,774; United States v. Vernon County Court, Id. 14,877; Same v. Buchanan County, Id. 14,679; Same v. Jefferson County, Id. 15,472; Same v. Treasurer of Muscatine County, Id. 16,538; Same v. Lee County, Id. 15,589; Smith v. Tallapoosa County, Id. 13,114; Britton v. Platte City, Id. 1,907.

Such mandamus will issue, notwithstanding an existing injunction restraining such tax, granted in a suit to which plaintiffs were not parties.—Smith v. Tallapoosa County, Case No. 13,114.

The fact that county commissioners have been enjoined by state court from assessing tax to pay a judgment rendered by the federal court is no defense to an application to federal court for a mandamus.—Clews v. Lee County, Case No. 2,892.

The state courts cannot lawfully interfere with the execution of such mandamus.—United States v. Treasurer of Muscatine County, Case No. 16,538.

A limitation in the charter upon the general power of taxation will not defeat the remedy by mandamus to enforce payment of a judgment.—Britton v. Platte City, Case No. 1,907; Brooks v. Memphis, Id. 1,954.

The federal circuit court cannot, by mandamus or otherwise, direct a municipal corporation to levy a tax larger than is authorized by law.—United States v. Elizabeth, Case No. 15,041a.

Where the maximum amount of tax authorized by a city charter for any one year is actually levied, a mandamus will be refused to a judgment creditor to compel the city to levy any other tax.—United States v. Burlington, Case No. 14,687.

It is no defense to a mandamus to compel a levy to pay a judgment for interest due on bonds that the levy of a tax to pay arrears on earlier bonds would exhaust the taxing power, where there is no expressed intention of levying such tax.—Sibley v. Mobile, Case No. 12,829.

In case of the evasion or disobedience of such writ, the federal court may appoint a marshal to execute it.—United States v. Treasurer of Muscatine County, Case No. 16,538.

Where a municipal corporation had no property on which an execution could be levied, and was without officers to levy and collect a tax to pay a judgment against it, the court appointed its marshal a special commissioner to assess, levy, and collect the requisite tax.—Welch v. Ste. Genevieve, Case No. 17,372.

A judgment against a county upon railway aid bonds may be enforced by a federal court by mandamus to compel the county court to draw a warrant on a fund applicable to such debt to pay the judgment.—United States v. Buchanan County, Case No. 14,679.

Mandamus will not issue to compel municipal officers to levy and collect a tax, unless the legislature has made it their duty to levy and collect such tax.—United States v. New Orleans, Case No. 15,871.

The fact that officers have resigned will not prevent the issue of a mandamus to compel the performance of a public duty, where their successors have not been elected or appointed and qualified.—United States v. Badger, Case No. 14,493.

Duty of county commissioners upon service of a mandamus execution in the collection and appropriation of funds for the payment of the judgment.—Loute v. Allegheny County, Case No. 8,544.

See, also, post, § 6.

§ 5. —— Acts and proceedings of private corporations.

A circuit court of the United States has power, by mandamus, to compel the Union Pacific Railroad Company to operate its road as required by law. Act March 3, 1873.—Hall v. Union Pac. R. Co., Case No. 5,950.

Private persons, who suffer damage and inconvenience from the failure of the company to operate its road as required by law, may institute proceedings under Act March 3, 1873, without the sanction of the attorney general.—Hall v. Union Pac. R. Co., Case No. 5,950.

§ 6. Jurisdiction.

Mandamus cannot be issued by the circuit court of the United States under the Acts of 1789, or June 1, 1872, as an original proceeding.—United States v. Union Pac. R. Co., Case No. 16,599.

The federal circuit court has not jurisdiction in the first instance, by mandamus, to compel a postmaster to furnish the advertised letter list to the newspaper having the lawful right to the printing.—United States v. Smallwood, Case No. 16,315.

The federal circuit courts outside the District of Columbia cannot issue the writ in the exercise of original jurisdiction, but only as necessary to the jurisdiction of the court, and to enforce a judgment rendered.—United States v. Smallwood, Case No. 16,315.

The federal circuit courts cannot issue mandamus after the practice of the king's bench, but only where it is necessary to the exercise of their jurisdiction.—Smith v. Jackson, Case No. 13,064.

Act March 3, 1875, confers original jurisdiction on the proper federal circuit court in cases of mandamus to compel the Union Pacific Railroad Company to operate its road according to law.—United States v. Union Pac. R. Co., Case No. 16,599.

The circuit court of the district of Iowa has jurisdiction in such case, if any part of the road is in the district of Iowa; and under Act June 20, 1874, process may be served upon the president or general superintendent of the company found in the district.—United States v. Union Pac. R. Co., Case No. 16,600.

The federal courts have power to issue mandamus to a municipal corporation to compel it to perform a duty created and enjoined by state law alone.—United States v. Burlington, Case No. 14,687.

The writ of mandamus is an original writ, and incident to original jurisdiction; and the superior court of the territory of Arkansas, which, under Act Oct. 22, 1828, is an appellate court only, has no power to issue it.—Howell v. Crutchfield, Case No. 6,778a.

The remedy by an action of mandamus, given by Rev. Code Iowa, § 3770, cannot be enforced in the federal courts.—Rusch v. Des Moines County, Case No. 12,142.

§ 7. Proceedings and relief.

A writ against a board of supervisors should be served upon the individual members. An acceptance by the clerk, although "by order of the board," is not sufficient.—Downs v. Rock Island County, Case No. 4,047.

The court cannot judicially notice a letter to one of the judges, by one on whom a rule to show cause why the writ should not issue has been laid, stating reasons for not appearing, and inclosing an opinion of the attorney general that the court has no jurisdiction.—United States v. Kendall, Case No. 15,517.

The respondent cannot be permitted to appear without returning the writ.—United States v. Kendall, Case No. 15,517.

It is a sufficient return to certify that the thing commanded has been done, although not by defendant personally.—United States v. Kendall, Case No. 15,518.

When the mandamus is to credit a certain sum of money, it is a sufficient obedience to credit that sum without interest.—United States v. Kendall, Case No. 15,518.

On mandamus to compel levy of taxes to pay judgment against a county, no matter is available as a defense which was properly used in resisting recovery of judgment.—Clews v. Lee County, Case No. 2,892.

To a writ of mandamus from a federal court, it is not a sufficient answer that the respondents had been enjoined by a state court from doing the act commanded.—United States v. Lee County, Case No. 15,589.

If the respondents make no return to the writ, or refuse to obey it, the court will issue an attachment.—United States v. Lee County, Case No. 15,589.

A municipal officer evading, by ingenious devices, the duty to cause a judgment against the city to be paid as directed by mandamus, will be *held* guilty of contempt.—Evans v. Pittsburgh, Case No. 4,568.

On the affirmance of a judgment awarding a peremptory mandamus, the court will not attach defendant for contempt in disobeying the former writ, which was superseded by the writ of error, but will issue an alias peremptory writ.—United States v. Kendall, Case No. 15,518.

But one writ of attachment should issue for contempt in the disobedience of a mandamus directed to a board of officers.—Durant v. Washington County, Case No. 4,191.

Amendments in form and in substance may be allowed in mandamus proceedings in any stage thereof, where justice will be thereby promoted.—United States v. Union Pac. R. Co., Case No. 16,601.

State statutes relating to pleadings and practice in actions of mandamus are not made applicable by Act June 1, 1872, to the ancillary jurisdiction of the federal circuit court.—United States v. Union Pac. R. Co., Case No. 16,599.

On proper affidavit, a rule will be granted to show cause why a mandamus nisi should not issue.—United States v. Kendall, Case No. 15,517.

Cases in which the attorney general must, and in which private citizens may, apply for the writ, considered.—Hall v. Union Pac. R. Co., Case No. 5,950.

A peremptory, instead of an alternative, mandamus will be granted where defendant has had ample opportunity to set up all defenses.—Aspinwall v. County Com'rs, Case No. 593.

Unless special circumstances should require it, a peremptory writ will not be issued, commanding a levy of taxes to pay a judgment against a municipal corporation at a time different from the next general levy.—Wisdom v. Memphis, Case No. 17,903.

It is the duty of a city, where mandamus has issued to compel the levy of a tax to pay a judgment, not only to make the levy, but to collect the tax, and pay it to the judgment creditor.—Brown v. Memphis, Case No. 2,020.

§ 8. Costs.

Where separate writs of mandamus are issued against the members of a board of officers for disobedience of a mandamus, the marshal and clerk will be allowed costs in each case.—Durant v. Washington County, Case No. 4,191.

MANDATE.

See "Mandamus."

For surrender of fugitive from justice, see "Extradition," § 6.

To lower court on decision on appeal or writ of error, see "Appeal and Error," § 40.

MANSLAUGHTER.

See "Homicide," § 2.

MARINE INSURANCE.

See "Insurance."

Jurisdiction of admiralty, see "Admiralty," § 18.

MARITIME CONTRACTS.

See "Maritime Liens."

Jurisdiction over, see "Admiralty," §§ 2, 13–28.

MARITIME LAW.

See "Admiralty"; "Collision."

MARITIME LIENS.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

(A) Under Maritime Law.

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IV. PRIORITY.

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§ 54, Jurisdiction in general. § 55, Effect of Rule 12 in Admiralty in general. § 56, Liens given by state laws. § 57, Time of taking proceedings for enforcement. § 58, Parties and intervention. § 59, Libel. § 60, Answer. § 61, Evidence. § 62, Distribution of proceeds—In general. § 63, —— Priority in distribution. § 64, —— Who entitled to share. § 65, Subrogation.

As ground of proceeding in rem, see "Admiralty," § 39.
Bottomry and respondentia liens, see "Shipping," §§ 105–127.
Contracts and torts creating liens enforceable in admiralty, see "Admiralty," §§ 1–36.
For demurrage, see "Shipping," § 222.
For freight, see "Shipping," §§ 60–64, 189.
For lays or shares in earnings of vessel, see "Seamen," § 152.
For salvage, see "Salvage," § 57.
For towage, see "Towage," § 8.
For wages and expenses of master of vessel, see "Shipping," § 91.
—— of seamen, see "Seamen," §§ 122–131.
For wharfage, see "Wharves," § 6.
Jurisdiction over claims for repairs and supplies, see "Admiralty," § 16.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

(A) UNDER MARITIME LAW.

§ 1. Nature in general.

A maritime lien is the right which a creditor has in a thing of another, which right consists in the power to cause the thing to be sold in order to have the debt paid out of the price.—Mordecai v. The Mary Eddy, Case No. 9,790.

A maritime lien is only a privilege to arrest the vessel for the debt.—The Triumph, Case No. 14,182.

A maritime lien is a jus in re, constituting an incumbrance on the property, and existing independent of the process used to execute it.—The Young Mechanic, Case No. 18,180.

Maritime liens do not depend upon possession.—The Anna Kimball, Case No. 404.

§ 2. On what vessels allowed.

A floating elevator used in the harbor of New York, though without motive power or capacity for cargo, *held* a vessel subject to a maritime lien.—The Hezekiah Baldwin, Case No. 6,449.

The repair of a vessel used to navigate tide water, although used partly on inland navigation, is a maritime contract.—McLelland v. The Robert Morris, Case No. 8,896.

No lien arises for necessaries supplied to enable a vessel to make voyages between ports within the limits of the district where she is enrolled and licensed, where she is employed regularly in such voyages, as a part of a through line for interstate transportation.—Pickell v. The Loper, Case No. 11,119.

§ 3. Maritime character of services in general.

To impart a maritime character to personal services rendered in or upon a vessel, they must be connected with the reparation or betterment of the vessel, or be rendered in aid of her navigation, directly, by labor on the vessel, or in sustenance and relief of those who conduct her operations at sea.—Gurney v. Crockett, Case No. 5,874.

No lien arises on a vessel for compressing cotton for more convenient carriage and stowage.—The Joseph Cunard, Case No. 7,535; United Hydraulic Cotton-Press Co. v. The Alexander McNeil, Id. 14,404.

A lien arises for board furnished seamen employed on a vessel in port.—United Hydraulic Cotton-Press Co. v. The Alexander McNeil, Case No. 14,404.

The services of stevedores in loading or unloading a vessel are not maritime in their nature, and they have no lien therefor enforceable in admiralty.—Kegan v. The Amaranth, Case No. 7,646; The Amstel, Id. 339; The A. R. Dunlap, Id. 513; The Joseph Cunard, Id. 7,535; Cox v. Murray, Id. 3,304; Coyne v. The Alexander McNeil, Id. 3,312a; McDermott v. The S. G. Owens, Id. 8,748. CONTRA, see The George T. Kemp, Case No. 5,341.

No lien arises for services in taking and discharging cargo at wharves, in no way connected with the vessel's navigation.—The D. C. Salisbury, Case No. 3,694.

No lien arises under the maritime law for the wages of a watchman or shipkeeper while the vessel is laid up in port.—The Champion, Case No. 2,584; Henderson v. The Hannah M. Buell, Id. 6,352; The Island City, Id. 7,109; The John T. Moore, Id. 7,430; McGinnis v. The Grand Turk, Id. 8,800.

The services of divers and wreckers on board of a seagoing vessel are maritime, and they have a lien upon the vessel therefor.—The Highlander, Case No. 6,476.

The master of a vessel has no maritime lien for his compensation as such.—Gardner v. The New Jersey, Case No. 5,233; The Monongahela, Id. 9,712.

The same rule applies to the vessel's physician.—Gardner v. The New Jersey, Case No. 5,233.

Work done upon a vessel in the dry dock, in scraping her bottom preparatory to coppering, is not of a maritime character.—Bradley v. Bolles, Case No. 1,773.

Neither costs of advertising a vessel for sea, portage, nor commissions for procuring freight, are liens on the vessel.—The Joseph Cunard, Case No. 7,535.

A ship's broker has a lien on a foreign vessel, in the nature of the lien of a material man, for services in shipping a crew for the vessel, and for advances for their wages.—The Gustavia, Case No. 5,876.

A ship carpenter employed on a steamboat, who deposits for safe-keeping money and other valuables with the captain, has no lien upon the boat therefor.—Smith v. The Royal George, Case No. 13,102.

A general discussion of the right to a lien for wages of a person employed on a vessel and a waiver of liens by delay to enforce them, by Woodbury, C. J.—Packard v. The Louisa, Case No. 10,652.

§ 4. Construction of vessel.

There is no lien under the general maritime law for work and material used in the construction of a vessel.—McAllister v. The Sam Kirkman, Case No. 8,658; McCaskey v. The Coal Bluff No. 2, Id. 8,687; The Antelope, Id. 482; The Coernine, Id. 2,944; Collins v. The Fort Wayne, Id. 3,012. CONTRA, see Egleston v. The Agnes, Case No. 4,308; Menzies v. Same, Id. 9,430; Beers v. The John Adams, Id. 1,231.

A shipwright cannot sue in admiralty for wages for building ship to navigate high seas.—Clinton v. The Hannah, etc., Case No. 2,898; Young v. The Orpheus, Id. 18,169; Lewis v. Same, Id. CONTRA, see Read v. Hull of a New Brig, Case No. 11,609; The Richard Busteed, Id. 11,764.

No lien arises under the maritime law for painting a vessel while in the custody of the ship builder, before her completion.—Scott v. The Plymouth, Case No. 12,544.

Masts and spars furnished to a vessel while she is being built are not maritime supplies, and no lien arises therefor.—Griffenberg v. The John Laughlin, Case No. 5,811.

A person employed to build a vessel with a new hull, on which materials of an old boat are used, has no lien thereon for his wages.—Smith v. The Royal George, Case No. 13,102.

A lien for supplies will not follow portions of a vessel which have been used in the construction of a new vessel.—Srodes v. The Collier, Case No. 13,272.

The materials which constitute a ship become one as soon as she leaves the ways.—The Eliza Ladd, Case No. 4,364.

A contract to furnish a ship with the means of propulsion or to change the mode of her propulsion, after she is launched and afloat, is not a contract to build a ship, and is a maritime contract.—The Eliza Ladd, Case No. 4,364.

See, further, "Admiralty," § 20; post, § 21.

§ 5. Repairs and supplies in general.

Under the general maritime law, a lien arises or is implied for the benefit of material men, unless the ship be in her home port, or credit be to the master or owner.—Harney v. The Sydney L. Wright, Case No. 6,082a; Harris v. The Kensington, Id. 6,122.

Under the general maritime law, a lien for materials furnished exists against foreign ships and those of other states of the Union, which may be enforced in admiralty independently of any bottomry bond.—Sarchet v. The General Isaac Davis, Case No. 12,357.

By the general maritime law a shipwright has a lien for materials, labor, etc., expended in repairs.—Stevens v. The Sandwich, Case No. 13,409.

A lien arises under the maritime law for materials and labor furnished in repairing a vessel in a foreign port.—Woodruff v. The Levi Dearborne, Case No. 17,988.

A lien arises under the general maritime law for necessary supplies properly furnished to a vessel on her credit in a foreign port.—Ross v. The Neversink, Case No. 12,079.

The master cannot charge a vessel with a lien for necessaries furnished her before the voyage is begun, or in the port in which the owners reside.—Turnbull v. The Enterprize, Case No. 14,242.

§ 6. Character of repairs and supplies and work done.

Labor and supplies to furnish a passenger steamer's cabin give rise to a lien under the New York statute.—Pitman v. The Paraguay, Case No. 11,187.

A lien arises for labor and materials furnished in a foreign port in rebuilding a vessel which had been burned to the water's edge.—Hardy v. The Ruggles, Case No. 6,062.

One furnishing labor and materials, in putting in machinery ordered as an experiment, is entitled to a lien, although the experiment is an utter failure.—Knox v. The Dallas, Case No. 7,904a.

A steamboat temporarily disabled from making her regular daily trips is not subject to any lien for the contract price of another steamboat employed to take her place.—New York Harbor Tugboat Co. v. The Wyoming, Case No. 10,205.

A maritime lien attaches in favor of carpenters for services in lining a vessel to prepare her for receiving cargo.—The Emma V., Case No. 4,468.

"Ship chandlery" includes everything necessary to furnish and equip a vessel so as to render her seaworthy for the intended voyage, and, besides stores, stoves, hardware, and crockery, may include arms and ammunition.—Weaver v. The S. G. Owens, Case No. 17,310.

A lien arises for a diving bell, air pump, and other apparatus supplied a vessel which were not necessary for her use as a navigating ship, but were indispensable for the accomplishment of the enterprise in which she was about to engage.—The Witch Queen, Case No. 17,916.

A lien arises for supplies furnished in a foreign port for the restaurant of a boat running between New York and Sandy Hook.—The Plymouth Rock, Cases Nos. 11,235, 11,237.

A lien arises for liquors furnished to a vessel for use in a bar as a part of a restaurant on the boat run for the benefit of passengers.—The Long Branch, Case No. 8,484.

A lien arises for water casks furnished on the credit of a foreign ship.—Zane v. The President, Case No. 18,201.

A lien attaches for casks furnished to a whaler for the receipt of oil.—The Henry Trowbridge, Case No. 6,379.

A lien on a steamer for fuel arises upon the delivery thereof on a wharf near by, in pursuance of the orders of her officers.—Delaware & H. Canal Co. v. The Alida, Case No. 3,763a.

§ 7. Necessity for repairs and supplies.

To support a lien for repairs or supplies to a vessel in a foreign port, the necessity for the repairs and for a lien upon the vessel to enable the master to procure them must be shown.—The James Guy, Cases Nos. 7,195, 7,196; The Lulu, Id. 8,604.

Repairs upon a vessel in winter quarters in a foreign port, done by contract with the owner, there being no express claim of a lien at the time, and no immediate necessity for such repairs, do not constitute a lien.—The Maitland, Case No. 8,979.

A lien arises for repairs in a foreign port, where apparently reasonable and proper, although not absolutely necessary. All that is required on the part of material-men is good faith and reasonable ground for action.—The Fortitude, Case No. 4,953.

A person who furnishes repairs upon the order of the master is entitled to a lien, though the master was in fact, without his knowledge, holding the vessel as custodian for the marshal, and the repairs were greater than were necessary for her preservation while in his custody.—The Sultana, Case No. 13,603.

Supplies furnished at the request of the master create a lien, though they exceed the vessel's actual need, in the absence of mala fides or collusion.—The Gustavia, Case No. 5,876.

§ 8. Advances of money.

Advances to pay a debt which is a maritime lien constitute a lien.—The A. R. Dunlap, Case No. 513.

Money furnished to a vessel is not a lien, unless furnished to pay claims which would themselves be liens.—The Home, Case No. 6,657.

A maritime lien exists for moneys advanced to purchase or pay for necessary supplies whenever it would exist for the necessaries themselves.—The Union Express, Case No. 14,364.

An insurance company which has paid its quota for a salvage service, and made advances for the necessary repairs to the owners, who were without means or credit, have a lien to the extent of the repairs.—Collins v. The Fort Wayne, Case No. 3,012.

A lien arises for advances made upon the credit of a foreign vessel for necessary repairs and supplies where the money is actually employed for that purpose.—The J. F. Spencer, Case No. 7,316.

Money loaned in a case of actual necessity in a foreign port gives rise to a lien, though the master in fact applied a portion of it to pay claims which constituted no lien.—Southern Bank v. The Alexander McNeil, Case No. 13,186.

A lien arises for advances made on the credit of the vessel to supply her with necessaries, though the master squanders the money.—United Hydraulic Cotton-Press Co. v. The Alexander McNeil, Case No. 14,404.

A person lending money to be used for repairs and supplies stands in the same position as a material man.—Davis v. Child, Case No. 3,628.

A vessel owned in Philadelphia is subject to a lien for advances made in New York, on her credit, for the payment of necessary port disbursements and for repairs.—Dearborn v. The Union, Case No. 3,714.

A maritime lien arises on a loan of money to the master in a foreign port to pay overdue seamen's wages.—Southern Bank v. The Alexander McNeil, Case No. 13,186.

A lien arises for advances made in good faith to enable the master of a foreign vessel to pay customhouse charges and the wages of his crew.—The Tangier, Case No. 13,744.

A lien arises for advances to release a boat belonging in another state from the possession of the marshal.—Janney v. The Belle Lee, Case No. 7,211; The J. R. Hoyle, Id. 7,557.

But not to save the vessel from a threatened seizure.—Janney v. The Belle Lee, Case No. 7,211.

Advances to release a vessel from a common-law attachment in a foreign port, are not a lien on the vessel.—The A. R. Dunlap, Case No. 513.

A part owner agreed to pay petitioner for supplies, to permit the vessel to leave a foreign port, and subsequently, to prevent an attachment in another port, agreed to consign the vessel to him. *Held*, in the circumstances, the court would allow a lien on the proceeds of sale on a libel by others.—Delano v. The J. Walls, Jr., Case No. 3,752.

There is no lien, under the maritime law, for advances for the purchase of a vessel sold by her master in a foreign port.—The Sarah Harris, Case No. 12,346.

There is no lien on a vessel for advances made on a draft drawn by the agent for underwriters for her repairs while in the hands of the underwriters, to whom she was abandoned.—The Sea Flower, Case No. 12,577.

Mere advances of money to the owner of a vessel do not create a lien on her in favor of the lender, in the absence of any agreement for a lien upon the vessel, though the money be applied to the payment of liens upon the vessel.—The William A. Harris, Case No. 17,686.

Commissions on advances made on the credit of a vessel in a foreign port for necessary supplies and repairs, when agreed on or shown to be customary in the trade, are proper items of allowance.—The Sarah Harris, Case No. 12,346.

See, also, post, § 23.

§ 9. Insurance premiums.

No lien arises under the maritime law for the premium for insurance of the vessel.—Mutual Fire Ins. Co. v. The S. G. Andrews, Case No. 9,978; The John T. Moore, Id. 7,430. CONTRA, see The Illinois, Case No. 7,005; The Dolphin, Id. 3,973.

§ 10. Credit of vessel.

A vessel is not chargeable with supplies in a foreign port unless furnished on her credit and an apparent necessity existed therefor.—Boyce v. The Patapsco, Case No. 1,744.

Where the credit for supplies was not in fact given to the vessel, there is no lien enforceable in admiralty therefor.—The Transit, Case No. 14,139.

An agreement to do the work on the personal credit of an agent of the vessel would be sufficient to defeat the claim of the material-man against the vessel.—The Washington Irving, Case No. 17,244.

There is no lien where the materials were furnished to a vessel upon the credit of the owner.—Gardner v. The Rosedale, Case No. 5,235.

That the master and owners are personally liable for supplies furnished does not destroy the lien. A party may trust to the credit of the ship, master, and owner.—The Nestor, Case No. 10,126.

Necessary repairs furnished to a master in a foreign port on credit of the vessel give a lien.—The St. Lawrence, Case No. 12,234; Kelly v. The Pittsburgh, Id. 7,674.

A maritime lien exists for supplies furnished to a vessel in a foreign port, which were necessary and were furnished on the credit of the vessel, unless the necessity for such credit be disproved by proper evidence.—The Native, Case No. 10,054.

An express pledge of the vessel is not necessary to create a lien where necessary advances in a foreign port are actually made on the credit of the vessel.—The Emily B. Souder, Cases Nos. 4,454, 4,456.

To sustain a lien for supplies, a maritime necessity for credit upon the vessel must be shown.—The Lady Franklin, Case No. 7,982; The Lulu, Id. 8,604; The James Guy, Id. 7,195, 7,196; The Neversink, Id. 10,133.

By the general maritime law, the presence of the owner does not preclude giving credit to the vessel.—The George T. Kemp, Case No. 5,341.

A maritime lien exists for necessaries furnished upon request of the owner when shown affirmatively that they were furnished on the credit of the vessel.—The Union Express, Case No. 14,364.

Supplies furnished and charged to a vessel belonging to a nonresident insolvent owner, who was personally present, *held* a lien upon the vessel.—The James Guy, Case No. 7,195.

It is a question of fact whether credit is given to a vessel or her owners. The equitable ownership does not always determine the question

of credit.—The George T. Kemp, Case No. 5,-341.

A master may hypothecate his vessel for necessaries in a foreign port, unless he has at his command funds or credit of his owner.—The Gustavia, Case No. 5,876.

A purchaser of supplies necessary to a foreign vessel can assert no lien therefor, unless he prove that they could not have been obtained without such lien upon the credit of the owner.—The Sarah Starr, Case No. 12,354.

The fact that the vessel is in a foreign port is prima facie evidence of a necessity for the credit of the vessel.—The Eclipse, Case No. 4,-268.

Where there is neither a real nor an apparent necessity for pledging the credit of a vessel in a foreign port, a material man who has not been misled, and has made no inquiry, has no lien for materials furnished.—The Eledona, Case No. 4,340.

Want of credit in the owners of a vessel, in the case of supplies furnished, is shown by proof of an attachment and a mortgage of the vessel to release it.—The A. R. Dunlap, Case No. 513.

A lien arises, without an express agreement therefor, where a chain and anchor are furnished by another vessel in a foreign port, in which the owner's credit is not good.—The Sea Lark, Case No. 12,579.

Repairs and materials furnished in a foreign port do not create a lien where the owners have ample credit and actual funds in the port, of which the creditor has implied notice.—Sutherland v. The Lady Maunsel, Case No. 13,642.

The fact that a vessel which is repaired or supplied is not in her home port, in the absence of other circumstances, makes a case of apparent necessity for the credit of the vessel.—The Washington Irving, Case No. 17,244.

This apparent necessity may be dispelled by proof of other circumstances showing that the necessity for the credit did not exist, and did not appear to the material man to exist, at the time of his employment.—The Washington Irving, Case No. 17,244.

An admission in the pleadings that the vessel was in a foreign port is an admission of an apparent necessity for the credit of a vessel for alleged supplies furnished, though the answer avers that the owner was in good credit in such port.—The Washington Irving, Case No. 17,245.

A chartered vessel is liable for necessary supplies furnished in a port in which she herself, her charterer, and her owners are all strangers.—Harney v. The Sydney L. Wright, Case No. 6,082a.

A lien arises where the master is also one of the charterers, and consequently without authority to bind the owners, where he has no funds or credit belonging to himself or the vessel.—Ross v. The Neversink, Case No. 12,079.

Necessary coal furnished a steamer in a port foreign to the residence of her charterers, who were owners pro hac vice, on the order of the master, who had no funds, *held* to create a lien.—The Neversink, Case No. 10,133.

Supplies furnished on the order of the master, to a vessel running on regular trips upon the Great Lakes, give no lien, though charged directly to the vessel.—The Lady Franklin, Case No. 7,982.

Coal delivered to a foreign vessel on agreement with, and credit of, her charterers, is not furnished on the credit of the ship.—Consolidated Coal Co. v. The Secret, Case No. 3,128a.

Where materials for repairs are purchased by the agent of the owner of the vessel, residing at the place where the repairs are made, in his own name, and his personal undertaking given therefor, there is no lien on the vessel, unless it is specially given.—Phelps v. The Camilla, Case No. 11,073.

No lien arises for repairs to a vessel made on land where the owners were represented on the spot by a consignee who has funds.—Pritchard v. The Lady Horatia, Case No. 11,438.

The fact that the material man gave credit to the vessel, where nothing was said between the parties as to the credit, and the owner supposed that credit was given to him, will not create a lien.—The Regulator, Case No. 11,665.

A maritime lien does not arise for repairs made in a foreign port by persons who lived in the same place with the owner, and dealt with him personally, keeping a running account with him.—Roosevelt v. The C. H. Frost, Case No. 12,033.

Advances made in a foreign port for repairs and supplies to a vessel, at the request of purchasers from the master, *held* made on the credit of the vessel.—The Sarah Harris, Case No. 12,346.

§ 11. Presumption of credit to vessel.

Advances made to pay for supplies to a vessel in a foreign port, where neither master nor owners are known to have credit, are presumed to be made on the credit of the vessel.—The Emily B. Souder, Cases Nos. 4,454, 4,456, 4,-457.

Supplies sold to a master in a foreign port are presumed to be sold on the credit of the vessel.—The St. Joseph, Case No. 12,229; The Metropolis, Id. 9,503; The Prospect, Id. 11,443.

Supplies to a vessel represented and understood to belong to owners residing in another state are presumed to be furnished on her credit until the contrary is shown.—McAllister v. The Sam Kirkman, Case No. 8,658.

Advances made in foreign port to master to relieve vessel in straitened circumstances presumed to be on credit of vessel.—The Acme, Case No. 28.

The burden is on libelant to show that materials furnished at the request of the master and former owner, at the place of the latter's residence, were furnished on the credit of the vessel.—Jones v. The Ratler, Case No. 7,490.

Every person who furnishes supplies or repairs to a foreign vessel is, by the maritime law, considered as contracting with the vessel herself, as a principal debtor, as well as with the master and owners.—The H. B. Foster, Case No. 6,291.

The presumption of the necessity for the credit of the vessel for repairs ordered by the master is not repelled by proof that the owner was in good credit.—The Plymouth Rock, Case No. 11,236.

A ship chandler who charges directly to the vessel necessary supplies ordered in a foreign port, by the owner, not present at the time, without any special arrangement for payment, has a lien therefor.—The Eclipse, Case No. 4,-268.

No implied lien is created by the general maritime law where the owner himself is present, and makes the contract.—Sarchet v. The General Isaac Davis, Case No. 12,357.

A maritime lien is not implied for necessary supplies furnished a vessel in a foreign port by the direction of a managing owner there present superintending her affairs and ordering the supplies.—The Regulator, Case No. 11,665.

§ 12. Evidence of credit to vessel.

That a bill for supplies is made out against the vessel by name and her owners is evidence that credit was given to the vessel, and that the personal responsibility was not exclusively relied on.—The Mary Bell, Case No. 9,199.

A duebill given by the master in the name of the owner, reciting that the repairs were necessary, and that the advances therefor were on the credit of the ship, is conclusive on the owners unless impeached for fraud.—Collins v. The Fort Wayne, Case No. 3,012.

Mere proof that sails were furnished by written order of master, with directions to charge them to the vessel and her owners, is not sufficient to establish lien for supplies.—Beach v. The Native, Case No. 1,152a.

§ 13. Repairs and supplies in home port.

No lien arises under the maritime law for materials or supplies furnished to or work done on a vessel in her home port.—Woodruff v. The Levi Dearborn, Case No. 17,987; The Mary Bell, Id. 9,199; Hill v. The Golden Gate, Id. 6,491; McAllister v. The Sam Kirkman, Id. 8,658; Shrewsbury v. The Two Friends, Id. 12,819.

A lien of workmen and material men on a vessel, in a port to which she belongs, depends entirely on the provisions of the local law.—Harper v. New Brig, Case No. 6,090; The Hilarity, Id. 6,480; Thomas v. The Kosciusko, Id. 13,901.

The fact that the material men reside in another state, and the materials are procured there, is not material.—Graham v. The Escoriaza, Case No. 5,666; The Eliza Jane, Id. 4,363; Thomas v. The Kosciusko, Id. 13,901.

A shipping agent has no lien for expenses of fitting out and notarial fees at the home port.—Seaver v. The Thales, Case No. 12,594.

Where a vessel, while undergoing repairs in a foreign port, is sold to her master, who resides in such port, *held*, that a lien arose for such repairs under the general admiralty laws.—Wilson v. The Jewess, Case No. 17,812.

Supplies sold in New York on the credit of a vessel hailing from a British port, carrying the British flag, and intending to proceed to a foreign port to be sold as a British vessel, create a maritime lien, although it appear her owner resided in New York.—The Walkyrien, Case No. 17,091.

The presumption and knowledge of the home port is strengthened by the fact that the name is conspicuously painted on the vessel's stern, and a lien for supplies will not be allowed unless it appear that the claimant was deceived by fraudulent or unfair means.—Dudley v. The Superior, Case No. 4,115.

Under Admiralty Rule 12, as amended in 1872, ships, whether domestic or foreign, are liable for repairs, etc., furnished at express or implied request of the owner or master, whether in the home port or not.—The Augusta, Case No. 647.

§ 14. What is the "home" port.

In the case of a vessel built at one place for parties resident in another, the former place is her home port until after her delivery and her first voyage.—Scott v. The Plymouth, Case No. 12,544.

The place at which the ship's husband spends two-thirds of his time, and transacts his business, is the proper place for enrolling and licensing the vessel, though he has a legal domicile in another district.—The St. Lawrence, Case No. 12,234.

The home port of a vessel is the place where the law requires her to be registered, not necessarily the place where she was built.—Parmlee v. The Charles Mears, Case No. 10,766.

The place of enrollment in the state in which the managing owner resides is the home port of the vessel, although a majority of the owners reside in another state.—Collins v. The Fort Wayne, Case No. 3,012.

The residence of the owner is the home port, though the vessel is enrolled elsewhere. The place of enrollment is only prima facie the home port.—The Mary Bell, Case No. 9,199; McAllister v. The Sam Kirkman, Id. 8,658; The Alice Tainter, Id. 194, 195; The Plymouth Rock, Id. 11,237. CONTRA, see Pickell v. The Loper, Case No. 11,119.

The enrollment of a vessel under Act Dec. 31, 1792, is prima facie evidence of the home port, and will be *held* conclusive unless contradicted by clear evidence of the notorious residence of the owners at another place.—Dudley v. The Superior, Case No. 4,115.

§ 15. Foreign and domestic vessels.

A lien enforceable in admiralty arises for repairs and supplies to a vessel in the port of a state to which she does not belong.—Davis v. Child, Case No. 3,628; Same v. New Brig, Id. 3,643; Dudley v. The Superior, Id. 4,115.

No lien arises under the maritime law for supplies or repairs furnished a vessel in the state in which she is owned.—Hendrickson v. the Gesner, Case No. 6,356; The Albany, Id. 131; The Circassian, Id. 2,720a; Davis v. Child, Id. 3,628; Same v. New Brig, Id. 3,643; Dudley v. The Superior, Id. 4,115; Raymond v. The Ellen Stewart, Id. 11,594; Read v. Hull of a New Brig, Id. 11,609.

Material men have a lien for repairs under the admiralty law only in the case of foreign ships, or ships belonging to other states.—Zane v. The President, Case No. 18,201; The Calisto, Id. 2,316.

Supplies furnished in Maine by a material man in New York to a vessel belonging in New York are foreign supplies, and give rise to a privilege.—The Sarah J. Weed, Case No. 12,350.

The foreign or domestic character of a vessel is determined by the residence of her owners, and not her port of enrollment.—Hill v. The Golden Gate, Cases Nos. 6,491, 6,492; The Albany, Id. 131; Thomas v. The Kosciusko, Id. 13,901.

A ship whose legal owner is foreign, and whose flag is foreign, is a foreign ship, so far as material men are concerned, though the equitable owner lives in the state.—The George T. Kemp, Case No. 5,341.

Such a ship is not within the Massachusetts statute, requiring a record to be made of claims for supplies and repairs to vessels.—The George T. Kemp, Case No. 5,341.

When the owners of a boat reside at different ports, the vessel is to be considered a domestic vessel at the port where she is enrolled.—Dudley v. The Superior, Case No. 4,115.

Where the equitable owner lives in the port where the work is done, and the dealings are with him as owner, the ship is domestic so far as liens are concerned, though the legal title be in a foreigner.—The Island City, Case No. 7,109.

A vessel in the hands of mortgagees, who were in fact the real owners, is not a foreign vessel in the port of their residence, as to one advancing money with knowledge of the facts.—The Guisborough, Case No. 5,864.

The ports of the different states are foreign to each other, within the meaning of the admiralty law in relation to liens.—Woodruff v. The Levi Dearborne, Case No. 17,988; Churchill v. The British America, Id. 2,715; The Calisto, Id. 2,316.

A port of another state from that in which the vessel is enrolled and registered is, in the absence of special facts, a foreign port in respect to the creation of maritime liens.—The Lulu, Case No. 8,604.

Jersey City is foreign to New York City in the sense of the law governing supplies to ships.—The Sarah J. Weed, Case No. 12,350; Thomas v. The Kosciusko, Id. 13,901.

Baltimore and Alexandria are not foreign to each other, within the rule in relation to the maritime lien for supplies and repairs in foreign ports.—Levering v. Bank of Columbia, Cases Nos. 8,286, 8,287.

A vessel registered in New York was bought jointly by a resident of Washington, D. C., and of Fair Haven, Conn., for use on the Potomac river, and was repaired and supplied in Fair Haven on the credit of the vessel. *Held*, that there was a lien as for repairs and supplies in a foreign port.—Baldwin v. The E. Morris, Case No. 799.

A lien for supplies furnished in one port to a vessel belonging to another port, both before and after the purchase of a share in her by a resident of the former port, and her enrollment there, *held* enforceable as to the supplies purchased before the new enrollment, but not subsequently, the latter lien having been devested by making subsequent voyages.—Tree v. The Indiana, Case No. 14,165.

A ship chandler in one state, in which the purchaser of a vessel resided, who furnishes materials to her builders in another, without knowledge of any interest or possession of the purchaser, where the title had not passed out of the builders, may have a lien.—The Sarah Starr, Case No. 12,354.

A lien arises for repairs and supplies furnished a vessel at a port other than that in which her legal owners reside, at the request of one to whom they had agreed in writing to transfer the title, where the purchaser subsequently assigned the contract to a resident of the port, who completed the contract.—The Susan G. Owens, Case No. 13,634.

A collector's office, where bills of sale are matters of record, is the only place where persons dealing with the vessel may be presumed to search for information in regard to the title.—McAllister v. The Sam Kirkman, Case No. 8,658.

But persons apprised of the real nature of such transfers, or fairly chargeable with knowledge thereof, can claim no benefit therefrom.—McAllister v. The Sam Kirkman, Case No. 8,658.

Persons giving credit in good faith to a steamboat, as a foreign boat, for supplies and repairs, are not affected by the fact that she was made to appear a foreign boat by fraudulent conveyances.—McAllister v. The Sam Kirkman, Case No. 8,658.

Charterers navigating and having exclusive control of the vessel are to be deemed the owners pro hac vice.—Hill v. The Golden Gate, Cases Nos. 6,491, 6,492.

§ 16. Notices and special contracts affecting liens.

Parties may stipulate for a lien for necessaries, though no such lien is implied by the law of the place where such necessaries are furnished.—The Union Express, Case No. 14,364.

Ship carpenters employed by a contractor have a lien, unless there is express or implied notice that they must look only to the contractor.—The Augusta, Case No. 647.

By the maritime law, one selling materials to a mechanic whom he knows to have contracted to make repairs for a stipulated sum, and to whom he gives credit, has no lien.—Smith v. Eastern Railroad, Case No. 13,039.

The owner of a ship yard who places a mast in a vessel on the order of one who contracted with the master to furnish the same for an agreed price, and who was paid therefor when the work was done, has no lien on the vessel therefor.—The Eledona, Case No. 4,341.

No lien arises against a vessel, built under a contract with a shipwright, for materials and labors of third persons which entered into its construction, where the full contract price has been paid according to the contract.—Leslie v. Glass, Case No. 8,275.

A person contracting with the owner to float a vessel driven upon a beach is not the agent of the owner, so as to give laborers and material men a lien on the vessel.—The Whitaker, Case No. 17,524.

The notice from the owner that supplies furnished the vessel in her home port must be exclusively on the personal credit of the master who runs her on shares will prevent a lien for supplies furnished at the master's request.—The Columbus, Case No. 3,044.

A person who furnishes provisions to a vessel not in her home port may have a lien therefor, although he knows that the master has taken her on shares, and is to victual and man her.—The Monsoon, Case No. 9,716.

Where the owners inform persons who furnish supplies at the request of a charterer that the ship would not be responsible, they cannot acquire a lien therefor.—Swift v. The Albus, Case No. 13,694.

Where a charterer becomes owner of a vessel for a voyage, his agent can bind the vessel for coal supplied in a foreign port, though the person furnishing the coal knew the charterer was bound to furnish it for the voyage.—The City of New York, Case No. 2,758.

An agreement by a charterer to pay all expenses is not an agreement to pay them in cash, and is not inconsistent with power in him to create a lien for supplies.—The Lucia B. Ives, Case No. 8,590.

An agent employed by the charterer of a ship to procure freight, having notice from the owner that he must rely on the personal credit of the charterer, has no lien on the ship for his services.—Robinson v. The Medora, Case No. 11,959a.

(B) UNDER STATE LAWS.

§ 17. Validity and effect of state laws in general.

Acts Ohio Feb. 26, 1840, and Feb. 24, 1848, do not create a lien, but only afford a remedy.—Wick v. The Samuel Strong, Case No. 17,607.

A state may create liens for materials and supplies furnished a vessel in her home port where not amounting to a regulation of commerce, and may enact reasonable regulations for their enforcement.—The Edith, Case No. 4,282.

Maritime liens cannot be created by state statute.—Moir v. The Dubuque, Case No. 9,696.

The remedy by proceedings in rem against vessels given by Laws Mich. 1864, p. 107, is an exercise of admiralty jurisdiction, and the act and the liens given thereunder are void.—Moir v. The Dubuque, Case No. 9,696.

The lien on a vessel arising in her home port is regulated exclusively by the local law.—Nall v. The Illinois, Case No. 10,005.

It seems that a state legislature, by declaring a claim to be a lien, cannot override a mortgage duly recorded under the federal statutes.—The Skylark, Case No. 12,928.

The statute of Maine conferred on mechanics and material men such a lien on domestic vessels as the general admiralty law had previously allowed to them on foreign vessels.—The Young Mechanic, Case No. 18,180.

Gen. St. Mass. c. 151, giving liens on vessels for repairs, is valid so far, at least, as it

applies to refitting and renewing domestic vessels to adapt them to a new business.—The Island City, Case No. 7,109.

The lien given by Code Tenn. § 1991, attaches to all contracts for supplies, whether credit was given to the vessel or owner, and continues for 90 days.—The Illinois, Case No. 7,005.

New York statute giving a lien for repairs and supplies to vessels is valid in regard to domestic vessels, but does not apply to foreign vessels.—The Chusan, Case No. 2,717.

The cases on the subject of liens for repairs and supplies in the home port of a vessel given by the local law, and their enforcement in admiralty, reviewed and discussed.—The Edith, Case No. 4,283.

See, also, post, § 28.

§ 18. Vessels to which liens attach.

A steamboat employed upon a ferry between New York and Ft. Lee is a ship or vessel subject to a lien under the New York law.—The Joseph E. Coffee, Case No. 7,536.

§ 19. Ownership and possession.

2 Rev. St. N. Y. p. 423, § 1, giving a lien for materials or work furnished when contracted for by the master, owner, agent, or consignee, does not apply in the case of materials furnished to one who builds the vessel under the supervision and direction of the owner.—Udell v. The Ohio, Case No. 14,322.

Act Mass. 1848, c. 290, does not give a lien for materials sold to one contracting with the owner of a vessel to make repairs, where the vendor has notice of such contract.—Smith v. Eastern Railroad, Case No. 13,039.

The purpose of this statute was to create liens on domestic vessels for repairs, supplies, etc., to the same extent as the lien given by the maritime law on foreign vessels.—Smith v. Eastern Railroad, Case No. 13,039.

A vessel delivered to persons who contracted to purchase her, for the purpose of repairs, though it was agreed that the same should not be a lien on her, *held* subject to a lien in favor of the material man without notice, as against the owner who retook possession. Act N. Y. April 24, 1862, § 1. Case No. 7,340 reversed.—The John Farron, Case No. 7,341.

§ 20. For what services lien allowed in general.

Act Me. Feb. 19, 1839, giving a lien for labor and materials furnished under a "written or parol agreement," includes all parol agreements, whether expressed or implied.—Read v. Hull of a New Brig, Case No. 11,609.

Such statute does not give a lien for services performed under a hiring at monthly wages for any kind of labor required upon various vessels.—Read v. Hull of a New Brig, Case No. 11,609.

A trench excavated in front of the launching ways of a ship for the purpose of deepening the water is not labor performed in launching the vessel, within Act Mass. 1855, c. 231, giving a lien on vessels for such labor.—Woolly v. The Peruvian, Case No. 18,031.

A lien arises for services rendered in taking care of a ship in port under the New York statute, where they amount to $50, enforceable in admiralty.—The Harriet, Case No. 6,097; The Harvest, Id. 6,175.

St. Mass. 1848, c. 290, gives a lien for alterations of vessels.—The Ferax, Case No. 4,737.

§ 21. Construction of vessel.

Act Mass. 1848, c. 290, § 1, gives lien for materials actually used in construction of vessel.—The Antarctic, Case No. 479.

The lien under Rev. St. Me. c. 125, § 35, does not cover a claim for insurance on a cargo of timber used in the construction.—The Kearsarge, Case No. 7,634.

A lien arises for materials obtained on the credit of a vessel, and used in her construction, under 3 Rev. St. N. Y. c. 8, tit. 8, § 1, whether the builder obtained them in his character of owner or builder.—Concklin v. The Sylvan Shore, Case No. 3,090.

The builder of a vessel, who furnishes materials, and is to be paid in installments, is a vendor, and has no lien, either under the maritime law, or under Act N. Y. March 29, 1855, giving a lien for work or materials "furnished."—Harbeck v. The Francis A. Palmer, Case No. 6,045a.

See, further, "Admiralty," § 20; ante, § 4.

§ 22. For what supplies lien given.

Lien arises under 2 Rev. St. N. Y. 493, for fuel furnished boat for purposes of navigation.—The Alida, Case No. 200.

Under the Maryland statute, there is a lien, enforceable in the federal courts, for material and labor used in repairing sails and tackle, but not for groceries.—Milbourne v. The Daniel Augusta, Case No. 9,540.

§ 23. Advances of money.

Money advanced for custom-house fees and to procure a bond, or for commissions, gives rise to no lien under the New York statute of April 24, 1862, as these are not "necessaries."—The Lucia B. Ives, Case No. 8,590.

See, also, ante, § 8.

§ 24. Amount.

To give a lien under 2 Rev. St. N. Y. p. 493, § 1, it is not necessary that each item should amount to $50, but only that the whole account should aggregate that sum.—The St. Mary, Case No. 12,242.

A debt of less than $50, which, by the accumulation of interest, exceeds such sum, does not create a lien under 2 Rev. St. N. Y. 493, which gives a lien for a debt amounting to $50 or upward.—The Stephen Allen, Case No. 13,361.

§ 25. Appropriation of labor or materials to vessel.

The seller has no lien for materials sold generally to a shipbuilder on credit without reference to any particular vessel.—The Abby Whitman, Case No. 15.

The party claiming a lien on a vessel for materials must show that the contract under which they were furnished had reference to some particular vessel, in the construction or repair whereof such materials were to be used.—The Young Sam, Case No. 18,186.

Rev. St. Me. c. 125, § 35, does not give a lien on one vessel for materials furnished for it and for another one, but only for what was used in the vessel proceeded against.—The Kiersage, Case No. 7,762.

A laborer hired generally to work in building or repairing a vessel has no lien under Act Me. Feb. 19, 1834, c. 626.—The Calisto, Case No. 2,316.

There must be an appropriation, express or implied, to the vessel, of the labor or materials, at the time of the contract or of its execution, to give a lien under Rev. St. Me. c. 125, § 35.—Sewall v. Hull of a New Ship, Case No. 12,682.

The lien given by Rev. St. Me. c. 125, § 35, does not cover charges for tools or other articles used by the workmen in doing the work, but only for materials which make part of the vessel.—The Kearsarge, Case No. 7,634.

For materials furnished generally for two vessels, building at the same time, the material man has a lien on both vessels, and may enforce

it against either. Rev. St. Me. c. 125, § 35.—The Kearsarge, Case No. 7,634.

Lumber sold to a shipbuilder, who has several vessels on the stocks, but not for use in any particular one of them, gives rise to no lien against one, in which part of it is used.—Drew v. Hull of a New Ship, Case No. 4,078.

The debt to create a lien under Laws N. Y. 1855, c. 10, must be created at the port where the vessel lies.—Brown v. The Alida, Case No. 1,989.

Such debt cannot be created by agreement or stipulation, but must be for services or supplies for the benefit of the vessel.—Brown v. The Alida, Case No. 1,989.

Credit must be given to the vessel to entitle a material man to a lien under the New York statute for materials or labor used in her construction.—Van Pelt v. The Ohio, Case No. 16,870a.

§ 26. Proceedings to perfect lien.

The lien for work done in the construction of a vessel, given by the local law, is lost by a failure to comply with its provision for enforcement.—Heppard v. The General Cadwalader and The Major Ringgold, Case No. 6,390.

Claims for repairs and supplies to a vessel in her home port are a lien under the Louisiana law only when properly recorded.—The John T. Moore, Case No. 7,430.

A material man has no lien on a vessel built under a contract which names the parties for whom to be built as owners, after the builders are paid in full, and the vessel launched. 2 Rev. St. N. Y. p. 423, § 1.—Udell v. The Ohio, Case No. 14,321a.

The certificate for a lien under Laws Mass. 1855, c. 231, must contain the given as well as the surname of the lien claimant.—Gove v. The Bold Runner, Case No. 5,644.

Under Act N. Y. 1850, a lien does not arise unless lien specifications are filed within 10 days after the vessel leaves the port where the debt was contracted.—Elmore v. The Alida, Case No. 4,419.

Under Act N. Y. 1855, a lien does not arise unless lien specifications are filed within 10 days after the return of the vessel to the port where the debt was contracted.—Elmore v. The Alida, Case No. 4,419.

The lien for supplies under 2 Rev. St. N. Y. 493 dates from time when furnished, and not from date of contract.—The Alida, Case No. 200.

In the case of daily supplies to a boat, the lien specification must be filed within 10 days of each delivery, under the New York statute.—Spencer v. The Alida, Case No. 13,231.

The lien for services of a blacksmith whom the engineer of a domestic vessel had promised to employ to make all the repairs during the season is separate as to each distinct job when the same is completed, under 2 Rev. St. N. Y. p. 405, § 2.—The Alida, Case No. 199.

Under the New York law, it is not necessary to file a specification of lien, where the vessel has not left the state before seizure, under process to enforce it.—The Henry Trowbridge, Case No. 6,379.

See, also, post, § 42

II. CREATION, OPERATION, AND EFFECT IN GENERAL.

Operation and effect in bankruptcy, see "Bankruptcy," § 256.

§ 27. Creation in general.

No court can by rule create maritime liens or change the order of existing liens.—Baldwin v. The Bradish Johnson, Case No. 798.

Want of jurisdiction to enforce a lien in a particular locality is not fatal to its existence.—The Boston, Case No. 1,669.

§ 28. Effect of local legislation in general.

When supplies have been furnished in a foreign port or in a state other than that to which the vessel belongs, the liens are admiralty liens, and they cannot be affected in any way by state enactments.—Carroll v. The Leathers, Case No. 2,455; The Active, Id. 34; Baldwin v. The Bradish Johnson, Id. 798; The Chusan, Id. 2,716, 2,717; Harris v. The Henrietta, Id. 6,121.

State legislation providing for the enforcement of maritime contracts by attachment of the vessel, not being a common-law remedy, is unconstitutional.—The Edith, Cases Nos. 4,282, 4,283.

See, also, ante, § 17.

§ 29. Foreign laws.

The power of the master to contract for necessary supplies for which a lien arises under the maritime law is not controlled by the law of the flag.—Hatton v. The Melita, Case No. 6,218.

The lex loci contractus is observed in granting or refusing the remedy where a lien is claimed for labor and materials furnished to a vessel in a port of another country.—The Infanta, Case No. 7,030.

The question of a lien on a British vessel which puts into a Danish port in distress for advances to make repairs must be determined by the law of Great Britain.—The Woodland, Case No. 17,977.

By the law of Great Britain, the master has no right, even in a foreign port, to pledge his vessel for necessaries, or create a lien thereon by any other form of hypothecation than a formal bottomry bond.—The Woodland, Case No. 17,977.

3 & 4 Vict. relates to liens for supplies furnished foreign vessels, and is declaratory of the maritime law.—The Champion, Case No. 2,583.

By the law of England, no lien existed for supplies furnished domestic vessel before 3 & 4 Vict.—The Champion, Case No. 2,583.

§ 30. Right of part owners, agents, etc., to lien.

A part owner, though ship's husband, has no lien upon the share of his co-owner for advances and disbursements. Case No. 8,086 reversed.—The Larch, Case No. 8,085.

A part owner and general agent and superintendent of a line of boats has no lien for materials, but must be regarded as having given credit to the company.—The St. Joseph, Case No. 12,229.

A part owner, who furnishes material and labor for making repairs, is entitled to a maritime lien therefor, which will be superior to the rights of a mortgagee under a mortgage given by the other part owner upon his interest in the vessel.—Pettit v. The Chas. Hemje, Case No. 11,047a.

A person who makes a parol contract for the purchase of a share in a vessel, and receives, jointly with the other owners, possession of the vessel, cannot acquire a lien for maritime services.—Dowling v. The Reliance, Case No. 4,042.

A person jointly interested with the equitable owner of a vessel in the profits of a voyage has no lien for advances made during such voyage.—The Union Express, Case No. 14,364.

The clerk of a steamboat, owning a half interest, has no lien for wages.—Logan v. The Æolian, Case No. 8,465.

The ship's agent may have a lien for supplies furnished in a foreign port.—The Sarah J. Weed, Case No. 12,350; The Neversink, Id. 10,133.

The consignee of a vessel, in a foreign port, who furnishes necessary supplies on credit, not having funds of the owner in his hands, may have a lien therefor upon the vessel. — The Eliza Jane, Case No. 4,363.

The master has no lien for his advances and disbursements abroad.—The Larch, Case No. 8,085.

§ 31. Who may contract.

A carpenter making alterations in a vessel, in ignorance of the fact that she was held under a conditional sale, is entitled to a lien, where the vessel reverts to the seller on nonperformance of the conditions. — The Ferax, Case No. 4,737.

Where the charterer hires the use of the vessel, and the navigation remains with the owner, and the master, on the credit of the vessel, procures coal in a foreign port, the vessel is chargeable.—The City of New York, Case No. 2,758.

A lien for supplies or repairs upon a vessel under mortgage, and in possession of the mortgagor, is valid, and will be enforced after the possession is transferred to the mortgagee by decree in a suit in admiralty for possession.—The Granite State, Case No. 5,687.

A person who is neither owner nor master cannot contract for work or materials necessary for building, repairing, or supplying a vessel, which will create a lien thereon.—Harper v. New Brig, Case No. 6,090.

Repairs to a vessel while in the hands of a purchaser under a conditional sale constitute a lien upon her, in the hands of the seller, after possession resumed for breach of the condition. —Hawes v. The James Smith, Case No. 6,238.

Where the owners permitted a railroad using the vessel to appoint a steward, with authority to procure supplies, *held*, that they thereby consented that supplies might be procured in a foreign port on the vessel's credit.—The Metropolis, Case No. 9,503.

The owners of a vessel, who accept the insurance on it and the net proceeds of a sale by the master, are estopped, as against persons who furnished advances to the purchasers on the credit of the vessel, to set up invalidity of the sale.—The Sarah Harris, Case No. 12,345.

A lien arises for supplies furnished on the credit of a vessel in a foreign port on the authority of the master, appointed by a purchaser from a former master on a sale made in fraud of the rights of the real owner, where the creditor has no notice of circumstances to raise suspicion.—The Sarah Harris, Case No. 12,347.

Supplies furnished on the order of an agent known to represent the charterers *held* not furnished on the credit of the vessel.—The Metropolis, Case No. 9,502.

The seller of coal, bought, by one holding himself out as master and owner, for a tug lying in a distant port, must ascertain the extent of the purchaser's authority, and the necessity for the purchase.—The Hamilton Morton, Case No. 5,992.

The clerk of a river steamboat has no power to bind her for a loan without authority of the master, but if the master assents thereto directly or impliedly a lien arises.—McAllister v. The Sam Kirkman, Case No. 8,658.

§ 32. Effect of usage.

A usage, to affect the lien of workmen and material men on a vessel, must be clearly and uniformly well known and understood among the parties.—Davis v. New Brig, Case No. 3,643.

§ 33. Extent of lien.

A maritime lien for seamen's wages, or repairs and supplies, adheres to the ship and all its parts, wherever found.—Bruce v. The America, Case No. 2,046.

Privileged liens are matters stricti juris, and cannot be extended argumentatively from one case or person to another.—The Kiersage, Case No. 7,762.

Where a lien in admiralty attaches, it follows the proceeds into the hands of assignees. —Dike v. The St. Joseph, Case No. 3,908.

The master will not be allowed, as against other lienors, to enforce his mortgage by stripping the vessel and selling the sails.—The George Prescott, Case No. 5,339.

III. WAIVER, DISCHARGE, AND EXTINGUISHMENT.

Waiver or discharge of lien for seamen's wages, see "Seamen," § 131.

§ 34. In general.

The law will not suffer a mechanic's claim on a vessel, for work and materials furnished, to be defeated on slight grounds, but will be astute to prevent it.—Cole v. The Atlantic, Case No. 2,976.

A forfeiture for breach of the laws of the United States does not avoid the lien of seamen and material men, existing at the time of forfeiture.—The Florenzo, Case No. 4,886.

§ 35. Giving credit in general.

The lien is not waived by charging the materials against the builder of a vessel without naming the vessel.—The Sam Slick, Case No. 12,283.

Where repairs are originally charged to the several vessels on which they are made, the fact that a general account is subsequently made out against the firm owning the vessels does not affect the lien.—In re Kirkland, Case No. 7,842.

A maritime lien is not waived or extinguished by giving credit for a limited time.—The Napoleon, Case No. 10,011; The Nestor, Id. 10,126. CONTRA, see Zane v. The President, Case No. 18,201.

A lien for materials for the construction of a vessel is not extinguished by a credit which it is known will expire before completion of the vessel.—The Antarctic, Case No. 479.

A lien limited in time is waived by giving a credit extending beyond its duration. — The Kearsarge, Case No. 7,634.

A lien under a statute providing against extension of time is not defeated by an agreement to take payment in a promissory note, if no note has, in fact, been given or tendered.—Secor v. The Highlander, Case No. 12,604.

Persons furnishing supplies in the home port on a credit of six months have a lien therefor where satisfactory paper to secure the price was not given as agreed.—Freeborn v. The Falcon, Case No. 5,078a.

An agreement to give a time note for the last installment of the contract price of repairs to a vessel, not complied with, will not displace the lien under 2 Rev. St. N. Y. 493, §§ 1, 2.—The Highlander, Case No. 6,475.

No lien arises under 2 Rev. St. N. Y. 405, § 2, for services and supplies furnished a domestic vessel in her home port, at the request of her master and owner, to fit her out for a foreign voyage, and to be paid for on her return. —Remnants in Court, Case No. 11,697.

§ 36. Taking commercial paper.

The lien on the vessels for repairs, supplies, or advances is not waived by taking the negotiable note of the master or owner, unless the same is taken in payment.—The Active, Case No. 34; The Chusan, Id. 2,717; Drake v.

The Lime Rock, Id. 4,064; The Hilarity, Id. 6,480; Fitzgerald v. The H. A. Richmond, Id. 4,839; McKim v. Kelsey, Id. 8,861; Page v. Hubbard, Id. 10,663; Raymond v. The Ellen Stewart, Id. 11,594; The R. W. Skillinger, Id. 12,181; Reppert v. Robinson, Id. 11,703; The Eclipse, Id. 4,268; The Illinois, Id. 7,005; North v. The Eagle, Id. 10,309; The Napoleon, Id. 10,011.

The taking of a draft on the owner does not waive the lien, unless it is accepted as payment.—Southern Bank v. The Alexander McNeil, Case No. 13,186; The Acme, Id. 28; Logan v. The Aeolian, Id. 8,465; The Emily B. Souder, Id. 4,454, 4,457; Carter v. The Byzantium, Id. 2,473; The Washington Irving, Id. 17,244.

But such note or draft must be surrendered at the hearing or canceled.—Page v. Hubbard, Case No. 10,663; Harris v. The Kensington, Id. 6,122; Southern Bank v. The Alexander McNeil, Id. 13,186; Carter v. The Byzantium, Id. 2,473; The Eclipse, Id. 4,268; The Argo, Id. 515.

A bill of exchange taken of an owner or master will not discharge the lien.—North v. The Eagle, Case No. 10,309.

The discount of the note by the lienor, which he subsequently takes up, does not extinguish the lien.—The Napoleon, Case No. 10,011.

But an absolute transfer of the note will extinguish the lien.—Harris v. The Kensington, Case No. 6,122; The R. W. Skillinger, Id. 12,181.

And the lien is not revived where the note is subsequently taken up by the creditor.—The R. W. Skillinger, Case No. 12,181.

The lien is not discharged by taking the note of an agent of the vessel, unless so intended by both parties.—The Sarah J. Weed, Case No. 12,350.

Or unless the principal has settled with agent to his prejudice.—The Active, Case No. 34.

A lien for advances for supplies is waived by the taking of a bill of exchange for the amount indorsed by third persons to whom the ship is delivered as security.—O'Hara v. The Mary, Case No. 10,467.

The lien is discharged where a note or other security is given which, by the law of the place, discharges the original contract, and the jurisdiction in admiralty cannot be revived by a surrender of such note or security.—Reppert v. Robinson, Case No. 11,703.

A note of or a draft upon a third person, received in satisfaction of the debt, will extinguish the lien.—Underwriters' Wrecking Co. v. The Katie, Case No. 14,342.

The lien, if any, in favor of a consignee of a vessel, for repairs and advances, *held* waived by the taking of a bill of exchange on the owners on 60 days' credit.—Leland v. Medora, Case No. 8,237.

A lien arising upon advances made to pay for salvage and repairs is waived, as against a subsequent bona fide purchaser without notice, by taking a time draft duly accepted.—Davenport v. The Sea Flower, Case No. 3,589.

The taking of a draft on the consignees for the amount of the advances, which was afterwards protested for nonpayment, *held* a waiver of the lien, if any ever existed.—Murray v. Lazarus, Case No. 9,962.

The acceptance of a note, indorsed by a third person, where the same is returned on not being paid at maturity, *held* no waiver of the lien.—Moore v. Newbury, Case No. 9,772.

Under Act Pa. April 20, 1858, the acceptance of notes, etc., for an existing demand which would entitle the party to a lien upon the vessel, will not work a satisfaction or extinguishment thereof.—Srodes v. The Collier, Cases Nos. 13,272, 13,272a.

Nor is the lien released by the fact that the note includes another demand, or by the giving of a renewal note.—Srodes v. The Collier, Case No. 13,272.

The lien given by Act Pa. June 13, 1836, is not discharged by taking a note and giving a receipt in full, where such was not the intention.—Sutton v. The Albatross, Case No. 13,645.

§ 37. Taking collateral security.

No cognizance will be taken of tacit liens where the circumstances create a presumption that the same are waived and other security looked to.—Stillman v. The Buckeye State, Case No. 13,445.

A lien for repairs is waived by acts showing that other securities have been substituted therefor, and, in examining testimony to this point the court will make all presumptions that a jury ought to make on a trial of a question of fact.—Stevens v. The Sandwich, Case No. 13,409.

Where the person doing work on a vessel stipulates for other and different security from that of the vessel, the maritime lien is waived.—Case No. 13,788 reversed.—Taylor v. The Commonwealth, Case No. 13,787.

No lien upon the vessel arises where loans are made on a pledge of the freight.—The A. M. Bliss, Case No. 274.

But the taking by a material man of an order on the consignee for freight to be earned on the voyage is no waiver of his lien.—The Omer, Case No. 10,510.

Taking a mortgage or trust deed as security for supplies furnished does not waive the lien.—The A. R. Dunlap, Case No. 513; The Illinois, Id. 7,005; The Theodore Perry, Id. 13,879.

The lien created by an hypothecation by way of a mortgage for supplies in a foreign port is not lost by taking other security for the claim.—The Hilarity, Case No. 6,480.

A lien for repairs may be enforced notwithstanding the bond and mortgage given to secure it are not tendered back to the mortgagor, or surrendered in court at the trial.—The Theodore Perry, Case No. 13,879.

§ 38. Payment.

In the absence of express application by the owner, freight money received by the consignee of the vessel is to be deemed to be applied to the discharge of the liens on the vessel.—The J. F. Spencer, Case No. 7,316.

§ 39. Bankruptcy of owner.

The lien for supplies sold the charterer upon the credit of the vessel is not discharged by the bankruptcy of the charterer, and the composition accepted, though the material man voted to accept the composition.—The Home, Case No. 6,657.

§ 40. Death of owner.

A maritime lien is not divested by the death of the owner of the vessel and the representation by his administrator of the insolvency of his estate.—The Young Mechanic, Case No. 18,180.

§ 41. Assignment of claim.

The assignment of a maritime claim does not extinguish the lien incident thereto.—The Emma L. Coyne, Case No. 4,466; The Boston, Id. 1,669; The General Jackson, Id. 5,314; The Norfolk, Id. 10,297. CONTRA, see The Champion, Case No. 2,583.

§ 42. Departure of vessel.

The departure of a foreign vessel from the state before arrest does not affect either the lien or the remedy.—The Active, Case No. 34; The Nestor, Id. 10,126.

The lien is not discharged by the making of a subsequent voyage where the prosecution is prevented by sudden departure.—Anderson v. The Solon, Case No. 363.

Liens created under state laws for repairs and supplies do not adhere after the vessel has left the jurisdiction of the state.—Roosevelt v. The C. H. Frost, Case No. 12,033.

Putting into a port on account of a fog and to get provisions is an "arrival" into the port, under a local law providing that a lien given thereby shall cease in such case. Case No. 12,283 reversed.—The Sam Slick, Case No. 12,282.

A lien acquired under the New York statute by rendering services or furnishing materials to a vessel in distress in a port of the state is lost if she depart therefrom more than 12 days before commencement of the action to enforce the same.—Sturgis v. The Oregon, Cases Nos. 13,576b, 13,577.

Under the New York lien law, a departure from the port where supplies have been furnished a vessel, although with intent to return, destroys the lien.—Jenkins v. The Congress, Case No. 7,264.

The word "port," as used in 3 Rev. St. N. Y. c. 8, tit. 8, § 1, providing that the lien shall be lost where the vessel leaves the port, etc., means the place along the shore where the supplies were furnished.—Concklin v. The Sylvan Shore, Case No. 3,090.

The departure of a river steamboat on her daily trip is a "leaving of the port," within Laws N. Y. 1862, c. 482, requiring the filing of specifications of lien within 12 days therefrom.—The Monitor, Case No. 9,709; The Jenny Lind, Id. 7,287.

The lien under the New York law is not lost by the vessel leaving the state fraudulently or clandestinely, at a time when the lien creditor could not legally arrest her.—The Joseph E. Coffee, Case No. 7,536.

A steam ferry boat does not depart from the state, so as to destroy the liens, by making one trip on her route between New York and Fort Lee on Sunday before her repairs are completed.—The Joseph E. Coffee, Case No. 7,536.

The departure of a vessel from port on Sunday on a trial trip, and again secretly Sunday night, will not discharge the lien given by the New York law.—Freeborn v. The Falcon, Case No. 5,078a.

In the case of a tug used about New York harbor the lien of the material man for supplies under the New York statute is not lost by her secret departure from the state out of the line of her business.—Van Winkle v. The Henry Morrison, Case No. 16,882.

§ 43. Proceedings to enforce claim.

The lien of a material man is not lost by commencing a suit in personam in the state court and attaching the vessel therein.—The Paul Boggs, Case No. 10,846.

A maritime lien is not lost by an attachment of the vessel in a state court, where the action is voluntarily discontinued before filing the libel in admiralty.—Southern Bank v. The Alexander McNeil, Case No. 13,186.

The maritime lien is waived by obtaining judgment on the claim in a proceeding in a state court.—Stapp v. The Swallow, Case No. 13,305. CONTRA, see Rogers v. The Reliance, Case No. 12,019.

A claimant waives his original admiralty lien by proceeding under a state law against the vessel, and cannot be reinstated to his original rights.—Dudley v. The Superior, Case No. 4,115.

The discharge of the vessel from arrest on giving a satisfactory bond, as provided in a state statute giving a lien, terminates the lien.—The Edith, Cases Nos. 4,282, 4,283.

The delivery of the vessel on bail in a suit in admiralty does not discharge the lien for seamen's wages.—The Langdon Cheves, Case No. 8,063.

Attachment of a vessel on process from a common-law court operates on nothing but the owner's interest after the maritime liens are satisfied.—Maxwell v. The Powell, Case No. 9,324.

A libel in admiralty to enforce a mortgage given for advances to fit a vessel for sea will be dismissed where the claim of the libelant has been put in and allowed as to the balance of proceeds of a sale on prior libel on bottomry bond.—Deshon v. The Medora, Case No. 3,820.

§ 44. Judicial sale—In admiralty.

The sale of a vessel under a decree in admiralty on a libel to enforce a maritime lien, whether general or statutory, will free the vessel from all other liens.—The E. W. Gorgas, Case No. 4,585; Hill v. The Golden Gate, Id. 6,491; Stewart v. Fagan, Id. 13,426.

On a sale of a vessel on a final decree in a proceeding in rem, all liens and incumbrances are transferred from the vessel to the proceeds.—The Syracuse, Case No. 13,716.

A purchase by a mortgagee at such a sale will not extinguish the mortgage by a merger of title.—The Syracuse, Case No. 13,716.

A foreign condemnation in prize destroys maritime liens.—Pierce v. The Alberto, Case No. 11,142.

A foreign sovereign's conversion of a piratical ship into a public vessel conclusively proves her condemnation as prize.—Pierce v. The Alberto, Case No. 11,142.

Such foreign condemnation may be proved without producing the decree.—Pierce v. The Alberto, Case No. 11,142.

Where a British ship was adjudged forfeited to the United States, and was ordered sold by the marshal, but the purchaser failed to comply with his contract, so that a subsequent sale was necessary, *held*, that the vessel was subject to a maritime lien in the hands of the last purchaser for materials and labor expended in making repairs between the dates of the two sales.—Woodruff v. The Levi Dearborne, Case No. 17,988.

Where mortgagees of a vessel decline to appear as claimants in a suit in admiralty to enforce a maritime lien, their lien is not affected by a sale under the decree.—Schuchardt v. The Angeleque, Cases Nos. 12,483a, 12,483b. CONTRA, see Schuchardt v. The Angelique, Case No. 12,483c.

A condemnation and sale as unseaworthy, set up in a discharge of a previous lien for supplies, *held* not sustained by the testimony of the claimant, who had taken part in the proceedings as surveyor, and was an interested party.—The J. F. Spencer, Case No. 7,315.

§ 45. —— Under judgment in common-law proceedings.

The seizure and sale of a vessel in a judicial proceeding in a common-law court, under a state statute, does not divest liens arising under the general maritime law, and they may be enforced in admiralty against the vessel in the hands of the purchaser.—Ashbrook v. The Golden Gate, Case No. 574; The Bolivar, Id. 1,610; The Gazelle, Id. 5,289; Harris v. The Henrietta, Id. 6,121; Hill v. The Golden Gate, Id. 6,491; The John Richards, Id. 7,361; The Julia Ann, Id. 7,577; McAllister v. The Sam Kirkman, Id. 8,658; Maxwell v. The Powell, Id. 9,324; The N. W. Thomas, Id. 10,386; Taylor v. The Royal Saxon, Id. 13,803; The Skylark, Case No. 12,928. CONTRA, see Auther v. The Atlantic, Case No. 668; The Globe, Id. 5,483, reversing Case No. 5,484.

Where the claimant purchased the vessel under execution from a state court in a proceeding to enforce his own claim, the amount which he bid must be applied on his debt, and the balance may be proved as a claim.—The Skylark, Case No. 12,928.

A sheriff's sale of a vessel on execution against the owners discharges the lien for wages of a seaman who is a part owner. Foster v. The Pilot No. 2, Case No. 4,980, reversed.—Gallatin v. The Pilot, Case No. 5,199.

§ 46. Transfer of title generally.

The right to proceed against a vessel in rem for supplies is not analogous to liens at common law or by statute, and is not, like them, affected by mere transfer of possession.—Harney v. The Sydney L. Wright, Case No. 6,082a.

A maritime lien is equivalent to an express hypothecation, and all subsequent changes of title are subject thereto.—McAllister v. The Sam Kirkman, Case No. 8,658.

A bona fide change of ownership, without notice, does not divest the lien for damages arising from collision, where there is no laches by the injured party.—Edwards v. The Robert F. Stockton, Case No. 4,297.

A lien for work and materials, given by the local law, is not lost by a transfer of the vessel or a change of masters.—Davis v. New Brig, Case No. 3,643.

A lien given by local law will prevail over the title of a purchaser who has bought without notice of the lien.—The Unadilla, Case No. 14,332.

A maritime lien arising for supplies furnished to a foreign vessel is of force against her in the hands of subsequent domestic purchasers with notice.—Enslow v. The Sarah and Abigail, Case No. 4,495.

The purchase by the government of a vessel for the revenue service does not divest the same of valid liens existing at the time the title was acquired, and they may be enforced by the ordinary methods.—The Revenue Cutter No. 1, Case No. 11,713.

The lien of seamen's wages and of bottomry bonds exists in all cases as much against the government, becoming proprietor by way of purchase or forfeiture or otherwise, as against private persons.—United States v. Wilder, Case No. 16,694.

A sale of a vessel on credit does not destroy a material man's lien.—Beers v. The John Adams, Case No. 1,231.

A condemnation and sale as unseaworthy, set up in a discharge for a previous lien for supplies, *held* not sustained by the testimony of the claimant, who had taken part in the proceedings as surveyor, and was an interested party.—The J. F. Spencer, Case No. 7,315.

§ 47. Delay or laches—In general.

Limitations prescribed by the common law do not apply to claims in admiralty except by statutory provisions, but admiralty liens will not be permitted to lie dormant to the injury of third parties.—Stillman v. The Buckeye State, Case No. 13,445; The Prospect, Id. 11,443.

The lien of a material man is not lost by delay in commencing a suit in rem, if the ownership of the vessel remains unchanged, or if there be only a colorable transfer.—The Paul Boggs, Case No. 10,846.

Maritime liens continue during a reasonable time for their enforcement, but not beyond that.—The Admiral, Case No. 84; Stillman v. The Buckeye State, Id. 13,445; The Eliza Jane, Id. 4,363.

The right of preference over general creditors of the claim of a shipper for loss or injury of his goods may be lost by unreasonable delay.—The Rebecca, Case No. 11,619.

An attachment in the hands of the marshal of the district where the vessel is owned, kept alive by successive renewals, will prevent the claim becoming stale. Simply filing a libel will not have that effect.—The Emma L. Coyne, Case No. 4,466.

Where the lienholder and owner of a vessel are both residents of the same district, the former need not pursue the vessel in another district to prevent his claim becoming stale.—The Emma L. Coyne, Case No. 4,466.

A claim by an engineer for overdue and unpaid wages does not necessarily become stale in 20 months.—The Norfolk, Case No. 10,297.

A lien is not lost by two years' delay where the vessel has not been within the United States during such time.—The Sea Lark, Case No. 12,579.

Allowing a claim to slumber three years with repeated opportunities to enforce it, and no excusatory circumstances, is conclusive that it is waived.—Stillman v. The Buckeye State, Case No. 13,445.

A libel will not lie in admiralty after the lapse of six years where the vessel has been within reach of the process of the court, to the knowledge of libelants, for a reasonable time.—The Sarah Ann, Case No. 12,342.

On the Great Lakes tacit maritime liens will not be extended beyond the season of navigation except under special circumstances.—Stillman v. The Buckeye State, Case No. 13,445; The Dubuque, Id. 4,110.

Ordinarily a lien for supplies will not be upheld beyond the termination of the voyage for which the supplies were furnished.—The Boston, Case No. 1,669.

A lien for breach of maritime contract is not divested by making another voyage before libel filed.—Knox v. The Ninetta, Case No. 7,912.

The laborer's and material man's lien attaches when the work and materials are furnished, and cannot be afterwards divested by the act of one of the parties.—Davis v. New Brig, Case No. 3,643.

The vessel is exonerated from any lien where the creditor alone looked to personal responsibility of master or owner.—The Amstel, Case No. 339.

To maintain a lien for insurance under Act Pa. April 20, 1858, the insurer must hold a note or other acknowledgment of indebtedness given for the premium, totally disconnected from all other transactions.—Srodes v. The Collier, Case No. 13,272.

A libel to enforce a maritime lien will be dismissed where it appears that no attempt was made for over three years to enforce it, though libelant had repeated opportunities to do so, and offers no reasons for not doing so.—The Buckeye State, Case No. 13,445.

§ 48. —— In case of bona fide purchasers or incumbrancers.

The lien of a shipper for loss or injury of goods is not defeated by a bona fide sale before he has had an opportunity for enforcing it, especially where the purchaser has knowledge of his claim.—The Rebecca, Case No. 11,619.

A lien against a vessel is waived, as against a purchaser, where the claimant, of whom inquiries are made by the purchaser, is silent as to his claim.—Wood v. The Lumberman, Case No. 17,949.

A mortgagee is a bona fide purchaser where a present valuable consideration is given, or money subsequently advanced or liability incurred on the faith thereof.—Fitzgerald v. The H. A. Richmond, Case No. 4,839.

The purchaser of a vessel is bound to exercise reasonable diligence to ascertain the nature and

amount of existing liens.—The Atalanta, Case No. 597.

A notice to the purchaser will keep the lien alive if sufficient purchase money remains unpaid to meet it.—The Atalanta, Case No. 597.

The statement of the seller that there were some small claims against the vessel, which he would pay, *held* not sufficient to affect the purchaser with knowledge of any particular claim.—The Hercules, Case No. 6,400.

Notice to purchasers that previous owners are indebted for a set of sails furnished to the vessel is notice of a lien therefor.—Enslow v. The Sarah and Abigail, Case No. 4,495.

A mere notice of the existence of a certain claim cannot affect the purchaser's rights, unless such notice be had at the time of purchase or of payment.—The Hercules, Case No. 6,400.

A lienholder is bound to diligence in the enforcement of his right, though a subsequent mortgagee may not have suffered directly by the delay.—The Theodore Perry, Case No. 13,879.

A bona fide purchaser does not lose the protection of the law by taking the collateral guaranty of a third party indemnifying him against liens.—The Detroit, Case No. 3,832.

The taking of a mortgage upon another vessel to indemnify the purchaser against claims upon the vessel purchased does not operate to extend the time within which creditors should enforce their claims.—The Hercules, Case No. 6,400.

A delay, after reasonable opportunity, to enforce a lien, will be deemed a waiver as against subsequent purchasers or incumbrancers in good faith and without notice.—The Dubuque, Case No. 4,110; The Chusan, Id. 2,717; The D. M. French, Id. 3,938; The Eliza Jane, Id. 4,363; The General Jackson, Id. 5,314; The Harriet Ann, Id. 6,101; The Lillie Mills, Id. 8,352; The Paul Boggs, Id. 10,846; The Prospect, Id. 11,443.

The lien as against a bona fide purchaser does not necessarily continue until the vessel has returned to the place at which the supplies were furnished.—The Lillie Mills, Case No. 8,352.

There is no sufficient laches to prevent enforcement of the lien as against a bona fide purchaser for value where the vessel proceeded on a foreign voyage, and was libeled immediately upon her return.—The Walkyrien, Case No. 17,092.

A lien for work and material is not barred by the lapse of two years, unaccompanied by culpable or unreasonable neglect, even as against a bona fide purchaser.—Cole v. The Atlantic, Case No. 2,976.

Creditors of vessels on the Great Lakes must enforce their liens, as against bona fide purchasers without notice, during the current season of navigation, or at the commencement of the next season.—The Hercules, Case No. 6,400.

A lien accruing in August, 1873, against a vessel on the Great Lakes, *held* waived, as against one who purchased it in January, 1874, where the libel was not filed until September, 1874.—The Hercules, Case No. 6,400.

A lien for repairs to a canal boat *held* lost by 16 months' delay to enforce it, where the boat had returned several times to the place where the repairs were made.—The John Lowe, Case No. 7,356.

A lien for supplies in a foreign port *held* lost by two years' delay, where the vessel had since made several voyages, and had been sold at public auction to a bona fide purchaser without notice.—The Utility, Case No. 16,806.

A lien in a collision case will not be enforced after change of ownership and delay of 20 months.—The Admiral, Case No. 84.

A claim for damages by collision cannot be maintained against the bona fide purchaser of the vessel at mortgage sale two years later.—Chard v. The Kate L. Bruce, Case No. 2,614.

A libel filed four years after a collision *held* too late, as against a bona fide purchaser without notice, where the vessel had previously been within the jurisdiction of the court, to libelant's knowledge.—The D. M. French, Case No. 3,938.

A lien is lost by a delay to institute proceedings for three years, where there had been a change of ownership.—Packard v. The Louisa, Case No. 10,652.

Demand *held* stale, after two years, as against a mortgagee without notice, where the vessel was most of the time within the jurisdiction, and libelants were under no disability to sue.—Griswold v. The Nevada, Case No. 5,839.

Lien for towage services *held* waived by delay, for an entire season, to file a libel as against bona fide purchaser without notice.—The Detroit, Case No. 3,832.

As against bona fide purchasers without notice, a lien for repairs and supplies in a foreign port *held* not lost by eight months delay to enforce it.—Baldwin v. The E. Morris, Case No. 799.

Claim for pilotage made 6 months after last service performed not stale as against bona fide purchaser without notice.—The Argo, Case No. 515.

A libel for loss of goods filed two years and ten months after the loss, and after a bona fide assignee of a shipper's bill of lading had seized the boat, cannot be maintained.—The Favorite, Case No. 4,696.

The fact that the boat had been released on bond in the prior suit does not alter the case; the sureties have a right to look to the boat for their indemnity, and the power of the court over it still continues.—The Favorite, Case No. 4,696.

IV. PRIORITY.

Priority of claim for costs, see "Admiralty," § 150.

§ 49. Time of accrual of lien.

As between claimants of same class last furnisher of supplies sometimes preferred to the first.—The Boston, Case No. 1,669.

Persons furnishing supplies for the last voyage have precedence over those who furnished an earlier outfit.—The Fanny, Case No. 4,638; The Favorite, Id. 4,699; Hatton v. The Melita, Id. 6,218.

As between a material man who fitted a vessel for a voyage and one who refitted her in a port of distress, the latter has the prior lien.—The Omer, Case No. 10,510.

Claims on the western lakes and rivers are classed by the successive open seasons of navigation, instead of by separate voyages.—The Dubuque, Case No. 4,110.

A material man's lien for repairs under the local law is entitled to priority over a claim for prior towage services.—The Dan Brown, Case No. 3,556.

Claims for repairs for damages caused by a collision have priority over a claim of the other vessel for damages.—The Jeremiah, Case No. 7,290.

A claim for salvage services rendered to a vessel in collision has priority over a claim for damages by the collision.—The Jeremiah, Case No. 7,290.

A lien arising for damages suffered by a collision is paramount to all prior liens.—Rusk v. The Freestone, Case No. 12,143.

Claims for supplies and stevedores' services are subordinate to the claims of salvors of a vessel and cargo burned at a wharf.—Emerson v. The Pandora, Case No. 4,442.

The lien for cargo sold for necessaries of the vessel *held* prior to that for materials previously furnished.—The Grapeshot, Case No. 5,702.

A claim for towage furnished in one voyage has a lien superior to a claim for supplies furnished on a previous voyage.—Porter v. The Sea Witch, Case No. 11,289.

A lien for repairs to a foreign vessel will be preferred to a bottomry interest prior in point of time.—The Jerusalem, Case No. 7,294.

Where a wharfinger has made an express personal contract with the shipowner he will not be given a priority of claim over a bottomry interest which previously attached.—Ex parte Lewis, Case No. 8,310.

§ 50. Waiver of priority.

Claims for wages are subject to the rule that delay to enforce a maritime lien will postpone it to subsequent liens acquired without notice, the same as claims for repairs and supplies.—The Dubuque, Case No. 4,110.

The consent to release a vessel from custody operates as a waiver of priority of claim as against a subsequent libelant.—The A. R. Gray, Case No. 519.

The priority of the claim is not affected by the fact that a third person promised to pay the salvor if he could not collect from the vessel.—The Spaulding, Case No. 13,215.

Collision claim postponed to that of a subsequent mortgage where filing of libel was delayed five years.—The Columbia, Case No. 3,036.

§ 51. Comparative priority of various claims.

The lien of the shipper of goods on freight against the vessel for loss or damage by the fault of the master or the insufficiency of the vessel arises at the time that the misfortune happened, and his claim is preferred to that of general creditors of the owners.—The Rebecca, Case No. 11,619.

As between persons having a lien upon a steamboat and persons having a lien for work in converting her into a barge, the former will be required to resort first to those portions of the old vessel on which they alone have a lien.—The Buffalo, Case No. 2,111.

Maritime liens arising out of contracts of afreightment, and liens not resting upon the necessities of the ship, or the hazards of navigation, are subordinate to the claims of material men, bottomry bond holders, salvors, and collision claimants.—The America, Case No. 288.

In the distribution of proceeds of sale claims for towage and necessaries are entitled to rank with those for breaches of contracts of afreightment.—The Unadilla, Case No. 14,333.

Liens for damages by collision are of equal rank wth those resting upon the necessities of the ship and hazards of the voyage.—The America, Case No. 288.

The lien of laborers and material men will be preferred to a judgment lien in favor of the United States.—Phillips v. The Thomas Scattergood, Case No. 11,106.

The master's claim for wages and for advances of wages to the crew takes precedence to a lien of a bottomry bond given by him.—The Irma, Case No. 7,064.

Pilotage and towage into port stand in the same rank of maritime liens with necessary supplies and repairs.—Porter v. The Sea Witch, Case No. 11,289.

Salvage claims are paramount to that of the holder of a bottomry and respondentia bond.—Giro v. The Alexander Wise, Case No. 5,463.

Salvage services are entitled to priority of payment as against a claim for general average arising from the jettison of a portion of the cargo.—The Spaulding, Case No. 13,215.

A claim for the balance of the purchase price of a vessel has priority over a claim for supplies in the home port, but the latter will take precedence over a claim for advances subsequently made by the seller to fit the vessel for sea.—The St. Mary, Case No. 12,242.

Liens for repairs and supplies in the home port under the local law are of equal rank with liens for repairs and supplies under the general maritime law.—The Illinois, Case No. 7,005; The Dan Brown, Id. 3,556. CONTRA, see The John T. Moore, Case No. 7,430; Reyley v. The Carrie Brooks, Id. 11,718.

An attachment proceeding in the state court, not followed by a decree, does not give the attaching creditor any priority over a creditor subsequently filing a libel in the admiralty court.—Schmidt v. The Superb, Case No. 12,467.

§ 52. Liens for seamen's wages and other liens.

Seamen's wages are preferred to claims of material men.—The America, Case No. 288.

Seamen's wages are entitled to priority of payment out of the proceeds of the vessel, over a bottomry lien.—Furniss v. The Magoun, Case No. 5,163.

Seamen's wages are payable out of proceeds prior to the claims of material men furnishing supplies during their employment.—The Mary A. Rich, Case No. 9,198; The Hilarity, Id. 6,480.

Claims for wages earned after the boat was repaired have an equality of lien with that for advances made for repairs.—Collins v. The Fort Wayne, Case No. 3,012.

Seamen are not entitled to a lien for an increase of wages in an intermediate port prior to that of creditors for advances.—The Blohm, Case No. 1,556.

The claim for wages takes precedence of bottomry bonds and all other claims, whether the entirety of the fund out of which they are to be paid remains, or a part of it is lost by accident or otherwise.—Pitman v. Hooper, Case No. 11,185.

Seamen's wages for the last voyage are preferred, in a decree against the vessel, to all other claims after the expenses necessary to procure a condemnation, and such charges as accrue after the vessel is brought into port, as wharfage, etc.—The Paragon, Case No. 10,708.

The wages of seamen have a priority over a claim for collision, against the proceeds of their vessel, whether such wages were earned prior or subsequent to the collision.—The Orient, Case No. 10,569. CONTRA, see Rusk v. The Freestone, Case No. 12,143.

The seamen's lien for wages on the proceeds of a British vessel, libeled for collision, will be postponed to that of libelant, in conformity to the rule adopted by the British courts towards our vessels in like circumstances.—The Enterprise, Case No. 4,498.

The liens created under Gen. St. Mass. c. 151, are postponed to mariners' wages.—The Island City, Case No. 7,109.

§ 53. Mortgage liens and other liens.

Claims which are liens under the general maritime law have priority over claims of mortgagees, whether the mortgages were registered before or after such liens accrued.—Schuchardt v. The Angelique, Cases Nos. 12,483c, 12,483d, overruling Cases Nos. 12,483a, 12,483b; The St.

Joseph, Case No. 12,229; Reeder v. The George's Creek, Id. 11,654; Reyley v. The Carrie Brooks, Id. 11,718; The Norfolk, Id. 10,297; Zollinger v. The Emma, Id. 18,218; Baldwin v. The Bradish Johnson, Id. 798; The Alice Getty, Id. 193.

Liens arising under the local laws for repairs or supplies to a vessel in her home port take precedence to the lien of a mortgage duly recorded, under Act July 29, 1850 (Rev. St. § 4192), prior thereto.—The Alice Getty, Case No. 193; The St. Joseph, Id. 12,229; Srodes v. The Collier, Id. 13,272, 13,272a; Marsh v. The Minnie, Id. 9,117; The Kiersage, Id. 7,762; The Island City, Id. 7,109; The Hiawatha, Id. 6,453; The Illinois, Id. 7,005; The William T. Graves, Id. 17,758, 17,759. CONTRA, see The Kate Hinchman, Cases Nos. 7,620, 7,621; Baldwin v. The Bradish Johnson, Id. 798, reversing Case No. 1,770; Thomas v. The Kosciusko, Case No. 13,901; The Grace Greenwood, Id. 5,652; Reyley v. The Carrie Brooks, Id. 11,718; In re Scott, Id. 12,517; The Skylark, Id. 12,928.

A lien for repairs furnished in the home port is entitled to be paid in preference to a subsequent mortgage.—The Theodore Perry, Case No. 13,879.

The lien of a mortgage given for labor in the construction of a vessel is not preferred to the lien of a material man prior in date to the mortgage.—The Favorite, Case No. 4,699.

A lien given under the local law for materials furnished in the construction of a vessel will be postponed in a federal court of another state to a subsequent mortgage recorded under the act of congress in the home port of the vessel in the latter state.—Underwriters' Wrecking Co. v. The Katie, Case No. 14,342.

The lien obtained by one furnishing materials for construction, under the local law of Maine, is prior to that of a mortgagee, although the mortgage is prior in time. Case No. 7,634 reversed.—The Kiersage, Case No. 7,762.

The lien created by the hypothecation of a vessel to be built for advances, *held*, should be postponed to those of material men and laborers.—The Hull of a New Ship, Case No. 6,859.

The lien of a shipper for the performance of the contract of shipment takes preference over the lien of a prior mortgage.—The Hendrik Hudson, Case No. 6,358; The E. M. McChesney, Id. 4,463, 4,464; Justi Pon v. The Arbustci, Id. 7,589.

Maritime liens arising in preparing a vessel for sea with the knowledge and consent of the mortgagee take precedence over a prior mortgage, notwithstanding the state statute gives a mortgage precedence over other liens.—Crosby v. The Oriental, Case No. 3,424a.

A lien for materials and repairs will have priority over a mortgage owned by one who was presented to the material and repair men as a part owner of the ship, and who, by his bearing, himself confirmed the impression that he was one of the owners.—Wilson v. The Jewess, Case No. 17,812.

The liability of the vessel for wages of the nominal owner, shipped as cook, *held* superior to that of mortgagees from him, who had no knowledge that the sale to him was without consideration, and made for the purpose of obtaining a registry; and the liability for a deficiency cannot be set off against his claim for wages.—The Uncle Tom, Case No. 14,335.

The record of a mortgage in the office of the collector is not constructive notice to material and repair men.—Wilson v. The Jewess, Case No. 17,812.

An hypothecation of a vessel by her owner, to secure a pre-existing debt, which, in its origin, gave no lien on the vessel, gives no priority to such hypothecation over a prior maritime lien on the vessel.—The Native, Case No. 10,054.

Insurance premiums on policies issued prior to a mortgage on the vessel will be preferred to it, but those on later policies will be postponed.—The Illinois, Case No. 7,005.

A bottomry bond given by the owner in a foreign port for money to purchase cargo *held* entitled to priority over an earlier mortgage, under which the mortgagor was allowed to remain in possession without alteration of the ship's papers.—The Mary, Case No. 9,187.

V. ENFORCEMENT.

Costs in actions to enforce liens, see "Admiralty," §§ 127–153.
Enforcement in admiralty, see "Admiralty," § 3.

§ 54. Jurisdiction in general.

Admiralty has jurisdiction in rem for supplies furnished to foreign ships in our ports, and to our ships in foreign ports or in the ports of other states.—The Nestor, Case No. 10,126; North v. The Eagle, Id. 10,309.

The lien follows the ship wherever she goes, and may be enforced wherever there is jurisdiction to enforce it.—The Champion, Case No. 2,583.

There is a lien in Canada for supplies furnished an American vessel, and a court of admiralty has the power to enforce it.—The Champion, Case No. 2,583.

A lien for seamen's wages existing under the general maritime law will be enforced by the courts of the United States, though the lien arose in Canada, where there are no admiralty courts.—The Champion, Case No. 2,584.

A suit in rem cannot be maintained here for repairs made to a Canadian vessel in Canada, where the local law gives no lien.—The Mermaid, Case No. 9,459.

Whenever the existence of a lien on a vessel for work or repairs is established, under the local law, whether by statute or by common or municipal law, the jurisdiction of the admiralty attaches proprio vigore.—The Marion, Case No. 9,087.

The national courts have exclusive jurisdiction to enforce maritime liens.—McAllister v. The Sam Kirkman, Case No. 8,658.

The jurisdiction of the admiralty courts to enforce maritime liens cannot be ousted by any proceedings in the state courts by owners or agents.—McLelland v. The Robert Morris, Case No. 8,896.

A vessel seized by a sheriff on process by a state court to enforce a lien given by the local law is still subject to seizure on a libel in rem in admiralty to enforce a lien given under the general maritime law.—Riggs v. The John Richards, Case No. 11,827; Wall v. The Royal Saxon, Id. 17,093; Certain Logs of Mahogany, Id. 2,559. CONTRA, see The Oliver Jordan, Case No. 10,503.

A vessel in the hands of a sheriff under process of a state court to enforce a lien given by the local law for materials furnished is not subject to seizure by the marshal on a libel in rem in admiralty to enforce a similar lien.—The Robert Fulton, Case No. 11,890.

Where a vessel goes from a home port to another state to be repaired, a libel will lie against her at her home port for the balance due.—The Christopher North, Case No. 2,707.

Common-law courts of Massachusetts have no power to adjust maritime liens on a fund attached under the state law.—The Caroline, Case No. 2,419.

Filing a claim in admiralty, stating the prior attachment by the state court process, and

claiming protection in regard thereto, *held* not a submission of the jurisdiction of the court.—The Robert Fulton, Case No. 11,890.

§ 55. Effect of rule 12 in admiralty in general.

Under rule 12 in admiralty there is a lien enforceable in rem in admiralty for repairs to a domestic vessel, though no lien is given by the local law.—In re Kirkland, Case No. 7,842.

Under rule 12 in admiralty a lien exists for necessaries furnished a domestic vessel, though by the law of the place there may be no jurisdiction to enforce it.—The Union Express, Case No. 14,364.

The amendment of 1872 to rule 12 does not revive a claim which is almost barred by limitation, and make it a lien on the vessel, so as to cut off titles perfected or acquired before such rule was adopted.—The Circassian, Case No. 2,726.

Such amendment did not abrogate the distinction between a domestic contract and a maritime lien but relates only to the process.—The Selt, Case No. 12,649.

The twelfth admiralty rule, as amended May 6, 1872, affects merely the remedy, and is therefore applicable to all suits for repairs or supplies instituted after its passage, whether such repairs or supplies were made or furnished before its passage or not.—In re Kirkland, Case No. 7,842. CONTRA, see The Circassian, Case No. 2,720a.

§ 56. Liens given by state laws.

Where the lien is given by the local law, the lienors may elect to enforce it either in admiralty or in the state court.—Davis v. New Brig, Case No. 3,643.

Liens on domestic ships, given by a state statute in cases of contracts maritime in their nature, may be enforced by process in rem in admiralty under the 12th Rule in Admiralty.—The Richard Busteed, Case No. 11,764; Boon v. The Hornet, Id. 1,640; Davis v. New Brig, Id. 3,643; Dudley v. The Superior, Id. 4,115; The Edith, Id. 4,283; Gill v. The Continental, Id. 5,425; Haslett v. The Enterprise, Id. 6,197; The Hezekiah Baldwin, Id. 6,449; The Hull of a New Ship, Id. 6,859; The Illinois, Id. 7,005, note; The John Farron, Id. 7,341; The Norfolk, Id. 10,297; Phillips v. The Thomas Scattergood, Id. 11,106; The Raleigh, Id. 11,539; The Robert Fulton, Id. 11,890; Schuchardt v. The Angelique, Id. 12,483b; The Selt, Id. 12,649; The Unadilla, Id. 14,332; Weaver v. The S. G. Owens, Id. 17,310; White v. The Cynthia, Id. 17,546a; Whittaker v. The J. A. Travis, Id. 17,599. CONTRA, see The Adele, Case No. 78; The Island City, Id. 7,109; Jackson v. The Kinnie, Id. 7,137; New York Mail S. S. Co. v. The Baltic, Id. 10,213; Tupper v. The St. Lawrence, Id. 14,240.

A lien on a vessel given by the local law for services not maritime in their nature is not enforceable in admiralty.—Kegan v. The Amaranth, Case No. 7,646; Russell v. Barkman, Id. 12,151.

A contract for materials and labor in the construction of a vessel is not maritime, and the lien given therefor by the local law is not enforceable in admiralty.—Allair v. The Francis A. Palmer, Case No. 203; The Norway, Id. 10,359.

A lien given by the local law to a subcontractor for labor in building a vessel is valid and enforceable in admiralty, though the owner is not personally liable therefor.—Purinton v. Hull of a New Ship, Cases Nos. 11,472, 11,473.

Furnishing an air pump to a water craft (a "chuncker") used for pumping water out of dry docks is a maritime service, and the lien given therefor by the local law may be enforced in the district court in admiralty.—Winslow v. A Floating Steam Pump, Case No. 17,880.

The remedy for the enforcement of a lien under the local law for supplies in the home port whether valid or invalid, will not defeat the lien, or the jurisdiction of the admiralty court to enforce it.—The Illinois, Case No. 7,005; The John Farron, Id. 7,341.

No difference will be made in the enforcement of maritime liens between those created by state statute and those given by the general maritime law.—Schuchardt v. The Angelique, Case No. 12,483d; Whitlock v. The Thales, Id. 17,578.

The lien on a domestic vessel is enforced subject to the qualifications and limitations of the local law.—The Alida, Case No. 199.

The procedure on enforcement in the district court of a lien given by the local law must be according to that in admiralty.—Davis v. New Brig, Case No. 3,643.

The provision of a state statute that a lien given thereby shall not be enforced within 60 days is inapplicable to a suit in admiralty to enforce such lien.—The Richard Busteed, Case No. 11,764.

The admiralty court is not bound by the priority given the lien by the local law.—Schuchardt v. The Angelique, Case No. 12,483b.

The person in rightful possession running a vessel, though lessee, mortgagee, or parol vendee, and not the registered owner, will be considered the owner for the purposes of enforcing a lien under the state laws.—Weaver v. The S. G. Owens, Case No. 17,310.

The Wisconsin statute providing that every vessel used in navigating the waters of the state shall be liable for all debts contracted by the master, etc., and authorizing suit against the vessel by name, and the sale of the vessel or part thereof, as on execution, but not so as to vest in the purchaser an unincumbered title, creates no lien which can be enforced in admiralty against a domestic vessel by a proceeding in rem brought by a domestic creditor.—The Celestine, Case No. 2,541.

§ 57. Time of taking proceedings for enforcement.

Where a term of credit is given, the lien cannot be enforced until after its expiration.—The John Walls, Jr., Case No. 7,432.

A lienholder who receives a note for his claim cannot institute proceedings against a vessel until the maturity of the note, but may intervene before such maturity in proceedings instituted by others.—Srodes v. The Collier, Cases Nos. 13,272, 13,272a.

The lien for work or materials in the construction of a vessel may be enforced before it is finished or sold.—Davis v. New Brig, Case No. 3,643.

A lien given under the general maritime law for labor and materials in the building of a vessel may be enforced by process in rem, even before the vessel is launched.—Parmlee v. The Charles Mears, Case No. 10,766.

The New York statute of limitations in respect to enforcing liens on vessels does not apply to liens arising from torts.—Laing v. The G. L. Buckman, Case No. 7,988.

Limitation of suits in admiralty, see "Admiralty," § 44.

§ 58. Parties and intervention.

All the privileged creditors may unite in one libel, or, if the libel is filed by one, the others may be made parties by petition.—The Hull of a New Ship, Case No. 6,859.

The assignment of a claim for towage does not transfer the legal title, and the original

owner can sustain a libel in his own name.—The Emma L. Coyne, Case No. 4,466.

The right to sue in admiralty to enforce a claim for supplies and repairs to a vessel is personal, and cannot be maintained for the benefit of an assignee of a duebill or promissory note given to secure the claim.—Reppert v. Robinson, Case No. 11,703.

The lien of a material man is assignable, and, where the assignment is absolute, the assignee should proceed in admiralty in his own name.—The Sarah J. Weed, Case No. 12,350.

A sheriff who permits an attached vessel to be seized by admiralty process, without opposition, may intervene in the admiralty suit, and claim the proceeds in the registry.—Eneas v. The Charlotte Minerva, Case No. 4,483.

A mortgagee in possession may intervene to contest the validity of a lien.—Elmore v. The Alida, Case No. 4,419.

See, also, "Admiralty," § 53.

§ 59. Libel.

A libel by employés of a contractor, which fails to allege that the contractor had authority to make the repairs or to employ libelants, is insufficient.—The Augusta, Case No. 647.

A libel for supplies furnished to a foreign vessel must allege that the owner had no funds or credit with which to procure the supplies.—Brown v. The Albany, Case No. 1,987.

A libel to enforce an alleged lien for necessary materials and supplies furnished to the master in a foreign port, where no funds of the owner were available, need not specify the particulars and amounts which make up the claim, and the evidence by which they are to be proved.—Whitlock v. The Thales, Case No. 17,578.

A libel to enforce a lien upon a vessel or its proceeds for premiums due upon marine policies should aver their amounts and dates, the names of the insured, and the extent and character of their interests, and that the policies covered the vessel during the season of navigation.—The Dolphin, Cases Nos. 3,973, 3,974.

The libel to enforce a lien for materials used in the construction of a vessel filed before the vessel is launched must show the vessel to be of a size and build fitted for maritime employment, and intended for navigation upon the lakes or high seas.—Parmlee v. The Charles Mears, Case No. 10,766.

A libel to enforce a lien on a vessel must distinctly state the facts or law under which it arises or is claimed.—Parmlee v. The Charles Mears, Case No. 10,766.

The libel must show that the lien was filed within the time required by the law giving it.—The Antelope, Case No. 482.

§ 60. Answer.

The objection that the vessel for which supplies or repairs are furnished is not one fitted for navigation on the high seas must be taken by answer.—Reppert v. Robinson, Case No. 11,703.

The defense of stale claim in admiralty must be supported by a statement of facts showing that it is inequitable to enforce the claim.—Jay v. Allen, Case No. 7,235.

Whether supplies furnished to a vessel are necessary is a conclusion of law, and the claimant, in answer to a libel by a material man, is not required to either admit or deny that the articles furnished were necessaries.—The Gustavia, Case No. 5,876.

§ 61. Evidence.

A vessel coming from sea into an American port, and receiving repairs there, will be presumed to be liable under the general maritime law, until the contrary is shown.—Cohan v. The Rolling Wave, Case No. 2,959a.

The burden is on the claimant to prove that time drafts given for the amount of supplies were agreed to be received in payment.—The James Guy, Case No. 7,195.

Testimony of person making advances to relieve vessel in straitened circumstances, as to his intent, is admissible.—The Acme, Case No. 28.

§ 62. Distribution of proceeds—In general.

See, also, "Admiralty," § 111.

A surplus fund in a court of admiralty arising from the sale of a vessel is subject to the same trusts and liens as the vessel itself was subject to.—Gardner v. The New Jersey, Case No. 5,233; Remnants in Court, Id. 11,697; The Syracuse, Id. 13,716.

The district courts in admiralty exercise equity powers in the distribution of a surplus arising under a sale, whether the parties have maritime liens or not.—The Skylark, Case No. 12,928.

A proceeding by petition against the proceeds of property charged with a maritime lien is a proper method of invoking the admiralty jurisdiction.—Justi Pon v. The Arbustci, Case No. 7,589.

To impound a fund in admiralty until a decision can be had upon the validity of a contested claim, the creditor must have sued out attachment or pleaded his lien to an antecedent action.—French v. The Superb, Case No. 5,103a.

Surplus moneys in the registry will not be distributed until conflicting claims thereto are properly adjudicated.—The Fanny, Case No. 4,637.

Until all libels and petitions have been heard, the proceeds are not distributed except to those who have an undoubted priority, such as seamen and salvors; and this not without notice to all others.—The Fanny, Case No. 4,638.

The surplus in the registry after payment of the allowed claim will be applied pro rata to the payment of other claimants.—Logan v. The Æolian, Case No. 8,465.

Where the proceeds are not sufficient to satisfy either of two mortgagees, a material man whose lien is subsequent only to that of the junior mortgagee cannot object to the application of the proceeds as between the mortgagees.—The John T. Moore, Case No. 7,430.

Long delay in enforcing a maritime lien does not affect libelant's right to interest from the time the debt fell due.—Enslow v. The Sarah and Abigail, Case No. 4,495.

The right to proceed against the surplus proceeds of a vessel in court holds good where a party has a right to proceed in admiralty in personam, though not in rem.—The Stephen Allen, Case No. 13,361.

§ 63. —— Priority in distribution.

The time of bringing suit determines the priority of payment of claims which are of like character, without extrinsic priority.—The Adele, Case No. 78; French v. The Superb, Id. 5,103a; The Globe, Id. 5,483; The Pathfinder, Id. 10,797; Schuchardt v. The Angeleque, Id. 12,483a; Same v. The Angelique, Id. 12,483b, 12,483c; The Triumph, Id. 14,182; The America, Id. 288.

The decrees will be paid, with costs, under the rule of priority.—The Adele, Case No. 78.

The one who obtains the first decree has no priority over others whose liens are of equal degree.—The Fanny, Case No. 4,638.

Liens under the New York statute for supplies *held* should be paid in the order of the filing of the libels, and not in the order of filing specifications.—The Minnie R. Childs, Case No. 9,640.

A party who might have perfected his lien under a state law, had not the issue come into the

admiralty court, is entitled to priority in distributing the proceeds.—The Lady Franklin, Case No. 7,983.

Where the fund is still in court, the decree may be opened under circumstances which would excuse a default.—The America, Case No. 288.

Where there are several privileged debts against a vessel, those which are in the same rank of privilege are to be paid concurrently. But debts occupying a higher rank of privilege are fully paid before any allowance is made to those holding a lower rank of privilege.—The Paragon, Case No. 10,708.

Liens of the same rank will be paid out of proceeds in inverse order of dates of creation.—The America, Case No. 288.

In disposing of the proceeds of the sale of the parts of a wrecked vessel saved by the owners, the court will order payment,—First, to the seamen; and, second, to material men.—Bruce v. The America, Case No. 2,046.

Maritime liens are payable out of the proceeds, when the same are insufficient, in the following order: (1) Salvage; (2) general average; (3) seamen's wages; (4) bottomry bonds in inverse order of date; (5) supplies, repairs, materials, towage, pilotage; (6) wharfage, demurrage, contract of affreightment or passage, stevedore's services; (7) damage by collision; (8) unpaid premiums on insurance; (9) claims under Nos. 5 and 6 accruing after collision; (10) brokerage services (nonmaritime liens); (11) mortgage; (12) levy by execution against owner.—Provost v. The Selkirk, Case No. 11,455.

Claims for towage and necessaries are entitled to rank those for breaches of contract of affreightment.—The Unadilla, Case No. 14,333.

In the disposition of the proceeds of a vessel, different claims are marshaled as follows: (1) Seamen, suing for wages; (2) material men; (3) a consignee, for money advanced for towage, pilotage, light money, and port duties,—each claim carrying with it its own costs.—The Rodney, Case No. 11,993.

Liens on proceeds are paid in the following order: (1) For seamen's wages; (2) for materials arising by the general maritime law; (3) by virtue of a seizure under a state law, without reference to priority of seizure.—Dudley v. The Superior, Case No. 4,115.

The proceeds of a vessel sold on a libel for wages distributed in the following order: Wages and costs; recorded mortgage; clerk's, marshal's, and proctor's fees; supplies at the home port.—The Kate Hinchman, Case No. 7,620.

Where a vessel was libeled in the home port while in possession of shipwrights, *held*, that they must be first paid; then a prior mortgagee; and, afterwards, one who made repairs, but was never in possession, ratably with furnishers of supplies.—Marsh v. The Minnie, Case No. 9,117.

Two persons claiming by hypothecations made by the master to secure loans for necessary repairs and supplies are entitled to be paid out of the proceeds in court before a prior mortgagee, and, as between the two hypothecations, the later one is entitled to priority.—Furniss v. The Magoun, Case No. 5,163.

§ 64. —— Who entitled to share.

The proceeds of a sale may be appropriated in payment of liens on the original property other than that under which it was sold, but not of debts arising on personal contracts.—Brackett v. The Hercules, Case No. 1,762.

The right to proceed against surplus proceeds holds good where a party has a right to proceed in admiralty in personam, though not in rem.—The Stephen Allen, Case No. 13,361.

A person who declined to appear as claimant in suits to enforce maritime liens has no standing in court to claim a distribution of the proceeds of sale on a decree therein.—Schuchardt v. The Angelique, Case No. 12,483d.

Intervening mortgagees are entitled to the surplus proceeds of the sale of a vessel after the payment of prior claims.—United Hydraulic Cotton-Press Co. v. The Alexander McNeil, Case No. 14,404.

In marshaling the proceeds of a vessel for distribution, a mortgage debt will be entitled, after satisfaction of privileged and lien debts, to payment, as against the owner.—Remnants in Court, Case No. 11,697.

Where a mortgage lien appears, though informal on its face, the court, in distributing proceeds of sale of a vessel, will equitably allow payment as between the owner and the mortgagee.—Town v. The American Banner, Case No. 14,112a.

The proceeds of the sale of a vessel may be applied in extinguishment of a mortgage thereon, though it cannot be foreclosed in equity.—Bartlette v. The Viola, Case No. 1,083.

The holder of a mortgage on a vessel to secure a debt for advances made for her last voyage may interpose a claim on the balance of the proceeds in the custody of the court, on a sale to enforce preferred liens subsequently accrued, irrespective of his right to sustain a libel to enforce it against the ship originally.—Leland v. Medora, Case No. 8,237.

The fact that the purchaser of a vessel in a proceeding in rem is also the owner of a mortgage thereon does not extinguish the mortgage, but the same becomes a charge upon the proceeds of the vessel, and the purchaser thereof may, upon petition, obtain payment of the amount due upon the mortgage out of such proceeds, all other claims against the vessel having been satisfied.—The Syracuse, Case No. 13,716.

A person having an agreement for a mortgage upon a vessel has no such interest as will entitle him to claim the proceeds of her sale in the registry of the court.—The Favorite, Case No. 4,699.

The court has no power to order paid out of surplus proceeds in the registry a demand which could not be enforced in admiralty by a suit either in rem or in personam.—The Fanny, Case No. 4,637.

Persons may be paid out of the surplus on petition, though they could not sustain an original action in rem.—The Boston, Case No. 1,669.

A party having a prior right to a vessel may claim distribution from surplus proceeds in admiralty, although his original demand was not one enforceable in admiralty.—Harper v. New Brig, Case No. 6,090.

Uncontroverted claims which are within the jurisdiction of the court, although clothed with no privilege, and not reduced to judgment, may be satisfied out of surplus proceeds in the registry.—The Fanny, Case No. 4,637.

Claims arising on the last voyage and those for watching the vessel in port up to the time of her seizure by the marshal were allowed out of the surplus proceeds in the registry, as against the assignee in bankruptcy.—The Trimountain, Case No. 14,175.

Where a vessel, bona fide assigned by the owner, is subsequently sold under a maritime lien, the assignee is entitled to a distribution of the surplus, in preference to a creditor having no such appropriation.—Harper v. New Brig, Case No. 6,090.

A material man whose lien is discharged by the giving of credit is still entitled, upon petition, to be paid out of remnants and surplus remaining in the registry.—Zane v. The President, Case No. 18,201.

As between a lien claimant and the owner, though the lien has been lost by lapse of time, if originally founded upon a maritime claim, the court will order it to be paid out of the proceeds in the registry.—Town v. The American Banner, Case No. 14,112a; The Stephen Allen, Id. 13,361.

A lien which could be enforced against a vessel by the state law follows the proceeds of a sale made to satisfy a maritime lien.—The Lady Franklin, Case No. 7,983.

In the distribution of proceeds after the sale of a vessel in admiralty, parties having liens under state laws are entitled to payment in preference to the owner.—The Grace Greenwood, Case No. 5,652.

Though a lien given by a state law against a vessel for repairs and supplies in the home port cannot be enforced in admiralty, the admiralty court may, where the same is valid, pay it out of the fund in the registry.—The Island City, Case No. 7,109; Francis v. The Harrison, Id. 5,038.

A state statute, giving a preferential lien for materials or supplies furnished in the construction or repair of a vessel, *held* valid and operative as to surplus proceeds in the registry after satisfaction of maritime liens.—Francis v. The Harrison, Case No. 5,038.

The successive decisions of the supreme court abrogating the practice of enforcing such liens by proceedings in rem, reviewed and explained.—Francis v. The Harrison, Case No. 5,038.

The mortgagee of a vessel is entitled to payment of his mortgage out of the fund in the registry in a court of admiralty after the payment of prior liens.—The Island City, Case No. 7,109.

Act Ohio Feb. 26, 1840, confers no lien in favor of the persons therein mentioned, and such persons are not entitled to payment out of the surplus proceeds in the registry of the admiralty court.—The Velocity, Case No. 16,911.

The rights of a creditor having a lien against a vessel under Rev. St. Me. c. 125, § 35, are paramount to the rights of the general creditors under the laws of the state regulating the distribution of estates of deceased insolvent debtors.—The Young Mechanic, Case No. 18,181.

A loan to the master to enable him to discharge a lien for seaman's wages and relieve the boat from arrest may be satisfied out of the surplus in the registry.—The Fanny, Case No. 4,637.

But not so with moneys advanced to purchase fuel to enable the vessel to continue her trip, or to pay expenses of bonding her.—The Fanny, Case No. 4,637.

The surplus proceeds are subject, as against the owner, to the master's claim for wages and disbursements on account of the vessel up to the time of her seizure, but not after such time.—The Santa Anna, Case No. 12,325; The Monongahela, Id. 9,712; Gardner v. The New Jersey, Id. 5,233.

A court of admiralty will not favor an indirect lien upon the fund in hand by those claimants who cannot sue originally in such court, especially where there are adverse interests.—Gardner v. The New Jersey, Case No. 5,233.

Factors entitled to a certain sum as commissions are not entitled to the proceeds of sale of a cargo as against bona fide possessors thereof, but the court will decide upon the equities of all concerned, and decree the amount of the lien to the factors, and the residue to the other claimants.—The Packet, Case No. 10,655.

A sheriff who, after attaching a vessel in a suit by a creditor against her owner, permits, without opposition, her seizure by the marshal under admiralty process, is a competent party to intervene in the admiralty suit, and claim the proceeds in the registry.—Eneas v. The Charlotte Minerva. Case No. 4,483.

In an admiralty seizure cause, a proportion of the proceeds cannot be awarded to informers unless by special statutory authority.—The Langdon Cheeves and The Caledonian, Case No. 8,064.

§ 65. Subrogation.

As to the right of subrogation in admiralty in the case of the payment of the claims of seamen and others.—The Tangier, Case No. 13,744.

The hypothecary creditor is not subrogated to the privilege of material men and laborers merely by paying their claims on orders drawn by the builder.—The Hull of a New Ship, Case No. 6,859.

Advances made by a mortgagee to subsisting lien holders at the time of taking possession under the mortgage should be paid in the order in which the liens themselves would have been paid.—The St. Joseph, Case No. 12,229.

The general agent of a ship at her home port is not entitled to be subrogated to the lien of seamen whose wages he has paid in the regular course of his agency.—The Sarah J. Weed, Case No. 12,350.

The person who, at the request of the owner of a vessel seized in a foreign port for supplies furnished, signs a stipulation for its release, and subsequently pays the amount decreed against the vessel, is not subrogated to the lien discharged thereby.—The Robertson, Case No. 11,923.

The principle that where one creditor has two funds to resort to, while another has security on only one of such funds, the former will be compelled to resort to the other fund, will not be applied in admiralty at the instance of a mere mortgagee.—The Sailor Prince, Case No. 12,219.

MARITIME TORTS.

See "Torts."

Jurisdiction of admiralty, see "Admiralty," §§ 30-33.

MARRIAGE.

§ 1, What law governs. § 2, Who may marry. § 3, What constitutes. § 4, Solemnization. § 5, Proof.

See, also, "Bigamy"; "Breach of Marriage Promise"; "Divorce"; "Husband and Wife."

Consideration for conveyance, see "Fraudulent Conveyances," § 10.

§ 1. What law governs.

As a general rule, the capacity or incapacity to marry depends on the law of the place where the marriage is contracted, and not on the place of the domicile of the parties.—Ponsford v. Johnson, Case No. 11,266.

§ 2. Who may marry.

A state marriage law prohibiting marriage between negroes and white persons is not annulled or affected by the civil-rights bill or the fourteenth amendment.—In re Hobbs, Case No. 6,550.

Rev. St. § 1977, giving to all persons the same right of making and enforcing contracts as is enjoyed by white persons, does not extend to a marriage contract which is void by the law of the state where the parties reside; and this whether the marriage was solemnized in that state, or in another state where the marriage was lawful, and to which the parties resorted, to evade the law of their own state.—Ex parte Kinney, Case No. 7,825.

§ 3. What constitutes.

Oregon and California laws as to the requisites of a valid marriage.—Holmes v. Holmes, Case No. 6,638.

Marriage, in Missouri, may be had by the mutual, present consent of two competent persons, made in good faith, and followed by cohabitation.—Holabird v. Atlantic Mut. Life Ins. Co., Case No. 6,587.

A contract of marriage, made between citizens of the state, not in accordance with its laws, who purposely go beyond its jurisdiction, and not within that of another state,—as at sea,—is void.—Holmes v. Holmes, Case No. 6,638.

Living together as man and wife, in exclusive cohabitation, long continued, although evidence of a previous marriage, cannot make the parties man and wife.—Holmes v. Holmes, Case No. 6,638.

§ 4. Solemnization.

In Michigan, it is essential that a marriage shall be solemnized in the presence of a minister or magistrate, and two witnesses.—Meister v. Bissell, Case No. 9,398.

Requisites of an indictment against a minister for solemnizing a marriage between persons under age without the consent of their parents or guardians, contrary to Act Md. 1777, c. 12, § 9.—United States v. McCormick, Case No. 15,663.

The addition of "clerk" to the name of defendant is not a sufficient averment that he was a minister authorized to solemnize marriage rite.—United States v. McCormick, Case No. 15,663.

§ 5. Proof.

The admissions and acknowledgments of the parties to an alleged marriage *held* not sufficient to establish the same when only made in the presence of each other, and not in the presence of a third person.—Van Ness v. Van Ness, Case No. 16,869.

Marriage may be proven by general reputation, cohabitation, and the express recognition of the wife in the will of the husband.—Hinde v. Vattier, Case No. 6,512.

MARRIAGE SETTLEMENT.

See "Husband and Wife," § 2.

MARRIED WOMEN.

See "Husband and Wife."

MARSHALING ASSETS AND SECURITIES.

§ 1, Application of doctrine in general. § 2, Application to judgment creditors. § 3, Payment of bills and notes.

In bankruptcy, see "Bankruptcy," § 279.

§ 1. Application of doctrine in general.

When a common fund is equally liable as a security for various claims, it can only be administered for the benefit of all, and this whether the claims have matured or not.—Duncan v. Mobile & O. R. Co., Case No. 4,138.

As between creditors having a common lien on property, equity will require the one having also a separate lien on other property to enforce it first.—McLean v. Lafayette Bank, Case No. 8,888; Russell v. Howard, Id. 12,156; Findlay's Ex'rs v. Bank of United States, Id. 4,791; In re Foot, Id. 4,906.

The rule that a party having a double fund to resort to will be required, as against other creditors, to first resort to that one on which he alone has a lien, will not be applied where it would operate to his prejudice.—United States v. Duncan, Case No. 15,003.

Where a creditor with a right to two funds obtains satisfaction from both of them, equity will give a creditor who has a lien on one of such funds a lien on the fund not exhausted.—Findlay's Ex'rs v. Bank of United States, Case No. 4,791; In re Foot, Id. 4,906.

The opposition of one creditor to the claim of another on the administration of a common fund in equity inures to the benefit of all.—Duncan v. Mobile & O. R. Co., Case No. 4,138.

The express waiver of all objections by other creditors only affects the proportion of the fund to which they would be entitled on exclusion of the disputed claim.—Duncan v. Mobile & O. R. Co., Case No. 4,138.

The election of a creditor to retain or recover a debt from one of two parties, or out of one of two funds, cannot vary in a court of equity their rights inter sese.—Wiggin v. Dorr, Case No. 17,625.

The rule that payment is to be applied to the oldest debt if the debtor gives no directions is applicable to the liability of sureties on successive bonds.—Boody v. United States, Case No. 1,636.

§ 2. Application to judgment creditors.

The rule as to marshaling assets, and its application to judgment creditors.—Alston v. Munford, Case No. 267.

Purchaser of lands subject to judgment lien cannot require officer to marshal debtor's lands in order of attaching of the lien.—Barth v. Makeever, Case No. 1,069.

§ 3. Payment of bills and notes.

Where an assignee of certain drafts, in trust for the payment of debts incurred thereon, recovers on some, and not on others, the amount recovered should be applied pro rata to the several drafts.—Farmers' & Mechanics' Bank v. Stickney, Case No. 4,657.

MARSHALS.

Of United States, see "United States Marshals."

MARTIAL LAW.

See "War," §§ 5, 83.
Conflicts between military and civil authorities, see "Habeas Corpus," § 13.

MASTER AND SERVANT.

§ 1, The relation. § 2, Compensation and lien. § 3, Master's liability for injuries to servant—In general. § 4, —— Tools, machinery, and appliances. § 5, —— Fellow servants. § 6, —— Risk assumed by servant. § 7, —— Contributory negligence of servant. § 8, —— Actions. § 9, Liabilities for injuries to third persons. § 10, Interference with relation by third persons.

See, also, "Apprentices"; "Slaves"; "Work and Labor."
Employment of seamen, see "Seamen."
Parol evidence of contract of employment, see "Evidence," § 67.
Priority of claims for wages, see "Bankruptcy," § 433.
Right to inventions, see "Patents," § 61.

§ 1. The relation.

Where a person employed under contract by which the employer was to have the benefit of all inventions made during the term of service continues after the expiration of the term in the contract, without any new agreement, the employer is entitled to the exclusive use of all

inventions made while the person was in his service.—Wilkens v. Spafford, Case No. 17,659.

A locomotive engineer employed by the day to daily make a particular run cannot lawfully quit before the run is finished. — United States v. Stevens, Case No. 16,392.

§ 2. Compensation and lien.

Hauling quartz to a quartz mill is "performing labor for carrying on the mill" within St. Nev. 1869, p. 61.—In re Hope Min. Co., Case No. 6,681.

The lien is acquired by the performance of the work, and not by filing the notice, etc.—In re Hope Min. Co., Case No. 6,681.

§ 3. Master's liability for injuries to servant—In general.

Master liable only in case of negligence or want of due and proper care and prudence.—Adams v. West Roxbury, Case No. 67.

Employés on vessels cannot recover for injuries caused by the mere negligence of the officers or other employés.—Malone v. Western Transp. Co., Case No. 8,996.

§ 4. —— Tools, machinery, and appliances.

The proprietor of dangerous machinery is bound to use reasonable care to keep it in a safe and sound condition.—Jones v. Yeager, Case No. 7,510.

Furnishing unsuitable explosive for blasting is negligence.—Adams v. West Roxbury, Case No. 67.

Master in selecting dangerous instruments, such as explosives, must not sacrifice quality to cheapness.—Adams v. West Roxbury, Case No. 67.

Where the original construction and plan of a railroad structure is not faulty, and it is regularly inspected by competent men, the company is not liable to an employé for an injury received from a defect of which it had no notice. —Gohen v. Texas Pac. Ry. Co., Case No. 5,507.

A railway company managing its trains by telegraph failing to provide a suitable telegraph line, so equipped with telegraph stations and operatives as to properly and safely control the movement of its trains, is liable for injuries sustained thereby to one of its train servants.—Walker v. Grand Trunk Ry. Co., Case No. 17,070.

Railroad company *held* not liable for an injury to a brakeman standing on a freight car, caused by a wire stretched across a public street by a telephone company, of which it had no knowledge.—Dalton v. Receivers, Case No. 3,550.

§ 5. —— Fellow servants.

There can be no recovery for an injury arising from incompetency or unskillfulness of a coservant, or from defects of machinery, unless it appear that the master knew of such incompetency, etc., or did not exercise proper care in selection.—Haugh v. Texas & P. R. Co., Case No. 6,221.

The master is liable for injuries to a servant from the negligence of an incompetent fellow servant, in whose employment the master did not use ordinary care.—Miller v. Baltimore & O. R. Co., Case No. 9,560.

A master who exercises due care in selecting his servants is not liable for injuries resulting from the negligence of a fellow servant in the same line of employment.—Kielley v. Belcher Silver Min. Co., Case No. 7,761.

No recovery can be had against the master for an injury caused by the negligence of a fellow servant, unless it appear that he was incompetent, and that the master was guilty of willful negligence in employing him.—Jordan v. Wells, Case No. 7,525.

The doctrine of the nonliability of the employer for an injury by a fellow servant will not relieve an employer who failed to use ordinary care in providing competent servants and safe materials and structures.—Dillon v. Union Pac. R. Co., Case No. 3,916.

The contributory negligence of a fellow servant will not defeat an action for injuries caused by the negligence of the master.—Walker v. Grand Trunk Ry. Co., Case No. 17,070.

The rule exempting the master from liability for injury by fellow servants rests upon the implied condition in the contract of service that the servant takes upon himself all ordinary risks of the service.—Kielley v. Belcher Silver Min. Co., Case No. 7,760.

The rule which exempts the employer from liability for the negligence of a fellow servant is not applicable to the case of a minor servant ordered to a dangerous service wholly outside the contract of employment.—Fort v. Union Pac. R. Co., Case No. 4,952.

Superintendent of city streets employing workmen is a vice principal.—Adams v. West Roxbury, Case No. 67.

The owner of a railroad track is not liable for negligence of the servants of another railroad company while operating a train on such track. —Clymer v. Central R. Co., Case No. 2,912.

Those only are "fellow servants" who serve in such relation to the master and to each other that their means for protecting themselves from the negligence of each other are equal to or greater than those of the master to afford them protection.—Kielley v. Belcher Silver Min. Co., Case No. 7,760.

The fireman is a fellow servants of an engineer of the same engine, and cannot recover for injury caused by the neglect of the latter to discharge his duties.—Jones v. Yeager, Case No. 7,510.

An engineer and brakeman on the same train are fellow servants, and the latter cannot recover from the company for an injury caused by negligence of the former unless he show negligence, or want of reasonable care, in his employment or retention.—Hines v. Union Pac. R. Co., Case No. 6,521.

Master mechanics, foremen of roundhouses, and other persons engaged in the repair of machinery and rolling stock, are fellow servants with engineers, conductors, and other persons engaged in running trains.—Haugh v. Texas & P. R. Co., Case No. 6,221.

An assistant yard master, injured by a defective car, cannot hold the company by showing notice thereof to the car inspector and master mechanic, for they are his fellow servants.—Kidwell v. Houston & G. N. Ry. Co., Case No. 7,757.

Notice to a master mechanic of the habitual negligence and bad habits of a car inspector will not make the company liable to a servant injured by a defective car, unless the master mechanic has power to employ and discharge the car inspector.—Kidwell v. Houston & G. N. Ry. Co., Case No. 7,757.

Servants, some of whom are engaged in breaking down ore in a mine, and others in loading and wheeling it out, are fellow servants in the same line of employment.—Kielley v. Belcher Silver Min. Co., Case No. 7,761.

§ 6. —— Risk assumed by servant.

A locomotive engineer cannot recover for an injury caused by the want of a signal bell in the engine cab, known to him when he entered defendant's employ.—Dillon v. Union Pac. R. Co., Case No. 3,916.

A person employed to assist in unloading a vessel is charged with the usual knowledge of its construction, and the location of the usual

hatches, and cannot recover for injuries caused by falling through an open hatch.—Malone v. Western Transp. Co., Case No. 8,996.

Each employé engaged with others in the service of a common master takes upon himself the liability to injury resulting from the negligence of his coemployés.—Haugh v. Texas & P. R. Co., Case No. 6,221.

§ 7. —— Contributory negligence of servant.

One voluntarily continuing in a dangerous occupation, knowing that insufficient means are provided for avoiding the dangers, cannot recover for injuries resulting therefrom.—Kielley v. Belcher Silver Min. Co., Case No. 7,761.

A servant who voluntarily continues in the employ of the master with knowledge of the incompetency of fellow servants and of defective machinery cannot recover for an injury thereby caused.—Dillon v. Union Pac. R. Co., Case No. 3,916.

Defendant, employing children, is not liable for an injury caused by dangerous machinery where the child left his work, and carelessly exposed himself to danger.—Tilly v. Brown, Case No. 14,053.

The failure of a yard master to report a wire stretched across a public street so as to endanger the lives of brakemen standing upon freight cars will not render the company liable for the death of a brakeman who had knowledge of its existence.—Dalton v. Receivers, Case No. 3,550.

§ 8. —— Actions.

A railroad servant suing for an injury caused by a defective car must aver that it was defective when placed on the road, or, if it afterwards became defective, that notice thereof was brought home to the company.—Kidwell v. Houston & G. N. Ry. Co., Case No. 7,757.

Knowledge by servant of defect in premises whereby he is injured need not be negatived in his complaint.—Knaresborough v. Belcher Silver Min. Co., Case No. 7,874.

Knowledge by master of defect in premises may be proved under the general allegation of negligence.—Knaresborough v. Belcher Silver Min. Co., Case No. 7,874.

§ 9. Liabilities for injuries to third persons.

The act of a servant must be done in the course of his employment to render the master liable therefor.—The R. F. Cahill, Case No. 11,735.

Either partner is liable in tort for damages caused by the negligence of the servants and agents of the partnership while conducting its business.—Bowas v. Pioneer Tow Line, Case No. 1,713.

Railroad company *held* liable for an injury to a vessel colliding with a "sightpile" driven into the bed of a stream by bridge contractors at the request and for the convenience of the company's engineers.—Philadelphia & Havre De Grace Steam Tow-Boat Co. v. Philadelphia, W. & B. R. Co., Case No. 11,085.

Though a contractor be not an unskillful or improper person, if a nuisance necessarily occurs in the performance of the work the employer is liable for all injuries resulting from carelessness or negligence.—Ware v. St. Paul Water Co., Case No. 17,172.

Both the master who commands the doing, and the servant who commits the act of trespass, may be made responsible as principals, and may be sued jointly or severally.—Lightner v. Brooks, Case No. 8,344.

§ 10. Interference with relation by third persons.

In an action of assault and battery for beating plaintiff's servant, plaintiff must give evidence of loss of service.—Voss v. Howard, Case No. 17,013.

An averment of a contract of hiring "for a certain price" is supported by proof of an agreement to serve in consideration of a payment to a third person.—Milburne v. Byrne, Case No. 9,542.

MASTERS.

In chancery, see "Equity," §§ 109–118.
Of vessels, see "Shipping," §§ 74–94, 108–111.

MAXIMS.

Of equity, see "Equity," §§ 15–17.

MAYHEM.

§ 1. Nature and elements of offense.

Biting off an ear is not within Act Va. Dec. 17, 1792, to prevent malicious disfiguring.—United States v. Askins, Case No. 14,471.

The disabling or disfiguring of any limb or member of a person need not be done by cutting, to constitute an offense under Act 1790, § 13.—United States v. Scroggins, Case No. 16,243.

The particular weapon, means, or instrument used is not material, providing the result is maiming or disfiguring with intent to do so.—United States v. Scroggins, Case No. 16,243.

MEASURE OF DAMAGES.

See "Damages," §§ 9–11.

MEASURES.

See "Weights and Measures."

MECHANICS' LIENS.

§ 1, Nature of lien and statutory provisions. § 2, When lien attaches and proceedings to perfect. § 3, Duration of lien. § 4, Work done and articles furnished for which lien attaches. § 5, Priority. § 6, Payment of lien. § 7, Enforcement.

Operation and effect in bankruptcy, see "Bankruptcy," § 258.

§ 1. Nature of lien and statutory provisions.

The lien of a builder under Act Md. 1791, c. 45, § 10, is a remedy in rem only, and not in personam.—Homans v. Coombe, Case No. 6,654.

Construction of lien laws of Nevada of 1861, 1867, and 1871.—Sabin v. Connor, Case No. 12,197.

§ 2. When lien attaches and proceedings to perfect.

The lien attaches from the time the building was commenced.—In re Cook, Case No. 3,151; In re Hoyt, Id. 6,805; Sabin v. Connor, Id. 12,197.

And without reference to the time when the work was actually done or materials furnished.—In re Hoyt, Case No. 6,805.

The lien in Oregon attaches from the time the work is done or the materials are furnished, conditioned upon filing the notice within three months from the completion of the building.—In re Coulter, Case No. 3,276.

A mechanic's lien commences with the recording of the contract for building, and does not overreach prior incumbrances.—Homans v. Coombe, Case No. 6,654.

§ 3. Duration of lien.
Under Act March 2, 1833, the lien is lost in the District of Columbia after two years from the commencement of the building, unless action is commenced or the claim filed within three months after performing work or furnishing materials.—McClellan v. Withers, Case No. 8,696; Waller v. Dyer, Id. 17,108.

§ 4. Work done and articles furnished for which lien attaches.
Under the mechanic's lien law of the District of Columbia, no extra work not completed within three months preceding the filing of the claim in the clerk's office is covered by the lien.—Caldwell v. Winder, Case No. 18,245.

The lien is good only for articles actually used in the building, or sold for such use.—In re Cook, Case No. 3,151.

A mechanic's lien on "factory and other buildings" will not include machinery or fixtures or supports therefor, not necessarily connected with or forming part of building.—Beers v. Knapp, Case No. 1,232.

The Virginia mechanic's lien law does not apply to a ship building in a public ship-builder's yard under a contract by which she becomes the property of the owners from the laying of her keel, where credit is given to the builder.—Stewart v. Gorgoza, Case No. 13,428.

§ 5. Priority.
As between mechanics, there is no priority in liens.—In re Hoyt, Case No. 6,805.

A mortgage recorded before the filing of a mechanic's lien is entitled to priority.—Moran v. Schnugg, Case No. 9,786.

But the lien takes precedence of a mortgage given after the commencement of the work.—In re Hoyt, Case No. 6,805.

And pending foreclosure, the mortgagor cannot create a mechanic's lien which will affect the rights of the mortgagee.—Hards v. Connecticut Mut. Life Ins. Co., Case No. 6,055.

§ 6. Payment of lien.
Promissory notes, transferred or discounted, and taken up on maturity by payee, will not be treated as payment.—Beers v. Knapp, Case No. 1,232.

Under the rule that payments made by a debtor should be applied to the debt least secured, general payments by a debtor, not directed by him to be applied to the contract specifically, may be applied to the extra work, whether completed within the three months or not, provided such extra work was completed and the money due for it.—Caldwell v. Winder, Case No. 18,245.

§ 7. Enforcement.
In an action to enforce a lien which continues only two years, defendant will not be compelled to plead at the return term.—King v. Shaw, Case No. 7,803.

MEMORANDA.

As evidence, see "Evidence," § 55.
Required by statute of frauds, see "Frauds, Statute of," § 4.
Use by witness, see "Witnesses," §§ 61, 62.

MENTAL SUFFERING.

Damages, see "Damages," § 2.

MERCANTILE AGENCIES.

Defamatory communications, see "Libel and Slander," § 9.

§ 1. Liabilities.
An express agreement that a mercantile agency shall not be responsible for any loss to a subscriber by neglect of those collecting information will relieve it from liability even for gross negligence.—Duncan v. Dunn, Case No. 4,134.

MERGER.

Of cause of action in judgment, see "Judgment," §§ 46–48, 65.
Of estate, see "Estates."

MESNE PROCESS.

In ejectment, see "Ejectment," § 21.

MEXICAN GRANTS.

See "Public Lands," §§ 81–103.

MILITARY BOUNTIES.

See "Public Lands," § 35.

MILITARY LAW.

See "War," §§ 5, 83.
Conflicts between civil and military authorities, see "Habeas Corpus," § 13.

MILITIA.

§ 1, Constitutional and statutory provisions. § 2, Who liable to militia duty. § 3, Officers. § 4, Employment in aid of civil authorities. § 5, Fines and collections thereof.

Drafts of Militiamen, see "Army and Navy," § 6.

§ 1. Constitutional and statutory provisions.
Const. art. 8, cl. 15, which confers power upon congress to provide for the calling forth of the militia to execute the law of the United States, and Act Feb. 28, 1795, applies to the states.—United States v. Stewart, Case No. 16,401a.

§ 2. Who liable to militia duty.
A justice of the peace in the District of Columbia is not an officer of the government of the United States, under Act May 8, 1792, and is liable to militia duty.—Wise v. Withers, Case No. 17,913.

Clerks employed in the several departments of government are not liable to militia duty.—Ex parte Smith, Case No. 12,967.

An alien is not liable to militia duty.—Slade v. Minor, Case No. 12,937.

A sailmaker in the government navy yard, appointed by a warrant of the secretary of the navy, is an officer of the United States, and exempt from militia duty.—Sanford v. Boyd, Case No. 12,311.

§ 3. Officers.
The variance is fatal where the paymaster general of state militia is described in a suit on his bond as "principal paymaster" of the state militia.—United States v. Stafford, Case No. 16,372.

§ 4. Employment in aid of civil authorities.
The president has power to call out the military in aid of the civil authorities of the District of Columbia. Const. art. 2, § 2.—United States v. Stewart, Case, No. 16,401a.

§ 5. Fines and collections thereof.
Militia fines and enforcement thereof in the District of Columbia.—Ryan v. Ringgold, Case No. 12,187.

In trespass against the marshal for levying a distress for a militia fine, he need only show in justification that the military court had jurisdiction, and that it was regularly constituted and imposed the fine.—Slade v. Minor, Case No. 12,937.

It seems that a court-martial, organized under state authority, has no power to assess fines against militiamen for failure to obey a requisition to enter the service of the United States.—Meade v. Deputy Marshal, Case No. 9,372.

Judgment upon 10 days' notice cannot be rendered upon the bond given by the collector of militia fines.—Legionary Paymaster v. Spalding, Case No. 8,212.

MINES AND MINERALS.

I. PUBLIC MINERAL LANDS.

§ 1, Reservation and disposal in general. § 2, Location and acquisition of claims in general. § 3, Location of claims on veins or lodes—Construction of particular terms in statutory provisions. § 4, —— Extent and boundaries of claim. § 5, —— Rights to intersecting or uniting veins or lodes. § 6, —— Development and improvement. § 7, —— Relocation. § 8, Location of placer claims. § 9, Patents.

II. TITLE, CONVEYANCES, AND CONTRACTS.

§ 10, Rights and remedies of owners—Injunction. § 11, —— Inspection. § 12, Conveyances in general. § 13, Leases. § 14, Licenses and contracts.

III. OPERATION OF MINES.

§ 15, Rights and liabilities incident to working.

I. PUBLIC MINERAL LANDS.

§ 1. Reservation and disposal in general.

The United States have not conveyed or dedicated the minerals in the public lands to individuals or the public.—United States v. Parrott, Case No. 15,998.

Congress has power to authorize the president to lease lead mines; and, where within the Indiana territory (Act March 3, 1807, § 5), such mines may be leased after the territory is divided and organized into states.—United States v. Gratiot, Case No. 15,249.

A lease for smelting ore is within the law.—United States v. Gratiot, Case No. 15,249.

§ 2. Location and acquisition of claims in general.

There is a presumption of ownership in favor of every locator as to the territory covered by his location.—Leadville Co. v. Fitzgerald, Case No. 8,158.

The locator of a mining claim need not take any steps to purchase the same unless he thinks proper.—Chapman v. Toy Long, Case No. 2,610.

§ 3. Location of claims on veins or lodes—Construction of particular terms in statutory provisions.

A vein, lode, or ledge, in the meaning of the acts of congress, is a mineral body of ore within defined boundaries in the general mass of a mountain.—Stevens v. Williams, Case No. 13,413; Eureka Consol. Min. Co. v. Richmond Min. Co., Id. 4,548.

"Vein" or "lode," in the acts of congress, embraces any description of deposit inclosed in the general mass of the country rock, regardless of technical geological distinctions as to beds, segregated veins, gash veins, true fissure veins, or mere deposits.—Stevens v. Williams, Case No. 13,414.

"Top" and "apex," as used in the act of congress, mean that part of the vein which comes nearest to the surface, and may include a part standing in the solid rock below a body of the superficial mass.—Stevens v. Williams, Cases Nos. 13,413, 13,414.

A vein is "in place," in the meaning of the acts of congress, when inclosed in the general mass of the "country rock," as distinguished from the superficial mass known as "alluvium," "detritus," or "débris."—Stevens v. Williams, Case No. 13,414; Same v. Gill, Id. 13,398; Leadville Co. v. Fitzgerald, Id. 8,158.

Rev. St. § 2320, referring to veins and lodes in "rock in place," does not apply to ore upon the top of a movable rock, covered only by loose material and débris.—Leadville Co. v. Fitzgerald, Case No. 8,158.

§ 4. —— Extent and boundaries of claim.

Under a location of a certain number of feet along the ledge, without any distinct claim of side ground, *held*, that the locator was entitled to hold 100 feet on each side of the ledge, under the mining law.—Mount Diablo Mill & Mining Co. v. Callison, Case No. 9,886.

The locator may follow his vein for the prescribed number of feet on the course of a ledge, and to any depth within that distance. Act 1866.—Eureka Consol. Min. Co. v. Richmond Min. Co., Case No. 4,548.

A vein or lode does not come within Rev. St. § 2320, if it lies horizontally. But, if it departs from a horizontal position at all, the degree of departure is immaterial.—Leadville Co. v. Fitzgerald, Case No. 8,158.

Under Rev. St. § 2320, the vein cannot be followed outside the surface lines unless it can be traced continuously from one claim to the other. If the mineral is not continuous, it must be ascertained whether there are continuous boundaries inclosing the vein.—Leadville Co. v. Fitzgerald, Case No. 8,158.

A broad metalliferous zone having within its limits true fissure veins, plainly bounded, cannot be regarded as a single vein or lode, although such zone may itself have boundaries which can be traced.—Mount Diablo Mill & Mining Co. v. Callison, Case No. 9,886.

Under the act of congress a location may include 1,500 feet along the linear course of the lode and 150 feet on either side of it.—Stevens v. Williams, Case No. 13,414.

If a locator fails to locate his claim parallel with the apex, so that the latter passes out through a side line, he can take nothing except what lies within his boundaries.—Stevens v. Williams, Case No. 13,414.

The owner of a claim may follow the dip beyond his vertical side lines at any point where the apex is within his boundaries, though his location is not for its entire length along the apex. He may follow the vein in its departure in any degree from the perpendicular until it reaches the horizontal.—Stevens v. Williams, Case No. 13,413.

The right to follow the dip beyond the vertical side lines includes all veins which do not lie in a practically horizontal position.—Stevens v. Williams, Case No. 13,414.

Act May 10, 1872, § 3, confirms prior locations under the act of 1866, as to all lodes which have their apexes within the surface lines of the mining claims.—Mount Diablo Mill & Mining Co. v. Callison, Case No. 9,886.

§ 5. —— Rights to intersecting or uniting veins or lodes.

The party having priority of title cannot take all the ore of the cross vein found within his lines, but is limited to that contained in the space of intersection. Rev. St. § 2336.—

Hall v. Equator Mining & Smelting Co., Case No. 5,931.

Where the mass overlaying the ore is mere drift, or a loose deposit, the ore is not "in place," within the meaning of Rev. St. § 2320, so as to give the owners of a claim the right to follow the dip within the lines of an adjoining claim.—Tabor v. Dexler, Case No. 13,723.

In the case of lode claims, a dividing line between them, fixed by agreement, upon the surface at a given point, or for a given distance, must be extended along the dip of the lode, so far as that goes, and must necessarily divide all that the location on the surface carries, or it will not constitute a boundary between the claims.—Eureka Consol. Min. Co. v. Richmond Min. Co., Case No. 4,548.

Where the "contact" of a lode existing in one claim comes to the surface in an adjoining claim, the question whether the apex is in the latter is to be determined by finding whether there is something of value there; not for purposes of treatment, but something more than a mere trace, something positively verifiable as existing in the ore. In the case of silver, the value must be reckoned by ounces, one or more to the ton of ore.—Stevens v. Gill, Case No. 13,398.

Whether or not "the contact" is to be regarded as a lode or vein is to be determined by its value, whatever may be the rule in regard to true fissures.—Stevens v. Gill, Case No. 13,398.

If, in following the vein, the contact should be found barren of ore for a considerable distance because the two kinds of rock come together, then the deposit ceases to be a vein, and cannot be followed until another body of ore some distance beyond is reached.—Stevens v. Williams, Case No. 13,414.

§ 6. —— Development and improvement.

Work done anywhere within the surface lines on the surface, or below the surface, on any lode within the lines extended vertically, is work on the claim, within Rev. St. § 2324.—Mount Diablo Mill & Mining Co. v. Callison, Case No. 9,886.

Work done outside of a claim, for the purpose of prospecting or developing it, is equally available as work done within the boundaries.—Mount Diablo Mill & Mining Co. v. Callison, Case No. 9,886.

The owner of contiguous claims may form one general system, adapted and intended to work them all, and work in furtherance of the system is work on all the claims intended to be developed by it.—Mount Diablo Mill & Mining Co. v. Callison, Case No. 9,886.

As to the work required of claimants of mines located before the passage of the act of 1872.—Little Gunnell Co. v. Kimber, Case No. 8,402.

Work done by strangers will not inure to the benefit of the claimant of a mine located before the passage of the act of 1872, where purchased after commencing suit to recover the claim.—Little Gunnell Co. v. Kimber, Case No. 8,402.

§ 7. —— Relocation.

It is not sufficient for a relocator under Act Colo. 1874, § 16, to run a tunnel into the claim from an old shaft upon an adjoining claim.—Little Gunnell Co. v. Kimber, Case No. 8,402.

§ 8. Location of placer claims.

Under the act of 1870 a placer claim was limited to 160 acres, and under the act of 1872 to 20 acres.—St. Louis Smelting & Refining Co. v. Kemp, Case No. 12,239a.

Placer claims may be located and occupied jointly.—Chapman v. Toy Long, Case No. 2,610.

§ 9. Patents.

Under the act of 1866, the right to purchase a mining claim to a silver or gold bearing lode is in the nature of a pre-emption right, and was granted to the one who, under the local laws and regulations, was recognized as entitled to the possession.—Four Hundred and Twenty Min. Co. v. Bullion Min. Co., Case No. 4,989.

In the case of parties owning veins which unite in their downward course the oldest patent will take the vein below the point of union, including the space of intersection. Rev. St. § 2336.—Hall v. Equator Mining & Smelting Co., Case No. 5,931.

A patentee, under the acts of 1866 and 1872, cannot follow the vein outside of the end lines of the claim vertically drawn down through the lode, but he may follow the vein with its dips, angles, and variations to any depth beyond the side lines.—Eureka Consol. Min. Co. v. Richmond Min. Co., Case No. 4,548.

In the case of adjacent locations owned by one claimant, separate applications, separate statutory steps, and separate patents were required for each.—St. Louis Smelting & Refining Co. v. Kemp, Case No. 12,239a; Same v. Ray, Id. 12,239b.

The state statute of limitations relating to mining claims constitutes a part of the local laws by which the rights of parties are to be determined.—Four Hundred and Twenty Min. Co. v. Bullion Min. Co., Case No. 4,989.

The silence of the first locator when a subsequent locator applies for a patent is a waiver of his priority.—Eureka Consol. Min. Co. v. Richmond Min. Co., Case No. 4,548.

Claimants of an unpatented location are precluded from objecting to the issue of a patent to another, where they fail to present their objections after the prescribed notice has been given.—Eureka Consol. Min. Co. v. Richmond Min. Co., Case No. 4,548.

The doctrine of "relation" cannot be applied so as to cut off the rights of the earlier patentee under a later location.—Eureka Consol. Min. Co. v. Richmond Min. Co., Case No. 4,548.

In the case of interfering locations, for which patents have lawfully issued upon due notice to adverse parties, priority of right is determined by priority of patent, and not by priority of location.—Hall v. Equator Mining & Smelting Co., Case No. 5,931.

If, under any circumstances, a patent issued after the passage of the act of 1872 may be valid without the parallelism of lines required by that act, the law will presume that such circumstances existed, as public officers are presumed to do their duty.—Eureka Consol. Min. Co. v. Richmond Min. Co., Case No. 4,548.

The provision of the act of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction.—Eureka Consol. Min. Co. v. Richmond Min. Co., Case No. 4,548.

II. TITLE, CONVEYANCES, AND CONTRACTS.

§ 10. Rights and remedies of owners—Injunction.

A preliminary injunction preserving mining property in statu quo will not be dissolved where there is a strong controversy, in which the right of neither party clearly appears.—Hall v. Equator Mining & Smelting Co., Case No. 5,931.

§ 11. —— Inspection.
A court of equity has the power in a mining case to compel an inspection and survey of the claims and works of the parties.—Thornburgh v. Savage Min. Co., Case No. 13,986.

§ 12. Conveyances in general.
The Utah statute of conveyances of January 18, 1855, did not apply to mining claims.—Kinney v. Consolidated Virginia Min. Co., Case No. 7,827.

In early days in Nevada, actual transfer of possession of a claim, with intent to pass title, followed by actual possession of the transferee, acquiesced in by the transferror, conferred a valid title.—Kinney v. Consolidated Virginia Min. Co., Case No. 7,827.

Possession, work, and general recognition by miners of the vicinity of the validity of the claim gives good title, even if the original location was not in strict accordance with the mining rules; especially so as between co-claimants and their grantees.—Kinney v. Consolidated Virginia Min. Co., Case No. 7,827.

§ 13. Leases.
A lease of land for the sole purpose of mining, subject to the owner's use of the same for tillage, gives an exclusive right of mining.—Barker v. Dale, Case No. 988.

A complete executed lease of mineral rights for 99 years, renewable for a like term, *held* valid and binding on both parties though signed only by the lessor.—Price v. Nicholas, Case No. 11,415.

Under a lease of mineral rights, not specifying any time for developing them, *held*, that the lessee must act within a reasonable time.—Price v. Nicholas, Case No. 11,415.

In the case of inaccessible mountain lands, where a railroad was projected after 25 years, *held*, that the lessee should be allowed two more years to develop the land.—Price v. Nicholas, Case No. 11,415.

Ejectment by lessee, see "Ejectment," § 3.

§ 14. Licenses and contracts.
A grant of a right to dig, take, and carry away all iron ore to be found within a tract of land, on paying so much a ton, *held* a mere license, under which no property in the ore accrues until the privilege is exercised.—Grubb v. Bayard, Case No. 5,849.

The right is without stint, but is not exclusive of the owner of the soil.—Grubb v. Bayard, Case No. 5,849.

Such license is indivisible, and an assignee in part cannot support a suit against the owner of the soil.—Grubb v. Bayard, Case No. 5,849.

A state grant of a right to mine phosphate rock for a certain royalty *held* not exclusive. Act S. C. March 1, 1870.—Bradley v. South Carolina Phosphate & Phosphatic River Min. Co., Case No. 1,787.

III. OPERATION OF MINES.

§ 15. Rights and liabilities incident to working.
The owner of a mine is liable for injury caused to an adjoining mine by overflow of the usual drainage, and of the occasional and periodical heavy flow of water, and that caused by unskillful mining.—Prevost v. Gorrell, Case No. 11,404.

The lessee of a subjacent mine cannot complain of the mere natural flow from an upper mine through an opening wrongfully made by a previous lessee of the lower mine, but he may complain of any other discharge of water through such opening.—Prevost v. Gorrell, Case No. 11,404.

The damage recoverable for wrongfully flooding a lower mine is the loss of legitimate earnings, which plaintiff must clearly prove.—Prevost v. Gorrell, Case No. 11,404.

In trespass for digging and carrying away lead ore from lands of the United States, plaintiffs are not entitled to recover, as damages, the value of the ore after it is dug. The injury to the soil is the gist of the action, and the ore must be considered in aggravation of the damages.—United States v. Magoon, Case No. 15,707.

MINORS.

See "Infants."

MISNOMER.

See "Names." § 1.

MISREPRESENTATION.

See "False Pretenses"; "Fraud."
As ground of rescission of contract, see "Sales," §§ 14, 15; "Vendor and Purchaser," §§ 5, 7.
By insured, see "Insurance," §§ 44–65.

MISTAKE.

Affecting rights in public lands, see "Public Lands," § 56.
As a defense, see "Specific Performance," § 7.
As ground of amendment, see "Process," § 8.
—— of bill of review, see "Equity," § 128.
—— of cancellation of written instrument, see "Cancellation of Instruments," § 1.
—— of jurisdiction in equity, see "Equity," § 1.
—— of new trial, see "New Trial," § 11.
—— of opening or vacating judgment, see "Judgment," § 36.
—— of reformation of instruments, see "Insurance," § 19; "Reformation of Instruments," §§ 1, 3, 4.
—— of rehearing in equity, see "Equity," § 106.
—— of relief against judgment, see "Judgment," § 41.
—— of rescission of contract, see "Vendor and Purchaser," § 6.
In making payment, see "Payment," § 26.
In statutes, see "Statutes," § 5.

MITIGATION.

Of damages, see "Libel and Slander," § 13.

MODIFICATION.

Of contract, see "Contracts," § 26; "Sales," § 11.
Of decree in equity, see "Equity," § 123.
Of injunction, see "Patents," § 249.
Of judgment or order on appeal, see "Appeal and Error," § 38.

MONEY.

See "Counterfeiting."
Circulating notes, see "United States," §§ 22, 23.
Medium of payment, see "Payment," §§ 2–4.
Subject to levy on execution, see "Execution," § 1.

MONEY PAID.

See "Assumpsit, Action of."

MONEY RECEIVED.

§ 1, When the action lies. § 2, Evidence.

§ 1. When the action lies.

An action for money had and received will lie for money paid by plaintiff to defendant upon a contract which defendant has failed to execute on his part.—Richardson v. Peyton, Case No. 11,794.

Plaintiff cannot recover proceeds of his note, discounted with the defendant's indorsement, unless he has paid and produces the note, or accounts for its nonproduction.—Gillis v. Van Ness, Case No. 5,440.

Money paid on an erroneous judgment to the agent of the plaintiff may, on reversal, be recovered from him if yet in his hands, or if he was given notice at the time of payment that he would be required to refund it.—Bank of Washington v. Bank of United States, Case No. 947.

Plaintiff cannot recover under a count for goods sold and delivered, where defendant was employed to sell on commission, and the proceeds were embezzled by his clerk, to whom they were confided. In such case an action lies for money had and received.—Read v. Bertrand, Case No. 11,601.

An action for money had and received can be maintained in Virginia by an indorsee against a remote indorser of a negotiable promissory note.—Riddle v. Mandeville, Case No. 11,807.

An action for money had and received or money paid will not lie by the acceptor of a bill of exchange who has not paid it.—Parker v. United States, Case No. 10,750.

§ 2. Evidence.

Acceptance is evidence against the acceptor, in behalf of the drawer, of so much money, under the money counts.—Benjamin v. Tillman, Case No. 1,304.

An indorsement, though for accommodation, is evidence of money had and received by the indorser.—Bank of Alexandria v. Wilson, Case No. 856.

But otherwise where the indorser writes on the face of the bill, "credit the drawer."—Bank of Alexandria v. Young, Case No. 858.

Delivery of the cargo to the owners by the supercargo is evidence of his receipt of his commissions, in an action by a third person entitled to a share therein.—Manning v. Lowdermilk, Case No. 9,046.

See "Assumpsit, Action of."
Recovery of payment in general, see "Payment," §§ 24–28.
—— of price paid for land, see "Vendor and Purchaser," § 41.
— of tax paid, see "Taxation," § 11.

MONOPOLIES.

Grants of privileges or immunities, see "Constitutional Law," § 11.

§ 1. Creation.

A monopoly will never be awarded except by implication of a most direct and immediate character, and as necessarily annexed to powers expressly granted.—Minturn v. Larue, Case No. 9,646.

MORTGAGES.

§ 1, Requisites and validity—What constitutes a mortgage in general. § 2, —— Equitable mortgages. § 3, —— What debts may be secured. § 4, —— Absolute deed and agreement to reconvey. § 5, —— Form and contents of instruments. § 6, —— Validity. § 7, Recording and registration. § 8, Construction and operation—What law governs. § 9, —— Debts or liabilities secured. § 10, —— Property mortgaged. § 11, —— Estates of parties. § 12, —— Lien and priority. § 13, Rights and liabilities of parties. § 14, Assignment of mortgage or debt and rights and liabilities of parties. § 15, Transfer of property mortgaged or of equity of redemption. § 16, Release and satisfaction. § 17, Foreclosure by entry, possession, and notice. § 18, Foreclosure by exercise of power of sale—Nature of remedy. § 19, —— When power may be exercised, and suspension of power. § 19a, —— Receivers. § 20, —— Injunction against exercise of power. § 21, —— Recording notice and certificate. § 22, —— Who may sell. § 23, —— Manner and place of sale. § 24, —— Who may purchase at sale. § 25, —— Right and title of purchaser and his grantee. § 26, —— Setting aside sale. § 27, —— Disposition of proceeds and surplus. § 28, Foreclosure by action—Nature and form of remedy. § 29, —— Statutory provisions. § 30, —— Right to foreclose. § 31, —— Defenses. § 32, —— Jurisdiction. § 33, —— Limitations and Laches. § 34, —— Parties and process. § 35, —— Pleading. § 36, —— Evidence. § 37, —— Injunction and receiver. § 38, —— Judgment or decree. § 39, —— Sale. § 40, —— Deficiency. § 41, —— Disposition of proceeds. § 42, —— Review. § 43, Redemption—Who may redeem. § 44, —— Time of redemption. § 45, —— Amount necessary to redeem. § 46, —— Liability of mortgagee for rents and profits. § 47, —— Actions to redeem.

By corporation, see "Corporations," §§ 40, 46; "Railroads," §§ 31–54.
By factor, see "Factors," § 6.
Effect of assignment in bankruptcy, see "Bankruptcy," § 195.
Fixtures, see "Fixtures," § 2.
Foreclosure in bankruptcy, see "Bankruptcy," §§ 280–282.
Fraudulent as to creditors, see "Bankruptcy"; "Fraudulent Conveyances."
Levy on equity of redemption, see "Execution," § 1.
Of personal property, see "Chattel Mortgages."
Of trust property, see "Trusts," § 21.
Right of mortgagee to intervene in admiralty, see "Admiralty," § 64.
Subrogation to rights of mortgagee, see "Subrogation," § 2.

§ 1. Requisites and validity—What constitutes a mortgage in general.

A notarial act recognizing a mortgage *held* to be itself a mortgage, and its inscription effectual, under the law of Louisiana, to preserve its lien for 10 years.—Hunt v. Innis, Case No. 6,892.

A conveyance made in satisfaction of a precedent debt cannot take effect as a mortgage, although providing for redemption.—Alexander v. Rodriguez, Case No. 172.

A transfer of a negotiable note and mortgage to the plaintiff to indemnify him, he agreeing to transfer them if indemnified, *held* not a legal mortgage, but a conveyance in trust.—Warren v. Emerson, Case No. 17,195.

§ 2. —— Equitable mortgages.

An equitable mortgage springs from an agreement express or implied that there shall be a lien and a covenant by a debtor with his creditor to purchase certain lands and then mortgage them to him will be enforced in a court of equity by a decree of sale.—Wright v. Shumway, Case No. 18,093.

Courts of equity are not governed by the same rules as courts of law in declaring whether there be a mortgage.—Flagg v. Mann, Case No. 4,847.

Where the agreement was that the vendor should make a deed on payment of part of the consideration, and take a mortgage to secure the balance, and the vendee entered into possession,

but the vendor failed to make the deed, *held*, that the relation of mortgagor and mortgagee existed between the parties in equity.—Longworth v. Taylor, Case No. 8,490.

Where a transaction resolves itself into a security, it will be treated in equity as a mortgage, regardless of its form, and the parties cannot, by agreement, limit the rights of the mortgagor, or cut off his equity of redemption.—Flagg v. Mann, Case No. 4,847.

§ 3. —— What debts may be secured.

At common law, a mortgage for future advances and liabilities, made in good faith, is valid.—Leeds v. Cameron, Case No. 8,206.

Under Act N. H. July 3, 1829, a mortgage is void pro tanto, so far as it is intended to secure payment of moneys or other things which were not contracted for, or the liability for which did not attach, at the time of its execution.—Leeds v. Cameron, Case No. 8,206.

A mortgage given to secure the payment of four promissory notes made to raise means to work a plantation is valid, and, upon the negotiation of the notes, relates back to the date of execution.—In re York, Case No. 18,138.

A provision that the mortgage shall become security for the performance of a certain agreement at the election of the mortgagor becomes of binding force after election and notice.—Furbish v. Sears, Case No. 5,160.

The fact that no bond was ever executed is not fatal to a mortgage purporting to be executed to secure payment of a certain sum, according to the conditions of a certain bond.—Baldwin v. Raplee, Case No. 801.

§ 4. —— Absolute deed and agreement to reconvey.

A quitclaim deed and a bond to reconvey on the payment of a certain sum *held* to constitute an equitable mortgage, and not a conditional purchase, giving the grantor an equity of redemption subject to conveyance.—Flagg v. Mann, Case No. 4,847.

A deed, absolute on its face, will not be *held* to be a mortgage, unless the grantee, as well as grantor, understood the purpose of the conveyance to be the security of a debt.—Jones v. Brittan, Case No. 7,455.

An absolute conveyance of property as security for money advanced to pay the grantor's debts is a mortgage.—Amory v. Lawrence, Case No. 336.

The question, whether a conveyance amounts to a mortgage, does not turn on the question whether there be a defeasance.—Flagg v. Mann, Case No. 4,847.

The question of a defeasance and its effect considered on a deed of land.—Flagg v. Mann, Case No. 4,847.

Whether an absolute deed may be considered a mortgage, and under what circumstances such deed may become absolute as appears on its face.—Richmond v. Richmond, Case No. 11,801.

The fact that the relations between the parties were intimate, and that the vendor expected to be able to repurchase on favorable terms, does not make the conveyance a simple security for indebtedness.—Jenkins v. Einstein, Case No. 7,265.

An absolute deed by a husband to a trustee, in trust for his wife, in consideration of a sum advanced out of her separate estate, will not be deemed a mortgage by reason of the property exceeding in value the amount advanced.—Hunt v. Danforth, Case No. 6,888.

A warranty deed with a defeasance construed as a mortgage, although the grantee was given a right to sell the whole or part of the property, at a price fixed, in payment of the debt.—Dow v. Chamberlin, Case No. 4,037.

Quære, if a bond given by a grantee to one of several grantors, in order to defeat and make void the conveyance, if executed at the same time with the conveyance, will amount to a technical defeasance.—Flagg v. Mann, Case No. 4,847.

Oral evidence admissible to show deed absolute intended as mortgage.—Alexander v. Rodriguez, Case No. 172; Amory v. Lawrence, Id. 336; Andrews v. Hyde, Id. 377; Sprigg v. Bank of Mount Pleasant, Id. 13,257; Taylor v. Luther, Id. 13,796; Dow v. Chamberlin, Id. 4,037.

A deed absolute in form may be shown to have been really a mortgage, by the oral testimony of two witnesses, against the denials of the answer, where those denials are not satisfactory in themselves, and are accompanied with admissions that some confidential relations existed between the parties, not consistent with the terms of the deed.—Wyman v. Babcock, Case No. 18,113.

A deed absolute may, on bill in equity, be shown to be a mortgage, by evidence of the circumstances under which it was given and subsequent transactions and admissions between the parties.—Bentley v. Phelps, Case No. 1,331.

Sufficiency of evidence to show deed absolute intended as a mortgage.—Alexander v. Rodriguez, Case No. 172; Andrews v. Hyde, Id. 377.

Deed absolute to deceased not declared mortgage on uncorroborated evidence of single interested witness.—Andrews v. Hyde, Case No. 377.

§ 5. —— Form and contents of instruments.

Description in general terms in trust deed of lands granted under military warrant *held* sufficient.—Lewis v. Baird, Case No. 8,316.

§ 6. —— Validity.

A mortgage to secure a just debt, given to avoid a threatened criminal prosecution, is not void, as executed to compound a felony.—Plant v. Gunn, Case No. 11,205.

§ 7. Recording and registration.

Under the Indiana Code of 1838, a neglect to record a mortgage within the prescribed time did not invalidate it, except as to a subsequent bona fide purchaser or mortgagee whose deed or mortgage was first recorded.—Wyman v. Russell, Case No. 18,115.

A deed of trust in the nature of a mortgage is technically a deed for the purposes of execution, acknowledgment, and recording under the registration laws of Georgia.—Branch v. Atlantic & G. R. Co., Case No. 1,807.

"Months," as used in Dall. Pa. Laws, 112, requiring mortgages to be recorded within six months from their date, means calendar months.—Brudenell v. Vaux, Case No. 2,049.

§ 8. Construction and operation — What law governs.

A mortgage is governed by the law of the state where the land is situated when executed and sought to be enforced there, though payable in another state.—Fitch v. Remer, Case No. 4,836.

§ 9. —— Debts or liabilities secured.

Lien not affected by substitution of new notes or bonds for those originally secured or by the giving of a new mortgage expressly reserving rights under original mortgage.—Ames v. New Orleans, M. & T. R. Co., Case No. 329.

A mortgage or deed of trust made as security for a debt will operate as a security for the same continuing debt, though the evidence of it be changed by renewal or otherwise.—In re Wynne, Case No. 18,117.

A mortgage cannot be sustained as given for an actual debt other than that stated on its face, except on clear proof.—Baldwin v. Raplee, Case No. 801.

A mortgage to secure advances not to exceed a certain amount is good as security to its full amount to cover a balance of advances made in excess of such amount, diminished by partial payments on account.—In re York, Case No. 18,138.

A mortgage to secure future advances will not secure advances made after actual notice of a subsequent mortgage, in the absence of a binding contract to make such advances.—Ripley v. Harris, Case No. 11,853.

An indorsement by one joint obligor on a bond of an agreement to pay a greater rate of interest, as an inducement to forbear its collection, does not invalidate the bond, or the lien of a mortgage given to secure it, but the extra interest is not recoverable, as against junior incumbrances.—In re Hutchinson, Case No. 6,954.

§ 10. —— Property mortgaged.

In the case of conflict, the clause creating the lien will control the description of lands.—Ripley v. Harris, Case No. 11,853.

General terms of description are controlled by subsequent particular terms.—Pullan v. Cincinnati & C. Air-Line R. Co., Case No. 11,461.

§ 11. —— Estates of parties.

The release of the equity of redemption does not enlarge the estate conveyed by a mortgage in fee, but merely operates to remove the condition by extinguishing the equity of redemption.—Dexter v. Harris, Case No. 3,862.

Merger of equity of redemption in legal title, see "Estates."

§ 12. —— Lien and priority.

The equitable right of the junior to compel the senior mortgagee to resort to property on which he has an exclusive claim cannot be defeated by the declaration of a homestead therein.—Abbott v. Powell, Case No. 13.

The title acquired after the making of a mortgage inures to the benefit of the first mortgagee, as against a subsequent mortgagee whose mortgage was given after the title accrued to the mortgagor.—Corcoran v. Brown, Case No. 3,226.

In Louisiana a sale at the suit of a holder of a note under a mortgage securing several notes for a sum sufficient to discharge the mortgage does not discharge the lien of the mortgage as to the other notes.—Weaver v. Alter, Case No. 17,308.

A mortgage, under Act Ohio 1831, takes effect only from the time it is left for record, and a mortgage of subsequent date, first recorded, is a prior lien.—Sturgess v. Bank of Cleveland, Case No. 13,571.

The lien of a bona fide mortgagee is superior to the unrecorded deed of a vendee of the mortgagor.—Daggs v. Ewell, Case No. 3,537.

A second incumbrancer, taking up a prior incumbrance, which was also a lien upon other property, may enforce it against the property not covered by the second incumbrance.—Peter v. Smith, Case No. 11,020.

Priority as against mechanic's lien, see "Mechanics' Liens," § 5.

§ 13. Rights and liabilities of parties.

The mortgagor is, in equity, considered as the owner of the property, and he is entitled to possession until foreclosure or sale.—Vowell v. Thompson, Case No. 17,023; Witherell v. Wiberg, Id. 17,917; Souter v. La Crosse R. R., Id. 13,180.

On foreclosure, the title and possession remain in the mortgagor until a valid conveyance is made by the officer authorized to make the sale.—Semple v. Bank of British Columbia, Case No. 12,659.

Legal owner of equity of redemption and of mortgage paid by him *held* entitled to possession pending suit to declare title void.—Barnard v. Hartford, P. & F. R. Co., Case No. 1,003.

A mortgagee has no right or authority to take possession of the mortgaged premises and hold the same for the satisfaction of his debt, without the consent of the mortgagor.—Witherell v. Wiberg, Case No. 17,917.

The grantees of the heirs of the mortgagee have the same right as the mortgagee to enter for condition broken.—Kibbe v. Thompson, Case No. 7,754.

A mortgage lien after condition broken will cover timber removed from the premises by the mortgagee and the crops on entry by him.—In re Bruce, Case No. 2,045.

The grantee in an absolute conveyance intended merely as security is liable to account for rents and profits and for mismanagement of the property.—Jewett v. Cunard, Case No. 7,310.

A second mortgagee, after the satisfaction of the first mortgage, may claim from the first mortgagee, after notice, rents and profits not accounted for to the mortgagor.—Gordon v. Lewis, Case No. 5,613.

Such mortgagee in possession, receiving and retaining rents after the debt is satisfied, is liable for interest if he did not act under a mistake.—Gordon v. Lewis, Case No. 5,613.

No allowance is made for expenditures on mortgaged premises by a mortgagee in possession if their value is not enhanced thereby.—Gordon v. Lewis, Case No. 5,613.

A mortgagee in possession is liable for damages caused by willful default or gross neglect in making reasonable and necessary repairs.—Dexter v. Arnold, Case No. 3,858.

A mortgagee of lands to which the mortgagor has no present title is entitled in equity to the benefit of an after-acquired title.—Wright v. Shumway, Case No. 18,093.

A mortgagee, by obtaining an injunction in an action of waste against a person who had commenced the removal of a building from the premises, cannot be held liable where it is blown down by the wind.—Patterson v. Kingsland, Case No. 10,827.

A covenant in a mortgage to keep the mortgaged premises insured for the benefit of the mortgagee, where the mortgage is recorded, runs with the land, and is notice to all persons.—In re Sands Ale Brewing Co., Case No. 12,307.

A stipulation requiring payment without deduction for taxes, charges, or assessments does not prevent the mortgagor retaining the amount of income tax on the accrued interest, chargeable against the holder, and paid by the mortgagor.—Haight v. Pittsburgh, Ft. W. & C. R. Co., Case No. 5,903.

A mortgagee of a satisfied mortgage cannot maintain an action at law to recover possession against the mortgagor, or persons claiming under him, by the law of Maine.—Gray v. Jenks, Case No. 5,720.

Where a debtor gives his co-debtor a mortgage to secure the latter against the debt of their creditor, the mortgagee will be considered in equity a trustee for the creditor.—United States v. Sturges, Case No. 16,414.

See, also, post, § 46.

§ 14. Assignment of mortgage or debt and rights and liabilities of parties.

The assignment of a bond of defeasance of a deed is good in Rhode Island, as between the parties, though not attested by witnesses.—West v. Randall, Case No. 17,424.

The failure to observe a statutory requirement that a transfer of a mortgage shall be recorded would not render such mortgage void as against one taking another mortgage.—Oregon & W. Trust Inv. Co. v. Shaw, Case No. 10,557.

A valid mortgage in the hands of a bona fide assignee is preferred to a subsequent one, although the assignment is not recorded, unless the statute requires such record; but, as between bona fide assignees of the same mortgage, the assignment first recorded will have priority.—Oregon & W. Trust Inv. Co. v. Shaw, Case No. 10,556.

An assignee of a mortgage who might have obtained notice, and ought to have sought it, stands in no better situation than one having notice.—United States v. Sturges, Case No. 16,414.

An assignee of a mortgage four years overdue, and wholly unpaid, is chargeable with notice of its true consideration, which inquiry would have revealed.—United States v. Sturges, Case No. 16,414.

An assignment of a mortgage, with all sums due or to become due thereon, will include the note secured as an incident of the debt.—Baldwin v. Raplee, Case No. 801.

A payment to the mortgagee, made after assignment of the mortgage, but before the mortgagor has notice of it, is good, against the assignee.—Hubbard v. Turner, Case No. 6,819.

The assignee of a mortgage takes it subject to existing equities.—Corbett v. Woodward, Case No. 3,223; United States v. Sturges, Id. 16,414.

In Illinois, bonds and mortgages are placed upon the same footing as bills of exchange.—Hubbard v. Turner, Case No. 6,819.

No defenses against a mortgage taken, without notice of any outstanding equitable title, from one holding the legal title duly recorded, are open to the equitable owner, which cannot be made by the holder of the legal title.—Daggs v. Ewell, Case No. 3,537; Hubbard v. Turner, Id. 6,819.

A mortgage assigned in payment of a debt is not held by the assignee subject to the claims of the creditors of the assignor.—Hubbard v. Turner, Case No. 6,819.

§ 15. Transfer of property mortgaged, or of equity of redemption.

An absolute deed of mortgaged premises given by the mortgagee operates as a conveyance of a defeasible title only, and not as a disseisin, as between the mortgagor and mortgagee.—Dexter v. Arnold, Case No. 3,858.

A grantee assuming a mortgage is liable to the mortgagee both in equity and at law, and cannot be released without the consent of the mortgagee.—Betts v. Drew, Case No. 1,372.

The bringing of a foreclosure suit is a sufficient acceptance of the grantee's promise.—Bissell v. Bugbee, Case No. 1,445.

The assumption of the mortgage debt by the grantee of the mortgagor will not relieve the mortgagor from liability unless he has been released by the mortgagee.—Connecticut Mut. Life Ins. Co. v. Tyler, Case No. 3,109.

The mortgagee may recover in assumpsit from a purchaser from the mortgagor, where the mortgage constituted part of the purchase price.—Twichell v. Mears, Case No. 14,286.

The statute runs as against bill for accounting for mortgaged property in the rightful possession of third person from demand and refusal.—Almy v. Wilbur, Case No. 256.

And a debt protected by a mortgage is not barred until a suit as to the mortgaged property is barred.—Almy v. Wilbur, Case No. 256.

Quære, if the purchasers of an equity of redemption can take the objection that the mortgage was upon a usurious consideration, or, as plaintiffs, can have any relief in equity, without offering to pay the amount due.—Gordon v. Hobart, Case No. 5,609.

§ 16. Release and satisfaction.

Where one deed of trust is executed as a substitute for a preceding one, the former will at once cease to have any validity or effect.—In re Wynne, Case No. 18,117.

The acceptance of a second mortgage from the grantee will not constitute a release of the first mortgagor.—Connecticut Mut. Life Ins. Co. v. Tyler, Case No. 3,109.

The debt of a mortgagee cannot be considered as extinguished to the extent of the value of property wrongfully carried off by him, as a debt cannot be merged in a tort.—Palmer v. Burnside, Case No. 10,685.

A consent decree made in a case brought to enjoin the enforcement of a mortgage, in which the mortgage was recognized and its terms changed, *held* not to have the effect of extinguishing the mortgage, or merging it in the decree.—Hunt v. Innis, Case No. 6,892.

Where the mortgagee, before the foreclosure took effect, agreed to receive the money from the mortgagor, and subsequently transferred his rights to the person who advanced the money, *held* not a discharge of the mortgage, but a transfer of the land.—Shapley v. Rangeley, Case No. 12,707.

In the case of a creditor bank whose charter had expired 16 years before, a trustee in a deed given to secure the debt was ordered to convey to the heirs of the debtor.—Saunders v. Mason, Case No. 12,376.

When a debt secured by a mortgage has been discharged by the mortgagor, the mortgagee and his assigns will be required in equity to make a reconveyance.—Upham v. Brooks, Case No. 16,797.

The taking of new notes in place of others temporarily delivered up, and their renewal, *held* not a payment or discharge of a mortgage given as security for the original notes.—In re Freyvogel, Case No. 5,115.

§ 17. Foreclosure by entry, possession, and notice.

Sufficiency of entry by mortgagee to foreclose mortgage under St. Mass. 1788, c. 22; Id. 1798, c. 77.—Gordon v. Lewis, Case No. 5,612.

Foreclosure of right of redemption by taking possession under Act Me. Feb. 5, 1821.—Gordon v. Hobart, Case No. 5,609.

A declaration is not good in a writ of entry to foreclose a mortgage, unless counting on a mortgage, and using words to show that a foreclosure is desired rather than possession to take the profits.—Fiedler v. Carpenter, Case No. 4,759.

When amended in proper form, non tenure is a bad plea to such a declaration, whether put in by the mortgagor or any other person in possession, who is sued.—Fiedler v. Carpenter, Case No. 4,759.

A writ of entry to foreclose a mortgage may be maintained against a tenant in possession, lessee at will of the mortgagor.—Fales v. Gibbs, Case No. 4,621.

§ 18. Foreclosure by exercise of power of sale—Nature of remedy.

A power in a mortgage to sell the mortgaged property is a matter of contract, and will not be overthrown by the court.—Bowen v. Kendall, Case No. 1,724.

Where a mortgagee acquires possession after the expiration of a lease made by the mortgagor to another, where the mortgage passes no title, estate, or interest to the mortgagee, such possession, in connection with a power of sale in the mortgage, will not create a power coupled with an interest.—Lockett v. Hill, Case No. 8,443.

A power of sale in a mortgage is not, in Georgia, a power coupled with an interest, but is merely a collateral power, and it cannot be executed after the bankruptcy of the mortgagor.—Lockett v. Hill, Case No. 8,443.

§ 19. —— When power may be exercised, and suspension of power.

A power of sale limited to a specified time is forever gone when not executed within that time.—Lockett v. Hill, Case No. 8,443.

The bankruptcy of a subsequent mortgagee is no objection to the execution of the power of sale in a prior incumbrance.—Long v. Rogers, Case No. 8,482.

§ 19a. —— Receivers.

Where a mortgage provided that on certain conditions the trustees might, upon the request of any bondholder, take possession and sell the property, *held* that the fact that the condition existed which authorized such possession, and the refusal of the trustees, were sufficient grounds for the appointment of a receiver.—Warner v. Rising Fawn Iron Co., Case No. 17,188.

§ 20. —— Injunction against exercise of power.

A sale under a power of sale in an unrecorded mortgage will be enjoined where the assignee bought of the mortgagor in ignorance of such power.—Platt v. McClure, Case No. 11,218.

Where the evidence upon a motion for injunction raised gave doubts on the question whether the bondholders in whose behalf the trustee was about to make a sale were bona fide holders, an injunction to restrain the sale was allowed.—Western Division of Western N. C. R. Co. v. Drew, Case No. 17,433.

An injunction to restrain the sale of mortgaged premises by a trustee on the ground that the bonds are invalid will not be refused because possibly a favorable chance to sell the property will be lost by delay, where the sale would entirely destroy complainant's rights.—Western Division of Western N. C. R. Co. v. Drew, Case No. 17,433.

§ 21. —— Recording notice and certificate.

Notice of foreclosure and certificate of publication must be recorded in the registry where the mortgage is recorded, though division of the county has placed the lands in another county.—Burnham v. Hewey, Case No. 2,175.

§ 22. —— Who may sell.

A sale under a deed of trust may be made by the agent of the trustee.—Connolly v. Belt, Case No. 3,117.

§ 23. —— Manner and place of sale.

The trustee in a deed of trust, where there are subsequent incumbrances, cannot sell a part only of a single lot without the consent of all parties concerned.—Connolly v. Belt, Case No. 3,117.

A sale of a single lot will not be set aside because a part would have been sufficient to satisfy the demand.—Connolly v. Belt, Case No. 3,117.

Where trustees sell on credit, and receive the money before it is due, discounting legal interest, it will not operate in equity to discharge the lien.—Wallis v. Thornton, Case No. 17,111.

A power to sell at a certain door of the courthouse may be rightfully executed by a sale at the ruins of such door, where the courthouse was destroyed by fire in the interim.—Long v. Rogers, Case No. 8,482.

§ 24. —— Who may purchase at sale.

A mortgagee with a power to sell cannot himself become the purchaser either in severalty, joint tenancy, or otherwise. A power given to an individual cannot be executed by selling the property to a firm of which he was a member.—Lockett v. Hill, Case No. 8,443.

§ 25. —— Right and title of purchaser and his grantee.

A mortgagee purchasing the property under a power, at a sale to which the mortgagor's assignee in bankruptcy was a party, *held* entitled, as against the assignee, to the rents and profits between the day of sale and the day of confirmation by the bankruptcy court.—Lathrop v. Nelson, Case No. 8,111.

The purchaser at a trustee's sale *held* not relieved from paying interest as agreed from the day of sale, pending investigation of the title, and waiting its clearing, though he refused to take possession.—Markoe v. Coxe, Case No. 9,092.

But interest will cease to run from the time the money is paid into court.—Markoe v. Coxe, Case No. 9,092.

A subsequent purchaser of the title acquired on a trustee's sale is not bound to look beyond the recitals in the trustee's deed.—Long v. Rogers, Case No. 8,482.

§ 26. —— Setting aside sale.

Auction sale set aside where a party interested publicly announced that it was merely a legal form to perfect his title, and that purchasers would be subject to a suit at law.—McGuire v. Briscoe, Case No. 8,813a.

§ 27. —— Disposition of proceeds and surplus.

A mortgagee will not be allowed to get any advantage out of the mortgage fund beyond principal and interest.—Gordon v. Lewis, Case No. 5,613.

The rule governing the application of payments does not apply to mortgage notes given to secure indorsements.—Thomson v. Bradford, Case No. 13,981.

The surplus arising from a sale under a deed of trust cannot be enjoined in the hands of a trustee to answer damages which plaintiff may recover against the debtor for not delivering up the property according to his agreement.—Connolly v. Belt, Case No. 3,117.

A mortgagor is not responsible, without notice, for the application of any surplus which may remain on the sale of the mortgaged property after satisfying his mortgage.—McLean v. Lafayette Bank, Case No. 8,889.

§ 28. Foreclosure by action—Nature and form of remedy.

A mortgage to secure a debt executed by public act according to the law of Louisiana, although it imports confession of judgment, and there is a statutory remedy on it, may be enforced by suit in equity.—Benjamin v. Cavaroc, Case No. 1,300.

§ 29. —— Statutory provisions.

Construction of the statute of Kansas in relation to the foreclosure of mortgages.—Samuel v. Holladay, Case No. 12,288.

§ 30. —— Right to foreclose.

A mortgage given to secure a debt due and payable, no time of payment being specified, may be redeemed or foreclosed at any time.—Wright v. Shumway, Case No. 18,093.

The mortgagee may sue at law on his bond, and in equity to foreclose, at the same time.—Morrison v. Buckner, Case No. 9,844.

Scire facias does not lie under the Illinois statute (Rev. St. 1845, c. 57, § 23) to foreclose a mortgage not duly acknowledged, although by chapter 24, § 28, the record of mortgages not acknowledged is made notice to subsequent purchasers.—Kenosha & R. R. Co. v. Sperry, Case No. 7,712.

A stipulation that on default of the payment of interest the principal shall become due, is not a penalty, and equity will not relieve the party therefrom.—Ruggles v. Southern Minnesota R. Co., Case No. 12,121.

A bill of foreclosure by a junior mortgagee will not be sustained where he has already been

impleaded by a prior mortgagee.—Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., Case No. 13,643.

An entry to sell and pay the mortgage debt held not a strict foreclosure, and no defense to a suit on the bond.—Sagory v. Wissman, Case No. 12,217.

§ 31. —— Defenses.

The point that the mortgage is invalid as having been taken in violation of the national banking act, when not made in the pleadings, though disclosed in the proof, will not be acted upon by the court.—Ripley v. Harris, Case No. 11,853.

The remedy by a sale of the mortgaged property to pay overdue installments given in the mortgage *held* to be merely cumulative, not preventing foreclosure.—Furbish v. Sears, Case No. 5,160.

§ 32. —— Jurisdiction.

Jurisdiction in actions of foreclosure in the case of absent mortgagors, under the Minnesota statutes.—Smith v. Pomeroy, Case No. 13,092.

Jurisdiction of admiralty in suits for foreclosure, etc., see "Admiralty," § 10.

§ 33. —— Limitations and laches.

The limitation of an action to foreclose a mortgage applies to an action to reform and foreclose a mortgage.—Reeves v. Vinacke, Case No. 11,663.

Ten years' limitation applies to foreclosure of mortgage where mortgagee knew the land had been sold under prior mortgages, and the purchaser was in possession claiming title.—Cleveland Ins. Co. v. Reed, Case No. 2,889.

A suit upon a mortgage is not a suit for the "determination of any right or claim to or interest in real property," but is a suit upon a sealed instrument, which must be brought within 10 years under Civ. Code Or. §§ 5, 378. —Eubanks v. Leveridge, Case No. 4,544.

A mortgage cannot be foreclosed after the lapse of 20 years from the date when the cause of action accrued.—Wyman v. Russel, Case No. 18,115.

The right of the mortgagee to foreclosure or possession is barred, in Connecticut, where the mortgagor has been permitted to remain in possession for 15 years without payment on the debt, or recognition of the mortgage.—Fox v. Blossom, Case No. 5,008.

The statute cannot be pleaded against a mortgage when it cannot be pleaded against a note secured thereby.—Daggs v. Ewell, Case No. 3,537. CONTRA, see Sparks v. Pico, Case No. 13,211.

A junior mortgagee, out of possession, may, in such case, sue to have the first mortgage canceled, as barred by the statute.—Fox v. Blossom, Case No. 5,008.

Lapse of time does not raise the presumption of payment if foreclosure proceedings have been taken, or the mortgagee and his heirs have never resided within the state.—Kibbe v. Thompson, Case No. 7,754.

Absence of the mortgagor from the state, when or after the cause of suit accrues upon a mortgage, does not suspend or prevent the statute from running against a suit to foreclose the same.—Eubanks v. Leveridge, Case No. 4,544.

§ 34. —— Parties and process.

A state which is an indorser of bonds secured by a statutory mortgage is not a necessary party to a suit brought by holders of the bonds to foreclose the mortgage.—Young v. Montgomery & E. R. Co., Case No. 18,166.

In a proceeding to foreclose a mortgage, all persons holding the equity of redemption of the lands, or any part thereof, must be made parties.—Wyman v. Russell, Case No. 18,115.

Where a mortgage lien is paramount to a claim for homestead in the premises, the wife of the mortgagor is not a necessary party to a bill to foreclose.—Townsend Sav. Bank v. Epping, Case No. 14,120.

Cestuis que trustent are necessary parties to a suit to foreclose a mortgage given by the trustee.—Piatt v. Oliver, Case No. 11,115.

A person who may be chargeable with a balance in case the proceeds of the mortgaged premises do not satisfy the debt is an indispensable party to a foreclosure suit.—Matcalm v. Smith, Case No. 9,272.

A joint mortgagor, who has conveyed absolutely to the other his equity of redemption, is not a necessary party to a bill to foreclose; but his right of redemption is not cut off where the property did not satisfy the debt.—Townsend Sav. Bank v. Epping, Case No. 14,120.

Junior mortgagees may foreclose without making prior mortgagees parties, but a sale in such case will be subject to the prior mortgage.—Young v. Montgomery & E. R. Co., Case No. 18,166; Palmer v. Burnside, Id. 10,685; Searles v. Jacksonville, P. & M. R. Co., Id. 12,586.

Prior incumbrancers are necessary parties to a bill of foreclosure by a junior mortgagee, where there is substantial doubt as to the amounts due them, or the property covered by their liens. —Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., Case No. 13,643.

A general notice calling upon prior mortgagees to present their claims will not make them parties or bind them, but they must be served with process or voluntarily appear.—Young v. Montgomery & E. R. Co., Case No. 18,166.

§ 35. —— Pleading.

Where a part of the tract has been sold by a prior mortgagee or the mortgagor has no title thereto, it may be omitted in the bill to foreclose.—Sedam v. Williams, Case No. 12,609.

Where the answer to a bill to redeem asserts a mortgage title in the whole of the premises, it is not competent for defendants to set up a different title, as for a moiety, before the master.—Gordon v. Lewis, Case No. 5,613.

§ 36. —— Evidence.

In a suit by assignees of a note and mortgage, if the assignment is denied it must be proved.—Wyman v. Russell, Case No. 18,115.

The exemplification of the record of a mortgage is sufficient evidence of the existence of the mortgage and the debt due thereon.—Beall v. Dick, Case No. 1,162.

§ 37. —— Injunction and receiver.

In a foreclosure suit, the court before answer filed, will not enjoin the mortgagor in possession from receiving the rents and profits, nor appoint a receiver.—Oliver v. Decatur, Case No. 10,494.

A receiver will not be appointed unless it clearly appears that the security is inadequate, or there is imminent danger of the waste, removal, or destruction of the mortgaged property, or the rents and profits have been expressly pledged.—Morrison v. Buckner, Case No. 9,844; Pullan v. Cincinnati & C. Air-Line R. Co., Id. 11,461.

The exercise of this power depends upon sound discretion, and is governed, to a great extent, by the circumstances of each particular case.—Morrison v. Buckner, Case No. 9,844.

Where the security is inadequate, a receiver may be appointed for the rents and profits pending foreclosure sale and time for redemption though the mortgage gives no lien upon the rents and income.—Davidson v. Allis, Case No. 3,600.

After foreclosure, the mortgagor is, in general, entitled to possession until the time for redemption has elapsed; but, if such possession is likely to impair the purchaser's rights, a receiver may be appointed.—Lapham v. Ives, Case No. 8,082.

Where the court has taken possession of the property by the appointment of a receiver in a suit by junior mortgagees, the senior mortgagees cannot gain possession by a suit subsequently begun until the first is ended.—Young v. Montgomery & E. R. Co., Case No. 18,166.

§ 38. —— Judgment or decree.

A foreclosure decree is a judicial finding of default in payment, and the mortgagee has thenceforth the right of entry for condition broken.—Kibbe v. Thompson, Case No. 7,754.

A decree of sale of mortgaged premises is a final decree.—Whiting v. Bank of United States, Case No. 17,576.

On foreclosure of a mortgage in default of payment of interest, under the usual interest clause, giving the mortgagee the option to consider the whole amount due after such default, the decree will be granted for the full sum, though the bill does not allege option by the mortgagee and notice.—Quackenbush v. Lane, Case No. 11,491.

If the amount of rents and profits received by a mortgagee in possession cannot be ascertained, resort may be had to a fair occupation rent.—Gordon v. Lewis, Case No. 5,613.

A decree of foreclosure in the federal court *held* not objectionable, in not giving the time allowed for redemption by the state statute.—Hards v. Connecticut Mut. Life Ins. Co., Case No. 6,055.

A court of equity may sell mortgaged premises free from incumbrances, remitting the lienholders to the proceeds of sale.—Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., Case No. 13,643.

Where a foreclosure decree shows that the court was apprised of the existence of infant heirs at law, and took measures to preserve their rights, the legal presumptions in favor of its validity are not limited by producing the bill, in which their names are not given but process is prayed against them generally.—Kibbe v. Dunn, Case No. 7,753.

After the term at which a decree was entered, the court may amend it as to mode of execution, manner of sale, time of publication of sale, and distribution of proceeds arising therefrom.—Turner v. Indianapolis, B. & W. Ry. Co., Case No. 14,259.

§ 39. —— Sale.

A confirmation of the sale of mortgaged premises on the return of the commissioner, if erroneous, affords no ground on which to reverse the original decree.—Whiting v. Bank of United States, Case No. 17,576.

A statement by the mortgagee that his purpose in foreclosing was to protect the title, and that he would carry out a previous agreement to pay the debt out of the income, will not make an absolute deed obtained on the foreclosure a conditional one.—Howland v. Blake, Case No. 6,792.

A sale will not be set aside for mere inadequacy of the bid, unless the applicant show that a reasonable party will make an advance bid.—Turner v. Indianapolis, B. & W. Ry. Co., Case No. 14,259.

Mere inadequacy of price, which is not sufficient to show that the sale was not the result of fair dealing, is not a sufficient ground to set aside a sale.—Turner v. Indianapolis, B. & W. Ry. Co., Case No. 14,259.

A writ of assistance will not issue against persons who are not parties to the suit, or did not come in under them after suit commenced.—Thompson v. Smith, Case No. 13,977.

§ 40. —— Deficiency.

One in possession of mortgaged lands is accountable to the mortgagee for rents and profits if, on foreclosure, there is a deficiency.—Latimer v. Moore, Case No. 8,114.

Where the grantee of the mortgagor assumes the mortgage, the mortgagee will be entitled to a deficiency decree against him on foreclosure.—Bissell v. Bugbee, Case No. 1,445.

A personal decree will not be rendered against a married woman for a deficiency on foreclosure of a mortgage given by her to secure payment of a note executed by the husband and wife jointly for a loan to him, where she did not intend to be bound as surety.—Pawtucket Ins. for Savings v. Bowen, Case No. 10,852.

The power of the federal circuit court in a foreclosure suit to order a general execution for a deficiency after the sale of the mortgaged premises is discretionary. Sup. Ct. Rules 92.—Phelps v. Loyhed, Case No. 11,077.

A general execution for a deficiency allowed, although under the state statute an action at law on the notes to secure which the mortgage was given was barred.—Phelps v. Loyhed, Case No. 11,077.

A general execution for a deficiency refused where complainant, by reason of his delay, was not entitled to it under the state statute.—Phelps v. Loyhed, Case No. 11,077.

Where the creditor purchases the property at a sale by the trustee without competition, the enforcement of a deficiency judgment will be enjoined until the circumstances of the sale are ascertained upon final hearing.—Fairfax v. Hopkins, Case No. 4,614.

After a foreclosure by a mortgagee he is still entitled to recover the balance of the debt due him beyond the value of the mortgaged premises at the time of the foreclosure.—Omaly v. Swan, Case No. 10,508.

The mortgagee, after foreclosure, may recover at law, upon the attendant bond or note, the deficiency of the mortgaged property to pay the debt due, calculating the value of such property at the time of the actual foreclosure.—Hatch v. White, Case No. 6,209.

See, also, "Bankruptcy," § 385.

§ 41. —— Disposition of proceeds.

In the case of a mortgage given to secure the payment of five notes, two for the principal of the debt, one for the interest, and two as compensation to the mortgagee for indorsing the first three, *held*, that the holder of the first three notes was entitled to have the proceeds of the mortgaged property first applied to the payment of such notes.—Providence County Sav. Bank v. Frost, Case No. 11,453.

§ 42. —— Review.

After a surrender to the purchaser at foreclosure sale has been directed, a bill of review cannot be sustained, unless it appear that the purchaser has been let into possession.—Burley v. Flint, Case No. 2,168.

A bill of review will not lie for errors on the face of the record in a foreclosure suit, brought after time has expired for redemption.—Burley v. Flint, Case No. 2,168.

§ 43. Redemption—Who may redeem.

A third person who advances the purchase price for a settler on public lands, taking the receiver's certificate of location as security for payment, and giving back a bond for a deed upon repayment, will be *held* a mortgagee, and the settler or his alienee may redeem.—Wright v. Shumway, Case No. 18,093.

A judgment creditor may redeem a mortgage upon land upon which his judgment is a lien,

even as against an assignee of the mortgage.—United States v. Sturges, Case No. 16,414.

The grantee under a deed absolute in form given to secure a debt may enforce, in equity, the right to redeem.—Alexander v. Rodriguez, Case No. 172.

§ 44. —— Time of redemption.

Defendant will have the right to redeem from the foreclosure sale at any time within the statutory period, regardless of the provisions of the decree, and errors therein in such respect are merely matters of form.—Burley v. Flint, Case No. 2,168.

Undisturbed possession by the mortgagee for 20 years, without accounting, or any admission of the mortgagee's equity, will give him a good title in equity.—Cromwell v. Bank of Pittsburg, Case No. 3,409; Amory v. Lawrence, Id. 336; Dexter v. Arnold, Id. 3,857, 3,859; Gordon v. Hobart, Id. 5,609.

The fact that the right to redeem is barred by lapse of time as to certain parcels separately sold will not affect the right to redeem as to the others.—Dexter v. Arnold, Case No. 3,857.

The presumption that an equity of redemption is released after 20 years' possession by a mortgagee does not apply to a case where the mortgagee was in possession under an absolute deed, with an agreement that the mortgagor might redeem when he found it convenient; no specific time being fixed, and the mortgagee having no notice or request to redeem.—Wyman v. Babcock, Case No. 18,113.

Quære, whether parol admissions, within 20 years, are sufficient to keep open the equity.—Dexter v. Arnold, Case No. 3,859.

An acknowledgment in deeds and other writings with third persons is sufficient to allow redemption.—Dexter v. Arnold, Case No. 3,859.

Acknowledgments by the mortgagee after sales by him do not affect bona fide purchasers without actual notice of the mortgage.—Dexter v. Arnold, Case No. 3,857.

An acknowledgment of the mortgage by the mortgagee, in his answer to a bill in equity between other parties, is sufficient to allow redemption.—Dexter v. Arnold, Case No. 3,857.

§ 45. —— Amount necessary to redeem.

Where the mortgagor induced a third person to purchase the mortgage by promising in writing to pay, with interest, the whole sum advanced, the assignee of the equity of redemption will be allowed to redeem only by paying what his assignor must have paid.—Holbrook v. Worcester Bank, Case No. 6,597.

The mortgagor, in equity, is entitled to maintain a bill to redeem upon an offer to redeem, and proving himself able and ready to discharge the incumbrance as security against which the mortgage was given, and procure releases thereof, and of claims on account thereof.—Upham v. Brooks, Case No. 16,796.

§ 46. —— Liability of mortgagee for rents and profits.

On a bill to redeem, the mortgagee, who has failed to keep an account of rents and profits, is properly chargeable with what he may be presumed to have received.—Dexter v. Arnold, Case No. 3,858.

§ 47. —— Actions to redeem.

Act Me. Feb. 5, 1821, requiring tender of money due on a mortgage does not apply in a suit in the federal court.—Gordon v. Hobart, Case No. 5,609.

The objection that proof of newspaper publication of an intention to foreclose was not shown by a copy of the newspaper cannot be made for the first time on argument.—Cushing v. Smith, Case No. 3,511.

The master, on a bill to redeem from a mortgage, *held* right in refusing to open an account settled 30 years previously.—Dexter v. Arnold, Case No. 3,858.

On a bill to redeem from a mortgage, the master need not inquire as to the original consideration of the mortgage, where no question was raised in the pleadings.—Dexter v. Arnold, Case No. 3,858.

To a bill to redeem, the heirs of the mortgagee, as well as his personal representative, are ordinarily necessary parties.—Dexter v. Arnold, Case No. 3,857.

If the mortgagee has never taken possession during his lifetime, the mortgage belongs, in Rhode Island, to his personal representative, and the heirs need not be made parties to a bill to redeem.—Dexter v. Arnold, Case No. 3,857.

The trustees under a will, vested with the legal estate, are the proper parties to file a bill to redeem a mortgage given by testator.—Dexter v. Arnold, Case No. 3,857.

Neither the creditor nor the grantors in a deed of trust, nor the trustees named therein, nor the substituted trustee, are necessary parties to a suit by the grantee of the equity of redemption to redeem the lands from the lien of the trust deed.—Kanawha Coal Co. v. Kanawha & O. Coal Co., Case No. 7,606.

MOTIONS.

§ 1, Notice of motion. § 2, Hearing and decision. § 3, Orders.

In admiralty, see "Admiralty," § 92.
In bankruptcy proceedings, see "Bankruptcy," § 30.

Motions for particular purposes of relief.

Arrest of judgment in civil actions, see "Judgment," § 17.
—— in criminal prosecutions, see "Criminal Law," § 103.
Change of venue in civil actions, see "Venue," § 2.
Continuance in civil actions, see "Continuance."
Direction of verdict in civil actions, see "Trial," § 15.
Dismissal or nonsuit on trial, see "Trial," § 14.
New trial in civil actions, see "New Trial," §§ 19–27.
—— in criminal prosecutions, see "Criminal Law," §§ 100–102.
Opening or setting aside default judgment, see "Judgment," §§ 13, 14.
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—— indictment or information, see "Indictment and Information," §§ 19–22.
Relating to pleading, see "Pleading," § 65.
To dismiss or remand suit to federal court, see "Removal of Causes," §§ 53, 54.
To strike out evidence, see "Criminal Law," § 92; "Trial," § 10.

§ 1. Notice of motion.

Notice of a motion to dissolve an injunction, given on the first day of the term, is notice of a motion to be made at the next term.—Ramsay v. Wilson, Case No. 11,545.

A motion to produce a paper necessary to enable defendants to plead may be granted without a preliminary notice to produce.—Bronson v. Kensey, Case No. 1,927.

Orders obtained upon motion may be discharged upon motion, and orders obtained ex parte may be thus discharged when they have never been assented to by the other party.—Eslava v. Mazange's Adm'r, Case No. 4,527.

§ 2. Hearing and decision.

A prior ruling stated by the judge out of court to have been made by him, when unreversed, must be considered as the law of the case, when

coming before another judge.—In re Barnes, Case No. 1,011.

Where a motion made but not decided was not continued to the next term, *held*, that a continuance should be entered nunc pro tunc, but that the opponent would not be required to take it up at that term.—Hurd v. Williams, Case No. 6,918.

The respective claims of contending assignees of a cause of action pending in court will not be decided on motion.—Thomas v. Elliot, Case No. 13,896.

A motion to the discretion of the court is a motion, not to its inclination, but to its judgment, which is to be guided by sound legal principles.—United States v. Burr, Case No. 14,692d.

The effect of an equal division of opinion in the court on a motion for a rule or order.—Goddard v. Coffin, Case No. 5,490.

Decision upon a motion has not the effect of a judgment so as to preclude further examination by same court.—Akerly v. Vilas, Case No. 120.

§ 3. Orders.

Effect of minutes of court upon which no order is entered.—In re Barnes, Case No. 1,011.

A formal order must be entered upon the decision of the court. The decision will not be regarded as an order.—Boker v. Bronson, Case No. 1,606.

MULTIFARIOUSNESS.

In pleading, see "Equity," § 37.

MULTIPLICITY OF SUITS.

Jurisdiction of equity to avoid, see "Equity," § 14; "Injunction," § 2.

MUNICIPAL CORPORATIONS.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

§ 1, Incorporation and incidents of existence. § 2, Territorial extent. § 3, Consolidation. § 4, Dissolution. § 5, Governmental powers and functions. § 6, Legislative control.

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VIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 26, Limitation of amount of indebtedness. § 27, Aid to railroads. § 28, Warrants. § 29, Bonds and other securities—Power to issue. § 30, —— Issue and validity. § 31, —— Ratification, and estoppel to deny validity. § 32, —— Transfers. § 33, —— Bona fide purchasers. § 34, —— Effect of recitals. § 35, —— Priorities. § 36, —— Remedies of taxpayers. § 37, —— Remedies of holders. § 38, Taxes and application thereof.

IX. ACTIONS.

§ 39, Right of action. § 40, Preliminary notice and process. § 41, Pleading. § 42, Evidence. § 43, Judgment. § 44, Costs.

See, also, "Counties"; "Towns."

Injunctions affecting, see "Injunction," § 8.

Jurisdiction over vessels belonging to, see "Admiralty," § 7.

Mandamus, see "Mandamus," § 4.

Right of city fire department to salvage compensation, see "Salvage," § 20.

Water supply, see "Waters and Water Courses," § 9.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

§ 1. Incorporation and incidents of existence.

Counties and towns are, as to their corporate existence, completely within the control of the legislature.—Beckwith v. Racine, Case No. 1,213.

It was competent for a town to adopt article 9 of the Illinois incorporation act by ordinance, without a vote of the people.—Lake v. Hequembourg, Case No. 7,994.

The question of the legality of the incorporation of a city, because it did not have the number of inhabitants required by the constitution, cannot be examined collaterally.—Judson v. Plattsburg, Case No. 7,570.

Construction of the Virginia laws of 1779 and 1796, in relation to corporations.—Fowle v. Alexandria, Case No. 4,993.

Powers, duties, and liabilities of the corporation of Alexandria, Va.—Fowle v. Alexandria, Case No. 4,993.

Judicial notice, see "Evidence," § 6.

§ 2. Territorial extent.

The extent of land which may be included within a city is not limited by Act May 23, 1844.—Root v. Shields, Case No. 12,038.

§ 3. Consolidation.

Municipal corporation to which the territory of another is assigned, on its being legislated out of existence, must pay its existing debts in the ratio of territory obtained.—Beckwith v. Racine, Case No. 1,213.

§ 4. Dissolution.

A municipal corporation, created by legislative act for public purposes, is not dissolved by its failure to elect officers.—Welch v. Ste. Genevieve, Case No. 17,372.

The surrender of its charter by a city, and an organization under a general law, works a dissolution of the old corporation, and the new corporation is not liable on bonds theretofore issued.—Jones v. Pensacola, Case No. 7,488.

§ 5. Governmental powers and functions.

A municipal corporation may be enjoined from committing a breach of trust as to property or franchises held by it for the inhabitants.—Coulson v. Portland, Case No. 3,275.

It has no incidental or inherent authority under the usual grants of municipal powers as a means of discharging its ordinary municipal functions.—Gause v. Clarksville, Case No. 5,276.

The Pennsylvania act of April 12, 1828, forbidding any person "or body corporate" to put in circulation bills, etc., of less than $5, but nevertheless giving a right of action to holders thereof, applies to municipal corporations.—McCormick v. Allegheny City, Case No. 8,717.

The provision of said act giving a right of action on such instruments was not repealed by implication by the joint resolution of June 24, 1841.—McCormick v. Allegheny City, Case No. 8,717.

Construction of clause in the Washington city charter relating to the residence of free negroes and mulattoes.—Costin v. Washington, Case No. 3,266.

§ 6. Legislative control.

A prohibition against authorizing any "county, city, or town" to subscribe for stock unless authorized by a two-thirds vote does not restrain the legislature from authorizing "township" aid where sanctioned by a two-thirds vote.—Jordan v. Cass County, Case No. 7,517.

II. GOVERNMENT AND OFFICERS.

§ 7. By-laws in general.

The original by-laws of Georgetown need not be made under the seal of the corporation.—Holmead v. Fox, Case No. 6,628.

§ 8. Officers and agents.

The mayor of Georgetown may, in that town, do any act which a justice of the peace of the county can do.—Hodgson v. Mountz, Case No. 6,569.

The mayor of Washington cannot exercise jurisdiction in a case in which he is a party.—Barney v. Washington City, Case No. 1,033.

Appointment of constables for Georgetown.—Holmead v. Fox, Case No. 6,628.

The mayor, city attorney, and treasurer may engage attorneys to collect demands due the municipality, where they have ordinarily been suffered to make similar agreements.—Memphis v. Brown, Case No. 9,415.

Construction of the charter of Washington, D. C., in relation to the nomination and confirmation of officers.—Miller v. Washington, Case No. 9,593a.

A person rejected by the board of aldermen of Washington, D. C., on the mayor's nomination, cannot be reappointed by the mayor, in the recess of the same board, to the same office for which he was rejected by the board.—Miller v. Washington, Case No. 9,593a.

In respect to all acts which the corporation has power to perform, it may bind itself by those agents whom it suffers to act for it, and in the modes which its usages sanction.—Memphis v. Brown, Case No. 9,415.

See, also, post, §§ 9, 10, 16, 24.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

Liability for property taken to stay conflagration, see "Eminent Domain," § 1.

§ 9. Property.

Title to the streets and wharves in the city of Detroit, and the jurisdiction and powers of the city authorities in relation thereto.—Russel v. The Empire State, Case No. 12,145.

A municipal corporation, unless specially restricted, may make an irrevocable dedication of property to the public for the use of a public wharf.—Illinois & St. L. Railroad & Canal Co. v. St. Louis, Case No. 7,007.

On property thus dedicated the city may authorize the erection of a grain elevator to facilitate the handling of grain at the wharf.—Illinois & St. L. Railroad & Canal Co. v. St. Louis, Case No. 7,007.

An ordinance surrendering to a private person control over a public wharf for a fixed period, for the purpose of erecting a grain elevator, without reserving the right to resume possession and regulate charges, is void, unless specially authorized by law.—Illinois & St. L. Railroad & Canal Co. v. St. Louis, Case No. 7,007.

The commissioners of the city of Washington, under Act Md. 1793, c. 58, § 2, may resell public lots as often as a purchaser should fail to pay for them, and charge each preceding purchaser with the loss upon the resale.—Thornton v. O'Neale, Case No. 13,999.

The city authorities of the city of Detroit may erect wharves at the termini of their streets, suitable for landing; but, by so doing, such erections become free to the public as extensions of the streets, and tolls cannot be exacted for use thereof.—Russel v. The Empire State, Case No. 12,145.

The corporation of Georgetown, D. C., has power to rent fish wharves.—Georgetown v. Chew, Case No. 5,345.

As a general rule, a public place is inalienable except by the sovereign.—New Orleans v. Morris, Case No. 10,183.

The leasing by the city of New Orleans of a portion of the batture in front of the city for 10 years for a market bazaar is a withdrawal thereof from public use.—New Orleans v. Morris, Case No. 10,183.

Property of a municipal corporation necessary to the exercise of its functions, such as markets, prisons, etc., cannot be sold on execution against it.—New Orleans v. Morris, Case No. 10,182.

A municipal corporation cannot by its own act, independent of legislative authority, make a thing which is not necessary to the exercise of its functions a permanent source of revenue so as to exempt it from execution.—New Orleans v. Morris, Case No. 10,182.

A so-called "market bazaar," owned by a city for the sale of merchandise, excluding fresh meats, vegetables, etc., and rented out for a term of years, is not such a market as is protected from execution.—New Orleans v. Morris, Case No. 10,182.

Stock owned by a municipal corporation may be taken in execution and sold under a fi. fa. issued out of a federal circuit court.—Oelrich v. Pittsburgh, Case No. 10,444.

§ 10. Contracts.

Where the contract is to run for years, the authority to make it should be clear.—Garrison v. Chicago, Case No. 5,255.

The city of Chicago has not the right to contract for lighting the streets and public buildings for a term of years.—Garrison v. Chicago, Case No. 5,255.

If the other contracting party has gone to great expense in pursuance of such a contract, a strong equity may arise in his favor.—Garrison v. Chicago, Case No. 5,255.

The city of Boston *held* not to have authority to contract to pay expenses of having previously enlisted men credited upon the city's quota.—Burrill v. Boston, Case No. 2,198.

Municipal corporations with power to make contracts, and to sue and be sued in respect thereto, may, in the absence of special legislative restriction, compromise a disputed claim, and the settlement is binding on the municipality and its taxpayers unless it can be impeached for fraud.—Warren v. St. Paul, Case No. 17,199.

A taxpayer cannot overhaul or question the settlement, fairly made by a municipal corporation, of a disputed claim arising under a contract not ultra vires.—Warren v. St. Paul, Case No. 17,199.

Impairment of obligations of contracts, see "Constitutional Law," § 7.

§ 11. Municipal expenses.

As to the division of expenses and charges between the city and county of Washington.—Levy Court of Washington v. Washington, Case No. 8,306.

§ 12. Statutory liabilities.

Statutory authority to blow up buildings to prevent the spread of fire, when consented to by certain officers, does not render the city liable for buildings blown up without such authority.—Bowditch v. Boston, Case No. 1,718.

The liability of a city for buildings destroyed to stay the progress of a fire is wholly statutory, and plaintiff must bring his case strictly within the statute to sustain a recovery.—Bowditch v. Boston, Case No. 1,719.

What is essential under Act Md. 1835, c. 137, to recover against a city for the destruction of property in a riot. Pleadings and proof.—Duffy v. Baltimore, Case No. 4,118.

§ 13. Estoppel.

A municipal corporation may be estopped by its own act, as well as a private citizen.—Schenck v. Marshall County, Case No. 12,449.

IV. PUBLIC IMPROVEMENT.

Dedication of streets and public squares, see "Dedication," § 3.

§ 14. Power to make improvements.

A municipal corporation has no authority to take upon itself the burden of repairing a road or turnpike in which the public as well as the corporation are interested, when the same is outside the limits of said corporation.—Corporation of Georgetown v. United States, Case No. 18,281.

Construction of Act May 7, 1822, authorizing the corporation of Washington to drain the low grounds on or near the public reservations, etc.—Van Ness v. United States, Case No. 16,868.

The power of grading and regrading the streets of Washington, D. C., is a continuing power.—Smoot v. Washington, Case No. 13,133a.

Paving streets in Alexandria, Va.—Alexandria v. Mandeville, Case No. 184.

§ 15. Preliminary proceedings.

Proceedings on an inquisition under Act March 3, 1805, in relation to opening, extending, and regulating streets in Washington county, D. C.—Wright v. Georgetown, Case No. 18,080.

§ 16. Contracts.

Power to grade streets, etc., necessarily implies power to make contracts respecting the same in regard to the work to be done and the compensation to be paid.—Sturtevants v. Alton, Case No. 13,580.

A notice to abutting owners, to construct sidewalks in front of their lots, is a condition precedent to the right to contract for such construction under an ordinance authorizing such a contract, where the owners, after notice, have failed to do the work.—Hitchcock v. Galveston, Case No. 6,534.

An advertisement for bids, directed by the ordinance, authorizing a contract for street improvement, *held* a condition precedent to the making of a valid contract.—Hitchcock v. Galveston, Case No. 6,534.

The fact that the contract did not conform to the advertisement for bids did not make it void, provided the contract was within the scope of the ordinance which authorized it.—Hitchcock v. Galveston, Case No. 6,534.

The fact that there were no specifications will not invalidate the contract for uncertainty, where there was a well-known process of doing the work.—Hitchcock v. Galveston, Case No. 6,534.

A contract for sidewalk improvement *held* not invalidated by the fact that there were no specifications on file at any time as stated in the advertisement for bids for the work.—Hitchcock v. Galveston, Case No. 6,534.

A contract for filling and grading sidewalks is not void because at the date of the contract no grade for the sidewalks was established.—Hitchcock v. Galveston, Case No. 6,534.

The court may inquire into an ordinance providing for contracting with a railroad company for the erection of public buildings to determine whether its real object is to aid such company.—Coulson v. Portland, Case No. 3,275.

An appropriation to construct a public building which must cost three times the sum appropriated does not impose a limitation as to the expenditures.—Cook v. Hamilton County Com'rs, Case No. 3,157.

A contract to construct a public building on a lot authorized by law, but which the contractors know is not adequate for such purpose, may be validated by a subsequent legislative act authorizing the building to be placed on another lot.—Cook v. Hamilton County Com'rs, Cases Nos. 3,157, 3,158.

Contract for laying pavements construed, and *held* that the obtaining of the consent of the property holders was a condition precedent.—Hiscock v. Jaycox, Case No. 6,531.

A contract for the construction of county buildings *held* to be valid, under 49 Ohio Laws, 130.—Cook v. Hamilton County Com'rs, Case No. 3,158.

When contracts have been made, acts done, and labor performed pursuant to a construction of a city charter, acquiesced in by all the citizens, that construction will be sustained, if justified by any possible reading of the statutes.—Memphis v. Brown, Case No. 9,415.

The fact that a contract has been vacated, and a new one adopted in its place, is a good defense to an action on the original contract.—Hitchcock v. Galveston, Case No. 6,534.

The city cannot avoid a contract for street improvement because it imposes a more rigid condition on the contractor than authorized by the ordinance under which it was made.—Hitchcock v. Galveston, Case No. 6,534.

Where a contract is established against all charges of fraud, etc., the profits lost by its breach may be recovered, though they are unreasonable.—Hitchcock v. Galveston, Case No. 6,534.

Where contractors for a public building are dismissed without cause before the work is completed, they are entitled, in an action for damages, to the value of the work done and materials furnished and the profits which would have accrued on the entire contract.—Cook v. Hamilton County Com'rs, Case No. 3,158.

§ 17. Damages.

Municipal corporation may change the grade of the street without becoming liable to the adjoining landowners for the consequential damage caused to them in adopting their land to the grade, and protecting it.—Cheever v. Shedd, Case No. 2,634.

A municipal corporation, in opening a street, does not incur any liability for consequential damages necessarily done to the land adjoining that taken, where reasonable care was exercised.—Cheever v. Shedd, Case No. 2,634.

Where a street of proper width has been duly laid out, and the damages assessed include remuneration for the land taken, for the deprivation of any right or privilege attached to it, and for the damages done to the land adjoining that taken, the owner is not entitled to further compensation because the sides of the street were cut down perpendicularly, whereby the adjoining land was caused to cave into the street.—Cheever v. Shedd, Case No. 2,634.

The corporation of Washington, D. C., has power to regrade the streets under its charter without making compensation for individual injuries.—Smith v. Washington, Case No. 13,123b.

§ 18. Assessments for benefits.

On motion for judgment for assessment for paving, it is no defense that the paving was badly done.—Alexandria v. Mandeville, Case No. 184.

In an action against a city to set aside assessments for improvements as fraudulent, the burden of proof is on complainant to show that he and not the city was defrauded.—Lawrence v. New York, Case No. 8,139a.

V. POLICE POWER AND REGULATIONS.

Harbor regulations, see "Admiralty," § 99; "Collision," §§ 3, 60.
License to vessels, see "Commerce," § 3.
Rapid driving in city streets, see "Breach of the Peace."
Regulations as to party walls, see "Party Walls," § 1.
—— of sale of intoxicating liquors, see "Intoxicating Liquors."

§ 19. Extent and exercise of power.

Municipal ordinances in collision with an act of congress are null and void.—United States v. Hart, Case No. 15,316.

Charter authority to make by-laws for the suppression of vice and immorality, and to do all things necessary for the well-being and good police of the town, carries no power to provide for punishing crimes punishable by the general laws.—Ex parte Smith, Case No. 12,967a.

Markets are places for the sale of perishable comestibles for daily consumption, and which, by their very nature, require sanitary regulations, and thus fall within the police power.—New Orleans v. Morris, Case No. 10,182.

An ordinance of the city and county of San Francisco, requiring that prisoners shall have their hair clipped immediately upon arrival at the jail, *held* invalid, and no justification to the sheriff acting under it.—Ho Ah Kow v. Nunan, Case No. 6,546.

Under power to levy a license upon trades, professions, and callings, the city may levy a tax upon foreign corporations double that levied upon domestic corporations.—Insurance Co. v. New Orleans, Case No. 7,052.

A by-law prohibiting the keeping of a slaughter house within the limits of a town will apply to a subsequent addition to the town.—Virginia v. Smith, Case No. 16,967.

An ordinance against the unnecessary shooting of firearms within the limits of the city is within the power to prevent and remove nuisances, and to provide for the prevention of fires.—Washington v. Eaton, Case No. 17,228.

The corporation of Washington, under its authority to prevent nuisances, may prohibit the keeping of a dog in the city without payment of a license fee.—Washington v. Lynch, Case No. 17,231.

Under the power to prevent nuisances, and to superintend the health of a city, it has the right to prohibit the erection and use of brick kilns without a license.—Ward v. Washington, Case No. 17,163.

The corporation of Washington, under its charter, has power to prohibit ordinary keepers to sell spirituous liquors to free colored persons.—Washington v. Lasky, Case No. 17,230.

The corporation of Washington has power to prohibit the granting of tavern licenses to colored persons.—Johnson v. Washington, Case No. 7,420.

Under the power to "regulate ordinaries, taverns," etc., *held*, that the corporation could not prohibit the sale of liquors to guests at the bar of a tavern, or at their meals.—Werner v. Washington, Case No. 17,416a.

The corporation of Washington, D. C., has the power to fix a prohibitory license tax on the lottery business.—France v. Washington, Case No. 5,028.

The corporation of Washington has power to pass a by-law to prevent free colored persons from going at large later than 10 p. m. without a pass.—Nichols v. Burch, Case No. 10,240; Jennings v. Washington, Id. 7,284.

The corporation of Washington has power to designate the sites where fish may be cleaned and packed, and may purchase sites for that purpose and prohibit the use of any others.—Lambell v. Washington, Case No. 8,025.

A keeper of a wood yard in Washington is a retailer, within the meaning of that clause in the charter which authorizes the corporation "to provide for licensing, taxing, and regulating auctions, retailers, ordinaries, and taverns, hackney carriages."—Washington v. Casanave, Case No. 17,225.

The corporation of Washington, D. C., has no right to require a livery-stable keeper to take out a license.—Washington v. Barber, Case No. 17,224.

The corporation of Washington had authority, under the charter of 1802 (section 7) to pass a by-law to regulate and license hackney coaches.—Washington v. Wheaton, Case No. 17,239.

The corporation of Washington, D. C., has authority to prohibit gaming.—Hall v. Washington, Case No. 5,953.

The city of Washington has no power to prohibit free colored persons from selling perfumery.—Carey v. Washington, Case No. 2,404.

The common council of Alexandria has no authority to make by-laws operating beyond the limits of the corporation.—Ex parte Deane, Case No. 3,712.

The municipality of Alexandria, D. C., has power to prohibit the keeping of gaming tables under penalties to be recovered by warrant to be levied on the offender's personal property, though he be also liable to prosecution under the state law.—McLaughlin v. Stephens, Case No. 8,874.

A by-law of Alexandria, D. C., requiring the master to pay a poll tax for his journeyman, *held* not repugnant to the general law of the land, and authorized by the charter.—Morgan v. Rowan, Case No. 9,807.

§ 20. Violations of regulations.

Burning bricks in a clamp is not a violation of a by-law, making it penal to burn bricks in a kiln.—Washington v. Wheat, Case No. 17,238.

In the case of adjoining corporations, a hack owner of one place need not obtain a license for driving within the limits of the other, where he charges nothing for the service beyond the line of his corporation.—Lenox v. Georgetown, Case No. 8,245.

What constitutes buying up "any provision or article of food coming to market."—Botelor v. Washington, Case No. 1,685.

What constitutes "provision or article of food."—Botelor v. Washington, Case No. 1,685.

What constitutes "coming to market."—Botelor v. Washington, Case No. 1,685.

§ 21. Enforcement of regulations.

Equity will enjoin a municipal corporation from enforcing the penalties of an illegal by-law to the irreparable injury of the complainant.—Lambell v. Washington, Case No. 8,025.

The corporation of Alexandria cannot enforce its by-laws by corporal punishments.—Ex parte Deane, Case No. 3,712.

Indictment will not lie for forestalling the Georgetown market contrary to the by-law.—United States v. Kennedy, Case No. 15,523.

No information or indictment will lie upon a by-law of the corporation of Alexandria.—Virginia v. Howard, Case No. 16,963.

An information on a by-law may be amended by stating that the penalty accrued to the town instead of the commonwealth.—Virginia v. Smith, Case No. 16,965.

A warrant to recover the penalty of a by-law must name the corporate plaintiff, and describe the offense with reasonable certainty.—Barney v. Washington City, Case No. 1,033.

A warrant for the violation of a by-law and the judgment thereon should specify the by-law and the manner of violating it.—Boothe v. Georgetown, Case No. 1,651.

A warrant charging the sale of liquor without a license "during the last or present month" will not support a conviction.—Delany v. Washington, Case No. 3,755.

In a justice's warrant for the penalty of a by-law, all such defects will be disregarded as would be disregarded after verdict in debt or information upon a penal statute.—McGunnigle v. Washington, Case No. 8,818.

A warrant is too vague and uncertain which charges that the defendant "did, on or about the 20th of July inst., own, harbor, or keep a female of the dog kind in Washington city, in the county aforesaid, without having a license therefor, contrary to the act or acts of the mayor, etc., on that subject made and provided."—Washington v. Lynch, Case No. 17,231.

Failure of mayor or register of Washington, D. C., to publish monthly notice of price of flour, *held* a good defense to suit for penalty for selling short weight bread.—Friend v. Washington, Case No. 5,121.

An alderman of Washington, D. C., is not competent to try a person for a violation of a by-law of the corporation.—Hall v. Washington, Case No. 5,953.

Judgment for penalty of a by-law will be reversed on appeal where the warrant does not set forth the offense with sufficient certainty.—Delany v. Washington, Case No. 3,755.

The judgment will be arrested where an information upon a by-law states that the penalty accrued to the commonwealth, when, by charter, it accrued to the town.—Virginia v. Hooff, Case No. 16,962.

Commitment for failure to pay fines in Washington, D. C.—Ex parte Williams, Case No. 17,699.

No penalty was prescribed by the by-law of July 19, 1804, against hawkers and peddlers, for not taking out a license.—Washington v. Townsend, Case No. 17,234.

Fines, penalties, and forfeitures, under by-laws of Washington, D. C., and the jurisdiction and procedure for collecting and enforcing the same.—Ex parte Reed, Case No. 11,634.

Levy and collection of fines, and the powers and duties of the district attorney and the marshal in relation thereto, in the District of Columbia.—Levy Court of Washington County v. Ringgold, Case No. 8,305.

VI. USE AND REGULATION OF PUBLIC PLACES, STREETS, ETC.

Control and regulation of wharves, see "Wharves," § 1.
Regulations as to railroad crossings, see "Railroads," §§ 67, 71.
Street railroads, see "Street Railroads."

§ 22. Streets.

A city has the right to enter upon a street or tunnel under it or to use the water in front of plaintiff's lot for the construction of public improvements, being liable in such case only for negligence.—Northern Transp. Co. v. Chicago, Case No. 10,324.

Under statutes prohibiting the construction of railroads in city streets without the assent of the corporate authorities, the city may prescribe conditions under which assent will be given.—Pacific R. Co. v. Leavenworth, Case No. 10,649.

Where the conditions that the company shall build a depot in a certain place, and grade the streets and keep them in repair, are not performed, *held*, that the city might remove the tracks.—Pacific R. Co. v. Leavenworth, Case No. 10,649.

In the case of a highway adjoining a navigable stream, the right of passage from one to the other must be free to all.—Russel v. The Empire State, Case No. 12,145.

Owner of lots in Keokuk, fronting on Water street, owns the fee in the street to the river, and the portions reclaimed from the river, subject to the public easement.—Barney v. Keokuk, Case No. 1,032.

Right to lay railroad tracks and build depot or pier buildings in city (Keokuk) streets without consent of abutting owner.—Barney v. Keokuk, Case No. 1,032.

§ 23. Railroad bridges.

The mere erection of a railroad bridge in a particular location in a town, after a controversy with the inhabitants, does not amount to a perpetual contract, precluding the company from changing the location of the bridge.—Milnor v. New Jersey R. Co., Case No. 9,620.

VII. TORTS.

§ 24. Acts or omissions of officers.

To render a corporation liable for negligence of its servant in doing an act, it is not necessary that the act should have been ordered in writing or by a by-law.—Pritchard v. Georgetown, Case No. 11,437.

Authority under seal or under order entered on the corporate books to improve a street is not necessary to charge the corporation for an injury done by its agent in prosecuting the work.—Hooe v. Alexandria, Case No. 6,666.

A city may be liable for the wrongful acts of its officers where, if not wholly ultra vires, they were expressly authorized by the governing body, or were within the scope of their duties, and subsequently ratified.—Bowditch v. Boston, Case No. 1,719.

A municipal corporation is not liable for the unlawful acts of its officers, committed ultra vires, and not colore officii, in the known and willful violation of law.—Hart v. Bridgeport, Case No. 6,149.

A municipal corporation is not liable for the neglect of its mayor and police officers to protect private property against a known violation of

law, though they have sufficient power for that purpose.—Hart v. Bridgeport, Case No. 6,149.

The city is not liable for the willful act of its agent in raising the street grade above that fixed by a previous by-law; otherwise where it is done ignorantly or negligently.—Pritchard v. Georgetown, Case No. 11,437.

Where a vessel is detained an unreasonable length of time by the board of health of a city, acting as quarantine officers, before permitting her to land, the city is liable in damages.—Sumner v. Philadelphia, Case No. 13,611.

§ 25. Defects or obstructions in streets or other public ways.

A municipal corporation is liable in damages for the defective condition of its streets to an individual suffering injury therefrom.—Ericsson v. Manchester, Case No. 4,511.

This liability is not affected by the fact that the street is in the proprietorship of a private corporation.—Ericsson v. Manchester, Case No. 4,511.

The omission of a city to put a street in condition to permit of its use for public travel is not such negligence as will support an action for personal injuries.—Hughes v. Baltimore, Case No. 6,844.

The existence of a step in a sidewalk is not such a defect as to render the city liable for accidents to passengers stepping from one elevation to another.—Clark v. Chicago, Case No. 2,817.

A city is not bound, under all circumstances, to keep the sidewalks free from ice.—Clark v. Chicago, Case No. 2,817.

The city is liable for negligence in failing to require the owner of property facing on a narrow court to place guards around excavations made for admitting light at basement windows.—Lombard v. Chicago, Case No. 8,470.

A traveler in a narrow alley must exercise due care, considering the character of the place and the purpose for which it was constructed.—Lombard v. Chicago, Case No. 8,470.

The failure of a pedestrian to use reasonable care and caution in crossing a swing bridge will prevent recovery for his death, even though the city was negligent.—Brady v. Chicago, Case No. 1,796.

A city which has assumed to remove obstructions from a river, which it is under no obligations to remove, is not liable for subsequent damages caused by such obstructions, where it abandons the work without having changed the status of the obstructions.—Goodrich v. Chicago, Case No. 5,542.

VIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

Bonds, see, also, "Bonds," §§ 12–14.
Indorsement of bonds, see "Railroads," § 32.

§ 26. Limitation of amount of indebtedness.

An ordinance assuming a liability of $350,000, to be paid in semiannual installments in the course of 20 years, is in violation of a charter prohibiting the city from contracting an indebtedness exceeding $50,000.—Coulson v. Portland, Case No. 3,275.

Interest coupons attached to bonds do not form part of the principal debt, so as to invalidate the bonds as issued in violation of a constitutional provision prohibiting an indebtedness exceeding 5 per cent. of the valuation of taxable property.—Durant v. Iowa County, Case No. 4,189.

§ 27. Aid to railroads.

A municipal corporation cannot subscribe to the capital stock of a railroad company, and issue its bonds in payment, without authority expressly conferred by law.—Lewis v. Clarendon, Case No. 8,320; Chisholm v. Montgomery, Id. 2,686.

In the absence of constitutional restrictions, a legislature may authorize a municipal corporation to aid in the building of a railroad in which the inhabitants are interested, and such authority may be given with or without the assent of the qualified electors of the municipality.—Woodward v. Calhoun County, Case No. 18,002.

A constitutional provision requiring a uniform rate of taxation does not prohibit municipal aid to railroads.—Talcott v. Pine Grove, Case No. 13,735.

A constitutional provision that the state shall not be a party to or interested in any work of internal improvement does not prohibit the legislature from authorizing municipal aid to railroads.—Talcott v. Pine Grove, Case No. 13,735.

An election which results unfavorably to the subscription for stock in a railway company does not exhaust the power of the county board to subscribe, but the question may again be put to vote.—Woodward v. Calhoun County, Case No. 18,002.

Authority given "to any incorporated town or city" in a county to subscribe to capital stock is not limited to towns and cities incorporated at the date of the passage of the act.—Lewis v. Clarendon, Case No. 8,320.

Const. Mo. 1865, art. 11, § 14, as to loan of credit by municipalities to railway corporations, construed.—Jarrott v. Moberly, Case No. 7,223.

§ 28. Warrants.

Municipal warrants have not the quality of negotiable paper, and are subject, in the hands of a bona fide transferee, to all equities existing between the original parties.—School Dist. Tp. v. Lombard, Case No. 12,478.

A warrant issued for more than the sum actually due, so as to make its market value the amount of the debt, is void as to the excess.—Shirk v. Pulaski County, Case No. 12,794.

§ 29. Bonds and other securities—Power to issue.

The power of a municipal corporation to borrow money and to issue negotiable securities therefor depends upon its charter, and the legislation applicable thereto.—Gause v. Clarksville, Case No. 5,276.

A municipal corporation cannot issue bonds for purposes not fairly coming within the ends for which such corporations are created without legislative grant of power either in express terms or by necessary implication.—Lewis v. Shreveport, Case No. 8,331.

A municipal corporation has not inherent power to issue negotiable coupon bonds, which shall circulate as commercial paper, and be unimpeachable in the hands of a bona fide holder.—Hitchcock v. Galveston, Case No. 6,532.

The power to issue commercial securities, the consideration of which cannot be inquired into in the hands of a bona fide holder, is not inherent in municipal corporations, nor can it be implied from the ordinary police powers given to them.—Chisholm v. Montgomery, Case No. 2,686.

A municipal corporation has no implied power to issue negotiable bonds in payment of a debt which it is authorized to contract.—Green v. Dyersburg, Case No. 5,756.

In the ordinary course of its government, and in the conduct of improvements which it is the city's duty to make, it may execute promissory notes, bonds, and guaranties necessary and convenient for the purpose.—Memphis v. Brown, Case No. 9,415.

An act authorizing a city to issue its bonds in aid of railroad companies incorporated and or-

ganized does not extend to companies afterwards incorporated.—Smith v. Milwaukee & S. R. Co., Case No. 13,082.

A statute authorizing a city to subscribe to railroad stock "as fully as any individual" gives no authority to issue bonds in payment of a subscription.—Oelrich v. Pittsburgh, Case No. 10,442.

A county may issue coupon bonds in payment of subscription to railroad stock under the authority to make payment in such manner as may be agreed upon.—Adams v. Lawrence County, Case No. 59.

Legislative authority to subscribe to railroad stock, and borrow money therefor, gives power to issue bonds to pay the subscription.—Milner v. Pensacola, Case No. 9,619.

The issue of bonds to pay for land to be given to a foreign railroad corporation on which to establish and maintain its depot and machine shops is not authorized under a charter granting the power to provide for the construction "of a city hall, markets and other structures of public necessity and utility."—Lewis v. Shreveport, Case No. 8,331.

Municipal bonds issued under legislative authority to aid a railroad company in erecting machine shops *held* issued for a public purpose.—Jarrott v. Moberly, Case No. 7,223.

Bonds to borrow money to erect and repair wharves and to open streets, issued under the general grants of municipal power in a charter, *held* not binding.—Gause v. Clarksville, Case No. 5,276.

The grant of special powers for the collection of the cost of sidewalk improvements, and to issue bonds for certain other purposes, *held* an exclusion of the power to issue negotiable coupon bonds to pay for sidewalk improvements.—Hitchcock v. Galveston, Case No. 6,532.

A charter authorizing counties intersected by the road, and counties intersected by any other road "with which this road may be joined, connected, or intersected," to aid in its construction, extends no such authority to counties intersected by a road passing through a terminus of the road in question, with which no arrangement for any connection or consolidation was ever made.—Kennicott v. Wayne County, Case No. 7,711.

A clause in a state constitution requiring the assent of two-thirds of the qualified voters to the giving of aid to railroad companies does not apply where a debt has already been created for a subscription, and the legislature may thereafter authorize the issue of bonds to pay therefor, without submitting the question to the people.—Woodward v. Calhoun County, Case No. 18,002.

Where a city was authorized to borrow a specified sum, and issue its bonds therefor, and the money was borrowed and the bonds issued, its power was exhausted.—Chisholm v. Montgomery, Case No. 2,686.

A statute authorizing the issue of bonds by a city for the benefit of a private enterprise is void.—Citizens' Sav. Ass'n v. Topeka, Case No. 2,734.

Const. Tenn. art. 2, § 29, and Act Tenn. Jan. 23, 1871, c. 50, do not authorize the issue of municipal bonds for stock subscriptions.—Green v. Dyersburg, Case No. 5,756.

The town of Southfield, Richmond county, N. Y., had no power to issue bonds under Act May 11, 1869, after passage of Act May 5, 1870.—Bull v. Southfield, Case No. 2,120.

In an action on negotiable municipal bonds the federal court refused to declare the state statute under which they were issued to be in conflict with the state constitution.—Gilchrist v. Little Rock, Case No. 5,421.

§ 30. —— Issue and validity.

Under the authority to issue bonds in payment of a subscription to be made payable to "the president and directors of the railroad company, and their successors and assigns," bonds made payable to "the railroad company or bearer" are valid.—Woodward v. Calhoun County, Case No. 18,002.

Under authority to issue bonds to a certain company, *held*, that bonds might be issued to a consolidated company, of which the original company formed a part, where the facts were recited in the bond.—Thomas v. Scotland County, Case No. 13,909.

County bonds issued to a consolidated company, upon a subscription to one of the roads previous to the consolidation, are illegal and invalid, though issued to the original company and its charter permits consolidation.—Nugent v. Putnam County, Case No. 10,377.

Bonds issued for stock in a consolidated company under a vote for subscription for stock in a constituent company, where the facts were recited therein, *held* void in the hands of a bona fide holder for value.—Harshman v. Bates County, Case No. 6,148.

It is no defense to a suit on coupons to county railroad aid bonds that, intermediate the vote for the bonds and their actual delivery, the road had consolidated with another, and that such consolidation was unlawful.—Warrener v. Kankakee County, Case No. 17,205.

Town *held* liable on aid bonds issued to new corporation in which old corporation was merged under general law after subscription to stock.—Gray v. York, Case No. 5,731.

Noncompliance with an agreement as to the use of the proceeds of municipal aid bonds will not affect the rights of a holder, where the bonds were regularly executed.—Rockmulh v. Pittsburgh, Case No. 11,982.

The fact that the bonds were given in exchange for a single bond first issued in payment of the whole subscription is not a valid objection thereto.—Rockmulh v. Pittsburgh, Case No. 11,982.

A bona fide holder of negotiable municipal bonds issued under express and unrestricted authority may recover thereon, although made payable at an earlier date than directed in the ordinance relating to the mode of executing them.—Gilchrist v. Little Rock, Case No. 5,421.

Where county bonds are properly signed and sealed by the officers of the county, it is no defense to an action on the coupons that they are signed by only one of the county officers.—Thayer v. Montgomery County, Case No. 13,870.

Bonds under the seal, and signed by the proper officers, of the county, reciting that they are issued under a vote of the people, are presumptively valid.—Carpenter v. Buena Vista County, Case No. 2,429.

Where a statute gives authority to make bonds transferable as shall be directed by the city, the issuance of bonds raises a presumption that their form was duly authorized.—Oelrich v. Pittsburgh, Case No. 10,442.

Bonds made payable out of the state, without express authority of law, are not for that reason invalid, but such provision is not enforceable.—Mygatt v. Green Bay, Case No. 9,998.

A railroad company, or its assignee with notice, cannot enforce bonds issued to pay a subscription to stock, where a condition under which the city was authorized by statute to issue them has not been complied with.—Foote v. Mt. Pleasant, Case No. 4,914.

Conditions as to the location of a depot near the county seat, and that a bridge shall be so constructed that it may be used as a free wagon bridge, will not invalidate the vote of a county

on the issuing of railroad aid bonds.—Union Pac. R. Co. v. Merrick County, Case No. 14,383.

Holders of legal bonds received from a city in exchange for previous illegal obligations given for bona fide debts may recover thereon, if they had no part in the illegal issue, though they had notice of all the facts.—Merchants' Nat. Bank v. Little Rock, Case No. 9,445.

The want of an existing location of the route *held* no defense to a suit on town bonds authorized to be issued by any town "situate along the route" of a certain road to be built.—Smith v. Yates, Case No. 13,131.

Railway aid bonds bearing 10 per cent. interest, issued under authority given to issue bonds bearing 6 per cent. interest, are valid obligations for the principal and 6 per cent. interest.—Lewis v. Clarendon, Case No. 8,320.

A requirement to pay for subscription for stock in "not exceeding" six annual installments, with authority to issue "short bonds" bearing 6 per cent. interest, *held* imperative, and 10 years 7 per cent. bonds are invalid upon their face.—Green v. Dyersburg, Case No. 5,756.

An act authorizing a city to issue bonds payable in 20 years gives authority to make them payable 20 years from the date of the act, though this is less than 20 years from the date of the bonds.—Luling v. Racine, Case No. 8,603.

The substitution of municipal subscriptions for those of private citizens does not invalidate the bonds issued therefor, where there was no deceit or misconception of the facts.—Davis v. Kendallville, Case No. 3,638.

Const. Mo. art. 11, § 14, requiring a two-thirds vote to authorize subscription to railroad stock, *held* not to apply to railroad charters existing at its adoption.—Huidekoper v. Dallas County, Case No. 6,850.

Act Mo. March 18, 1870, authorizing the issue of "machine shop bonds" on a majority vote, *held* in violation of the constitutional provision requiring the sanction of a two-thirds vote.—Jarrott v. Moberly, Case No. 7,223.

Town bonds and coupons not sealed, issued under a law providing that they should be under seal, though their wording showed they were intended to be sealed, are void.—Avery v. Springport, Case No. 676.

A resolution of a common council declaring the subscription, and approved by the mayor, is sufficient to show a subscription by the city.—Davis v. Kendallville, Case No. 3,638.

Bonds issued by a town to aid the Illinois Grand Trunk Railway, under Act Ill. March 25, 1869, *held* valid, in the hands of innocent purchasers, though issued by the supervisor and clerk, and though the election was held by the ordinary judges of election, instead of a moderator.—Mercy v. Ohio, Case No. 9,457.

Mere irregularities in form, in respect to an election on the question of subscribing to aid a railway, do not affect the validity of the bonds issued, in the hands of innocent purchasers.—Mercy v. Ohio, Case No. 9,457.

The submission to a vote of the people of the decision of the grand jury in favor of a subscription by the county to railroad stock, authorized to be made upon the recommendation of a grand jury, will not affect the validity of the subscription.—Howard v. Crawford County, Case No. 6,757.

The omission of a condition in county aid bonds, where the liability would not be changed if it had been inserted, will not prevent a recovery thereon by a contractor who received them in payment for work done.—Howard v. Crawford County, Case No. 6,757.

Bonds of a county in Missouri not within the limits of the original charter of the company *held* void in the hands of a bona fide holder, for want of legislative authority to issue them.—Sherrard v. Lafayette County, Case No. 12,771.

A law requiring county bonds to be certified and registered cannot be evaded by antedating bonds voted before but not issued until after its passage.—Anthony v. Jasper County, Case No. 488.

Construction of Acts Kan. 1866, 1867, and 1871, relating to the construction of bridges and the validity of bonds issued in payment thereof.—Coler v. Wyandot County, Case No. 2,987.

After proof of fraud in the issue of negotiable railway aid bonds, plaintiff must show that he is a bona fide holder for a valuable consideration.—Curtis v. Butler County, Case No. 3,500.

A provision prohibiting the obligee putting bonds in circulation at less than par is not violated by the obligee receiving them at less than par after they were put out at par.—Curtis v. Butler County, Case No. 3,500.

Railroad aid bonds *held* validated by Act Kan. Feb. 25, 1868, as to irregularities in the order of submission, and the location of the line of the road.—Thayer v. Johnson County, Case No. 13,869.

In the case of bonds issued in pursuance of the authority of an ambiguously worded statute, the court will adopt a liberal construction in order to sustain them, though it would have prevented their issue had application been made therefor in season.—Woodhull v. Beaver County, Case No. 17,974.

A certiorari to review the decision of a county judge, that railroad aid bonds be issued, suspends the operation of his judgment, and the railroad company acquires no title to the bonds issued thereunder enforceable against the town on reversal of the judgment.—Bailey v. Lansing, Case No. 738; Stewart v. Lansing, Id. 13,432.

It would seem that when municipal railway aid bonds are delivered to a third person, to be delivered to the company on performance of conditions, the municipality should bear the loss from any premature or irregular delivery thereof by him.—Mercy v. Ohio, Case No. 9,457.

§ 31. —— Ratification, and estoppel to deny validity.

The legislature has power to validate municipal aid bonds defectively issued.—Cooper v. Thompson, Case No. 3,202.

A statute legalizing municipal aid bonds *held* to validate all bonds originally exchanged at par for stock, unless the subsequent purchaser had notice of illegality of their issue, and did not part with value.—Cooper v. Thompson, Case No. 3,202.

Act Kan. March 2, 1872, providing for the registration of municipal and county bonds, is not a curative act, in the sense that it takes away any valid defense which the city or county would otherwise have to bonds theretofore issued.—January v. Johnson County, Case No. 7,218.

Act Kan. March 9, 1874, was intended to change the mode of levying and collecting taxes to pay bonds, and not to validate or make binding bonds which would otherwise be void.—January v. Johnson County, Case No. 7,219.

An issue of bonds without authority of law cannot be ratified without legislative sanction, nor will any acts of its officers or inhabitants estop the corporation from denying its authority.—Lewis v. Shreveport, Case No. 8,331.

A town, having received and retained stock which was issued in exchange for its bonds, cannot raise the objection that the bonds and coupons were not made payable at the times directed by the statute.—Munson v. Lyons, Case No. 9,935.

A town, having as a corporation voted and issued bonds, is estopped as against bona fide holder to deny incorporation.—Aller v. Cameron, Case No. 243.

In a suit upon a municipal bond issued to a consolidated company in payment of a subscription to stock, the city is estopped to deny the corporate existence of the company or the validity of the proceedings for the consolidation.—Lewis v. Clarendon, Case No. 8,320.

Payment of interest on railway aid bonds for several years, and the election of commissioners to represent the stock received therefor, while the bonds are passing as negotiable paper, is an affirmance of the bonds in favor of a bona fide holder.—Luling v. Racine, Case No. 8,603.

The fact that notice of the election, at which the authority to issue the railroad aid bonds was given, was issued by the wrong officer, will not invalidate the bonds in the hands of a bona fide holder, where the county has paid interest thereon for nine years.—Schenck v. Marshall County, Case No. 12,449.

Plea of non est factum not allowed as to engraved bonds of the county, substituted for other bonds of like date, etc., where the county paid interest, without objecting, for two years.—McKee v. Vernon County, Case No. 8,851.

A town is not estopped, by having paid interest on its bonds for 10 years, from denying their validity, even in the hands of innocent purchasers, where there was no law authorizing their issue.—Leslie v. Urbana, Case No. 8,276.

Where a city, without authority, subscribed for stock and issued its bonds, it was not estopped by the act of its officers, or any matter appearing on the face of its bonds, to deny their validity.—Chisholm v. Montgomery, Case No. 2,686.

§ 32. —— Transfers.

Under a statute providing that certificates or bonds issued for stock subscriptions shall be transferable only on the books of the city, interest coupons attached to the bonds are not transferable in any other manner.—Oelrich v. Pittsburgh, Case No. 10,442.

§ 33. —— Bona fide purchasers.

A railroad contractor, taking aid bonds from the company in good faith in payment for work, is a purchaser for value.—Foote v. Hancock, Case No. 4,911.

Holders of negotiable railroad aid bonds as collateral security for debts are bona fide holders for value.—Allen v. Dallas & W. R. Co., Case No. 221.

In an action by a bona fide holder on a municipal bond issued under authority of law, mere irregularity, or fraud or misconduct of the agents of the municipality, cannot be set up as a defense.—Ronede v. Jersey City, Case No. 12,031a.

Mere suspicion of title, or the knowledge of circumstances which would excite suspicion on the part of a prudent man, or gross negligence at the time of the transfer, will not defeat the purchaser's title as a bona fide holder.—Ronede v. Jersey City, Case No. 12,031a.

The fact that overdue and unpaid coupons were attached to the bond is not sufficient to put the purchaser on inquiry.—Ronede v. Jersey City, Case No. 12,031a.

The purchaser of negotiable bonds is not chargeable with notice of defenses thereto from the mere fact that some of the interest coupons attached were overdue at the time of the purchase.—Preble v. Portage County, Case No. 11,380.

The pendency of a suit to restrain the transfer of negotiable county bonds, and a decree in such suit that they be delivered up to be canceled, are inoperative as respects a bona fide holder for value.—Durant v. Iowa County, Case No. 4,189.

Otherwise as to one having actual knowledge of proceedings when he becomes the owner and holder.—Durant v. Iowa County, Case No. 4,189.

The pendency of certiorari proceedings to have set aside the bonding proceedings will not defeat the title of a bona fide purchaser for value before maturity, who had no notice thereof.—Phelps v. Lewiston, Case No. 11,076.

The right of a purchaser, for value, of coupons of municipal aid bonds, to be considered a holder in good faith, is not affected by knowledge that the town contests its liability.—Cooper v. Thompson, Case No. 3,202.

Bonds and the coupons attached, issued by counties, payable to bearer, possess all the qualities of commercial paper.—Durant v. Iowa County, Case No. 4,189.

A person who has succeeded to the title of a bona fide purchaser of the bonds, is entitled to stand on such title, though not a bona fide holder of them himself.—Foote v. Hancock, Case No. 4,911.

The purchaser from a railroad company of railroad aid bonds issued in fraud of the rights of the town must show that he purchased in good faith and for value.—Bailey v. Lansing, Case No. 738.

A county which, in disregard of the limitation upon the power given it by statute to issue bonds, issues them absolutely payable to bearer, is liable thereon to a bona fide holder for value, who bought them in the market in the course of trade.—Wood v. Allegheny County, Case No. 17,939.

A proviso that railroad aid bonds shall not be sold for less than par does not affect rights of bona fide purchasers at market value.—Adams v. Lawrence County, Case No. 59.

Municipal bonds issued under legislative authority to aid in the erection of a private manufactory are void in the hands of holders for value.—Commercial Nat. Bank v. Iola, Case No. 3,061.

Municipal bonds, though issued in violation of a condition that they should only be issued upon a certain amount of work being done, are enforceable in the hands of innocent purchasers. In re Bloomington, Case No. 1,561.

Noncompliance by the railroad company with the terms of an ordinance authorizing the execution and delivery of municipal bonds to it is no defense to a suit by a bona fide holder for value.—Keane v. Fort Scott, Case No. 7,631.

Neither is the fact that the questions submitted to the voters embraced two distinct propositions a good defense.—Keane v. Fort Scott, Case No. 7,631.

Bonds issued by a municipal corporation, contrary to the restrictions of its charter, are binding in the hands of a bona fide holder for value, and the holders of bonds regularly issued cannot assail their validity or claim priority of payment.—Ranger v. New Orleans, Case No. 11,564.

Where a city had authority to issue bonds, they are binding in the hands of bona fide purchasers, though the conditions precedent to their issue were not observed.—Sala v. New Orleans, Case No. 12,246.

County bonds sold on the faith of a decision of the state supreme court declaring them valid are not invalidated, in the hands of innocent purchasers, by the subsequent action of the court overruling such decision.—United States v. Lee County, Case No. 15,589.

A reversal on certiorari to review the judgment of the county court that railroad bonds

be issued cannot invalidate the title of a bona fide purchaser.—Bailey v. Lansing, Case No. 738.

Railroad aid bonds issued under Act Mo. Jan. 11, 1860, *held* valid in the hands of an innocent holder, although they were not sanctioned by popular vote, and the payee, at the time, was not a corporation de jure.—Darlington v. Laclede County, Case No. 3,577.

Where railroad aid bonds are sold by the railroad at less than par, in violation of the statute recited in the bonds, a subsequent bona fide purchaser can recover thereon only the amount at which the company sold them.—Curtis v. Butler County, Case No. 3,500.

§ 34. —— Effect of recitals.

Negotiable municipal bonds issued under a law authorizing their issue, which recite that the conditions required by law have been complied with, are unimpeachable in the hands of an innocent purchaser for value before maturity.—Woodward v. Calhoun County, Case No. 18,002; Pollard v. City of Pleasant Hill, Id. 11,253; Portsmouth Sav. Bank v. Yellow Head, Id. 11,296; Miller v. Berlin, Id. 9,562; Foote v. Hancock, Id. 4,911; Davis v. Kendallville, Id. 3,638.

Negotiable bonds reciting the authority under which they were issued to a railroad having power to receive them *held* valid in the hands of a bona fide holder for value without notice.—Jordan v. Cass County, Case No. 7,518.

A recital in a railroad aid bond that it was issued to pay for a subscription to a certain railroad will estop the county, as against a bona fide holder, to assert that the subscription was not made.—Westermann v. Cape Girardeau County, Case No. 17,432.

The same is true of a recital that the subscription was authorized by a two-thirds vote, as required by the constitution, and that the vote was duly taken.—Westermann v. Cape Girardeau County, Case No. 17,432.

The fact that the consolidation of a company to which bonds were voted with one to which they were issued was illegal is no defense to a suit by a bona fide holder for value, without notice, where they recite due and legal consideration.—Washburn v. Cass County, Case No. 17,213.

The fact that the bonds issued to a consolidated company upon a subscription to one of the roads previous to the consolidation recite that they are issued in pursuance of law will not make them valid.—Nugent v. Putnam County, Case No. 10,377.

Where municipal officers are impliedly invested with power to decide whether a condition precedent to the issue of bonds has been complied with, their recital of that fact in the bonds is conclusive against the municipality in favor of a bona fide purchaser.—Phelps v. Lewiston, Case No. 11,076.

A bona fide purchaser of county railway aid bonds which recite that they are issued under an order of the proper court, pursuant to legislative authority, is not affected with constructive notice of facts recited in such order contrary to the recitals of the bonds.—Nicolay v. St. Clair County, Case No. 10,257.

Irregularities in the election authorizing the issue of bonds is no defense against bona fide holders for value, without actual notice, where public officers are to decide whether the requisite sanction has been given, and the bonds recite it.—Huidekoper v. Buchanan County, Case No. 6,847.

The recitals in a municipal bond issued to aid a plank-road company bind the city, in an action by a bona fide holder.—Mygatt v. Green Bay, Case No. 9,998.

As against bona fide purchasers of railway aid bonds, which recite that they were issued in conformity with law, the city is estopped from showing that only a minority voted for the subscription, and that the question was not properly submitted.—Milner v. Pensacola, Case No. 9,619.

The purchaser of railroad aid bonds need not look behind their recitals, where the bonds, on their face, do not put him on inquiry.—Foote v. Hancock, Case No. 4,911.

In a suit on town bonds, *held*, that defendant could not show that the bonds were delivered before any seals were affixed, and with the dates and numbers in blank, and were sealed and filled out and negotiated before the fulfillment of the conditions under which they were delivered, where the bonds recited that they were issued under the hands and seals of the commissioners.—Phelps v. Yates, Case No. 11,082.

A bona fide holder of municipal bonds for value without notice is not affected by the omission of a special registration of voters where the bonds recite that they were duly authorized by a vote of the voters of the city.—Judson v. Plattsburg, Case No. 7,570.

Negotiable bonds, made under a legislative authority reciting that they are issued "for the purpose of aiding internal improvements in said township," *held* valid in the hands of a holder for value, though in fact issued to aid a private enterprise.—Guernsey v. Burlington, Case No. 5,855.

Negotiable bonds, issued without authority, *held* invalid in the hands of a bona fide purchaser for value, where the recitals were sufficient to put him on inquiry.—Hackett v. Ottawa, Case No. 5,889.

Recitals in the bonds will not affect one who purchased for value after a validating act.—Cooper v. Thompson, Case No. 3,202.

Where municipal bonds recite the act under which they were issued, purchasers are bound to inquire whether the provisions thereof were violated in their issue.—Curtis v. Butler County, Case No. 3,500.

Railroad aid bonds issued by the city of Jeffersonville, Ind., *held* invalid.—Bissell v. Jeffersonville, Case No. 1,449.

In a suit on county railway aid bonds, it is not necessary to show an actual subscription by the county in the manner described by the statute, or that a certificate of railroad stock was issued to the county. A recital in the bond that it issued in payment of the subscription raises a presumption that these things were done.—McCoy v. Washington County, Case No. 8,731.

§ 35. —— Priorities.

The mere fact that New Orleans consolidated bonds were older than bonds subsequently issued *held* to give them no priority over other bonds. Act La. Feb. 23, 1852.—Maenhaut v. New Orleans, Case No. 8,940.

§ 36. —— Remedies of taxpayers.

A municipal corporation will be enjoined from unlawfully issuing interest coupons, payable in installments, upon complaint of a single taxpayer, in order to prevent a multiplicity of suits.—Coulson v. Portland, Case No. 3,275.

The issue of negotiable bonds will be enjoined when the statute authorizing their issue only upon certain terms has not been complied with in matters of substance.—Union Pac. R. Co. v. Lincoln County, Case No. 14,380.

The issue of bonds running 20 years under a statute requiring them to be paid in 10 years will be enjoined.—Union Pac. R. Co. v. Lincoln County, Case No. 14,380.

The issue of bonds to a railroad company will not be restrained where the requirements of the statute authorizing the issue have been complied with.—Union Pac. R. Co. v. Merrick County, Case No. 14,383.

§ 37. —— Remedies of holders.

Where bonds of a city are issued without authority for money borrowed and actually received by the city, the remedy against the city is not by an action on the bonds, but to recover the money.—Gause v. Clarksville, Case No. 5,276.

A city, which has power to borrow money and has issued bonds therefor, which were void because antedated and unregistered, is liable to the purchaser of such bonds or his assignee, for money had and received, for the amount actually paid to the corporation for the bonds, with simple interest thereon.—Wood v. Louisiana, Case No. 17,948.

Bonds issued by a county on behalf of an unincorporated township voting the aid can only be enforced by mandamus to compel the levy and collection of the special tax provided by law, whether before or after judgment.—Jordan v. Cass County, Case No. 7,517.

A bill will not lie by the holder of bonds of an insolvent city for an injunction and receiver, on default in payment, as the holders have a remedy by mandamus to compel the levy of taxes to pay the bonds.—Goelet v. Elizabeth, Case No. 5,502.

Money collected as provided by law to pay interest on bonds is a trust fund for such purpose, and the city will be enjoined from using it for other purposes.—Maenhaut v. New Orleans, Case No. 8,939.

A city which has issued bonds in aid of a railroad company without authority of law cannot be required, at the suit of a judgment creditor of the company, to deliver up securities received as collateral to the company's bonds issued by it, until the city's rights are determined.—Smith v. Milwaukee & S. R. Co., Case No. 13,082.

Where railway aid bonds are issued under statutory authority, and a contract by the city to appropriate money for the interest thereon is ratified by the legislature, this makes it the duty of the city to levy a tax therefor.—Sibley v. Mobile, Case No. 12,829.

The holder of coupons of negotiable railroad aid bonds cannot recover thereon without proof of a compliance with the recited condition that the railroad shall be constructed in a certain manner.—Green v. Dyersburg, Case No. 5,756.

A person can recover on coupons on bonds bought from a bona fide purchaser although his sole purpose, in buying them, was to bring suit on them in the federal court.—Foote v. Hancock, Case No. 4,911.

In an action on negotiable coupons, cut from bonds of a public corporation, which has no general authority to make negotiable paper, special authority must be alleged.—Kennard v. Cass County, Case No. 7,697.

A declaration upon county bonds should show by averment, or by recital in the bonds made part thereof, that the bonds were issued for some authorized purpose or object.—Thayer v. Montgomery County, Case No. 13,870.

In an action on county bonds, a holder need not allege compliance with the conditions on which the issue was authorized.—Chicago, B. & Q. R. Co. v. Otoe County, Case No. 2,667.

In a suit on railroad aids bonds, defendant cannot impeach the order of the county judge reciting the proceedings under which the commissioners to issue the bonds were appointed.—Foote v. Hancock, Case No. 4,911.

Claimants presenting negotiable bonds to a master, pursuant to an order of the court, are presumed to be bona fide holders until evidence tending to negative that presumption is introduced.—Kennicott v. Wayne County, Case No. 7,710.

Under an order requiring claimants to prove their bonds before a master, presentation by an agent or attorney is sufficient, though the proofs were taken in another state, if no suspicion has been thrown upon the bona fides of the bonds.—Kennicott v. Wayne County, Case No. 7,710.

See, also, post, § 38; "Mandamus," § 4.

§ 38. Taxes, and application thereof.

A tax imposed upon every boat or vessel "which may land or anchor at or in front of any landing, wharf, or pier" within the city limits, is unconstitutional.—Northwestern Union Packet Co. v. St. Paul, Case No. 10,346.

An ordinance of a city imposing a tax nominally on all banks, but from payment of which the state banks had been held exempt, was invalid.—City Nat. Bank v. Paducah, Case No. 2,743.

The authority of a municipal corporation to incur an obligation carries with it, by necessary implication, the power and duty of providing by taxation for its payment.—United States v. Elizabeth, Case No. 15,041a; Ex parte Parsons, Case No. 10,774.

Authority to incur a debt does not carry with it the power to levy a tax to pay the debt, where other provision is expressly made for such payment.—United States v. New Orleans, Case No. 15,871.

An agreement to levy a special tax cannot be implied from an ordinance making it the duty of the city council "to provide means to meet the payment" of a designated debt when the same may become due.—United States v. Burlington, Case No. 14,687.

It is not competent for the legislature, after ratifying a contract by a city to appropriate sufficient money to pay interest on a certain issue of bonds, to direct that the entire taxing power of the city, as limited by the constitution, be exhausted to pay the holders of other bonds, who have no specific claim on the fund raised by taxation.—Sibley v. Mobile, Case No. 12,829.

Where there is a constitutional limitation of the power of taxation, the city must exhaust its power of taxation to pay interest on its bonds, if necessary, after first providing for current expenses.—Sibley v. Mobile, Case No. 12,829.

In such case all bondholders of the city are entitled to share pro rata in the general fund raised by taxation, after payment of current expenses.—Sibley v. Mobile, Case No. 12,829.

A tax levied and collected as required by law to pay interest on certain bonds cannot be diverted to other purposes.—Ranger v. New Orleans, Case No. 11,564.

An injunction to restrain a city from receiving city script in payment of arrears of taxes levied to pay interest on certain bonds will be denied where it appears that, unless such script is taken, the taxes cannot be collected at all.—Ranger v. New Orleans, Case No. 11,564.

A statute requiring the levy each year of a special tax sufficient to pay the annual interest on certain municipal bonds *held* to authorize and require the levy of a tax to pay interest after the maturity of the bonds as well as before.—Peterkin v. New Orleans, Case No. 11,026.

The taxes or public revenues of a municipal corporation cannot be seized on execution by its creditors, though they are in the form of moneys deposited in a bank for safe-keeping.—Peterkin v. New Orleans, Case No. 11,026.

Under the power "to lay and collect taxes upon personal property within the city," the corporation may require persons bringing slaves

within its limits to record them.—Hill v. Washington, Case No. 6,501.

A court of equity has no power to restrain a municipal corporation in the disposition or management of taxes collected under a void ordinance, on the complaint of a single property holder therein.—Coulson v. Portland, Case No. 3,275.

The question whether property is benefited by being included within corporate limits, with a view to determine the validity of a tax, is a legislative, and not a judicial, one.—Gold Hill v. Caledonia Silver Min. Co., Case No. 5,512.

Municipal taxes are levied under the same general authority as state and county taxes, and a sale by municipal authority is essentially a sale by state authority.—Denike v. Rourke, Case No. 3,787.

Taxation of slaves of nonresidents under by-law of Washington, D. C.—Whelan v. Washington, Case No. 17,503.

The personal estate of testator is not liable for taxes accruing upon his real estate in Georgetown, D. C., after his death.—Ross v. Holtzman, Case No. 12,075.

Nature of the remedy by distress for taxes in the District of Columbia.—Ross v. Holtzman, Case No. 12,075.

The corporation of Alexandria has a right to collect taxes by distress and sale and to raise taxes for purposes and works out of the town.—Beale v. Burchell, Case No. 1,157.

Distress for taxes due to the corporation of Washington is not barred by the statute of limitations.—Hogan v. Ingle, Case No. 6,583.

Right of corporation of Georgetown, D. C., to sell real estate for taxes.—Georgetown v. Bank of the United States, Case No. 5,343.

Realty in Washington, D. C., cannot be sold for taxes, even with the assent of the true owner, if there be upon it personal property sufficient to pay them.—Hellrigle v. Ould, Case No. 6,344.

The assessment and advertisement of property in a wrong name in the District of Columbia does not make the tax sale void. Act May 26, 1824.—Semmes v. McKnight, Case No. 12,653.

Validity of sales for taxes in the city of Washington.—Rodbird v. Rodbird, Case No. 11,988.

The corporation of Alexandria *held* authorized to tax the Farmers' Bank, and to collect the tax by distress, etc.—Farmers' Bank v. Fox, Case No. 4,658.

The receipt of a dog tax after suit brought is a waiver of the penalty.—Boswell v. Washington, Case No. 1,684.

See, also, ante, §§ 36, 37.

IX. ACTIONS.

§ 39. Right of action.

A corporation aggregate, having, or supposed to have, a common fund, is liable in an action at common law for negligence in its duty.—Fowle v. Alexandria, Case No. 4,993.

A bill in equity will not lie to obtain payment of levee bonds by the enforcement of the levy and collection of a tax stipulated for their payment before judgment obtained on the bonds.—Heine v. Levee Com'rs, Case No. 6,325.

§ 40. Preliminary notice and process.

Plaintiff must give notice to the inhabitants of the town before suing its treasurer for damages caused by defective highway, under R. I. Dig. 299.—Holland v. Cranston, Case No. 6,606.

A charter requiring a certified copy of a summons to be served on the recorder in all suits brought against the town, *held* inapplicable to an action of ejectment.—Robertson v. Roe, Case No. 11,927.

Service of process upon the mayor-elect of a city, before acceptance or qualification, is not a valid service of process in a suit against the city.—Perkins v. Watertown, Case No. 10,991.

§ 41. Pleading.

Sufficiency of complaint in an action for an injury caused by an excavation in a street.—Serrot v. Omaha City, Case No. 12,673.

The plea of non est factum in a suit on a contract alleged to have been made by defendant city, by its mayor, is properly sworn to by members of the common council on information and belief.—Hitchcock v. Galveston, Case No. 6,534.

A declaration against the "common council of Alexandria" for work and labor done for "the mayor and commonalty" must show how the new corporation is liable for the debts of the old.—Lyles v. Alexandria, Case No. 8,623.

§ 42. Evidence.

A municipal corporation must sustain its title in ejectment by proof of as high an order as would be necessary by an individual.—Barclay v. Howell, Case No. 975.

§ 43. Judgment.

The annual estimate by municipal officers of the funds needed for the coming year *held* not an appropriation to pay a particular debt, and a judgment against the city will have preference over other debts.—Evans v. Pittsburgh, Case No. 4,568.

Damages for failure to provide a sinking fund for bonds, according to agreement, are ascertained by taking the difference in the value of the bonds as agreed to be made and their value as in fact made.—Memphis v. Brown, Case No. 9,415.

§ 44. Costs.

Full costs allowed upon a verdict of nominal damages in an action upon the case against a city for injury done by raising the level of a street.—Hooe v. Alexandria, Case No. 6,667.

MURDER.

See "Homicide," § 1.

MUTINY.

See "Seamen," §§ 175–177.

MUTUAL INSURANCE.

See "Insurance," §§ 196–199.

MUTUALITY.

Of contract, see "Contracts," § 5; "Specific Performance," § 6.

[Fed. Cas. Digest.]

N

NAMES.

§ 1, Misnomer in general. § 2, Idem sonans.

See, also, "Trade-Marks and Trade-Names."
Of corporations, see "Corporations," § 14.
Of limited partnership, see "Partnership," § 56.

§ 1. Misnomer in general.

In pleading, see "Pleading," § 26.

Where two names have the same original derivation, or where one is an abbreviation or corruption of the other, but both are taken promiscuously, and according to common use, to be the same, though differing in sound, the use of one for the other is not a material misnomer.—Gordon v. Holiday, Case No. 5,610.

If the name be wholly mistaken, and repugnant to truth, the misnomer is fatal.—Gordon v. Holiday, Case No. 5,610.

§ 2. Idem sonans.

"Jeffery" and "Jeffries" are not idem sonans.—Marshall v. Jeffries, Case No. 9,128a.

A person called Lebrun and Lebring having been on board a vessel as a seaman, and there being no one among the crew by the name of Lebering, *held*, that the administator of Lebering should have the wages due for the services of the person so designated.—Ketland v. Lebering, Case No. 7,744.

NATIONAL BANKS.

See "Banks and Banking," §§ 15–23.

NATURALIZATION.

See "Aliens," §§ 7–13.
Proof of, see "Evidence," § 20.

NAVIGABLE WATERS.

§ 1, What waters are navigable. § 2, Power to control and regulate in general. § 3, Improvement of channels and streams. § 4, Navigation. § 5, Harbors. § 6, Bridges—Power to control and regulate. § 7, —— Right to establish and maintain. § 8, —— Statutory provisions. § 9, —— Injunctions against as obstructing navigation. § 10, Booms. § 11, Piers, dams, and cable. § 12, Obstructions—In general. § 13, —— Removal. § 14, —— Injuries and liabilities therefor. § 15, —— Injunctions. § 16, —— Criminal prosecutions. § 17, Lands under water. § 18, Riparian rights.

See, also, "Canals"; "Collision"; "Ferries"; "Waters and Water Courses"; "Wharves."
Judicial notice, see "Evidence," § 4.
Jurisdiction, see "Admiralty," § 4; "Commerce," § 2; "International Law," § 1.
—— of crimes committed on, see "Criminal Law," §§ 10, 11.

§ 1. What waters are navigable.

The common-law rule that rivers are only navigable where the tide ebbs and flows is not applicable in this country.—Bowman v. Wathen, Case No. 1,740.

The Oconto river is, in contemplation of law, a navigable stream.—Leigh v. Holt, Case No. 8,220.

An obstruction, such as natural falls, etc., does not destroy the character of the river above them, if it be navigable.—Spooner v. McConnell, Case No. 13,245.

§ 2. Power to control and regulate in general.

In the absence of specific legislation by congress, the regulation of a navigable stream rests entirely with the state, and a bill will not lie by the government to prevent or abate any obstruction.—United States v. Beef Slough Manufacturing, Booming, Log-Driving & Transportation Co., Case No. 14,559.

The United States may bring an injunction bill in the proper circuit court to protect improvements made under the authority of congress in navigable waters, from injury which will be caused by works of internal improvement within state limits, by state authority.—United States v. Duluth, Case No. 15,001.

A state cannot authorize any material obstruction to be placed in the channel of a navigable tributary of the Mississippi (Illinois river), though beyond the ebb and flow of the tide.—Columbus Ins. Co. v. Curtenius, Case No. 3,045; Same v. Peoria Bridge Ass'n, Id. 3,046.

The states composed from the Northwestern Territory cannot obstruct their navigable rivers, they being by the ordinance declared to be forever public highways.—United States v. New Bedford Bridge, Case No. 15,867.

No state can obstruct a navigable stream which extends to other states, or is connected with a river or lake which falls into the sea.—Palmer v. Cuyahoga County, Case No. 10,688.

Under the power to regulate commerce, congress have power to prevent the obstruction of any navigable river which is a means of commerce between states.—Works v. Junction R. R., Case No. 18,046.

A law declaring a stream a public highway may be repealed or modified whenever the public convenience and common interests of the people require it.—Atkinson v. Philadelphia & T. R. Co., Case No. 615.

The Connecticut Reserve, ceded to the United States after the adoption of the ordinance of 1787, is subject thereto equally as other parts of the territory northwest of the Ohio river.—Palmer v. Cuyahoga County, Case No. 10,688.

A law declaring lawful a bridge over the Mississippi which obstructs navigation is not unconstitutional because of a treaty with France securing free navigation.—In re Clinton Bridge, Case No. 2,900.

§ 3. Improvement of channels and streams.

The paramount right of the public to use a navigable river as a highway does not prevent the state legislature, in the absence of a conflicting enactment of congress, from authorizing the construction of public improvements upon the stream, although they may involve a partial obstruction or inconsiderable detention to navigation.—Woodman v. Kilbourn Mfg. Co., Case No. 17,978.

Acts which do not necessarily interfere with the operation of legislation by congress for the improvement of a navigable stream will not be interfered with by the courts.—United States v. Beef Slough Manufacturing, Booming, Log-Driving & Transportation Co., Case No. 14,559.

The provision in the ordinance of 1787 that certain navigable waters "shall be common highways, and forever free," etc., does not prevent the improvement of the navigation by a state, and the charge of a reasonable toll for increased facilities.—Palmer v. Cuyahoga County, Case No. 10,688; Spooner v. McConnell, Id. 13,245.

§ 4. Navigation.

A steamer going at excessive speed through the channel between Blackwell's Island and New York City, and thereby causing swells which sink a moored canal boat, is liable.—The Massachusetts, Case No. 9,258.

The Hudson is a national highway, which may be used by all classes of boats at any speed they may think fit which does not unreasonably impair the rights of others.—The Daniel Drew, Case No. 3,565.

There is no rule of law prescribing the speed a boat may use, or the swell it may make, or how near it may pass to another.—The Daniel Drew, Case No. 3,565.

Steamer *held* not liable for injury to a boat in a badly arranged tow from its swells in passing, where it exercised reasonable care and diligence. —The Daniel Drew, Case No. 3,565.

§ 5. Harbors.

Harbor fees, under Act Va. Jan. 18, 1798.—Shinn v. McKnight, Case No. 12,789.

§ 6. Bridges—Power to control and regulate.

Congress has authority to regulate or prohibit the construction of bridges across the Mississippi, and can also delegate that authority to the head of a governmental department.—United States v. Milwaukee & St. P. Ry. Co., Case No. 15,778.

The state has a right to authorize the construction of bridges over navigable waters within its borders, provided they do not materially obstruct navigation.—Columbus Ins. Co. v. Peoria Bridge Ass'n, Case No. 3,046.

A state legislature may, in the absence of any restraint by congressional legislation, authorize the erection of a bridge over the state's navigable waters.—Silliman v. Hudson River Bridge Co., Case No. 12,852.

Under Acts April 1 and June 4, 1872, the secretary of war is authorized to determine whether the construction of a bridge over the Mississippi at a given point would seriously affect navigation, and to prohibit the building of the bridge there. —United States v. Milwaukee & St. P. Ry. Co., Case No. 15,778.

The court has no authority to control the discretion of the secretary of war as to the position of the draw in the bridge over the Potomac river, between Washington and Alexandria, under Act March 3, 1841.—Georgetown v. Porter, Case No. 5,346.

By Act April 1, 1872, § 4, the secretary of war was authorized to pass upon the location of a bridge across the Mississippi river in the vicinity of La Crosse, Wis.; and this court will not review his decision, but will assist in enforcing it. —United States v. Milwaukee & St. P. Ry. Co., Case No. 15,779.

The decision of the acting commissioner of the board of public works, under the Ohio statutes, approving the plan or structure of a proposed bridge over navigable waters, is final and conclusive.—Works v. Junction R. R., Case No. 18,046.

§ 7. —— Right to establish and maintain.

The right to cross a navigable water by a railroad bridge must be given by the sovereign power, by a special or general act.—Works v. Junction R. R., Case No. 18,046.

Where a company is authorized to construct a railroad between two points, "over" a navigable water, a right to construct a bridge over that water is implied, as a necessary means of carrying into effect the power granted.—Works v. Junction R. R., Case No. 18,046.

The establishment of a ferry is not an infringement of the exclusive right given by charter to maintain a bridge across a navigable stream.—Parrot v. Lawrence, Case No. 10,772.

The state of New Jersey, by its contract with the Delaware & Raritan Canal Company, did not disable itself from afterwards authorizing the bridging of the Raritan river.—Pennsylvania R. Co. v. New York & L. B. R. Co., Case No. 10,953.

§ 8. —— Statutory provisions.

The history of the legislation of New York and of the United States in regard to the New York and Brooklyn bridge reviewed.—Miller v. New York, Case No. 9,585.

Act Ill. Jan. 26, 1847, relating to bridge over Illinois river, construed.—Columbus Ins. Co. v. Peoria Bridge Ass'n, Case No. 3,046.

§ 9. —— Injunction against as obstructing navigation.

The state has no power to declare that a bridge with a draw of a particular width is not an obstruction.—Columbus Ins. Co. v. Peoria Bridge Ass'n, Case No. 3,046.

A bridge of sufficient elevation, or with a proper draw, is not necessarily an impediment to navigation; nor is any structure such an impediment which facilitates commerce, instead of being a hindrance.—Jolly v. Terre Haute Draw-Bridge Co., Case No. 7,441.

A drawbridge over navigable water, although it unavoidably occasions some delay in passing it, is not necessarily such an obstruction to the navigation as to amount to a nuisance.—Works v. Junction R. R., Case No. 18,046.

Where it appears that a proposed bridge across navigable inland waters is a common nuisance, the proper remedy is a prosecution by the state. —Atkinson v. Philadelphia & T. R. Co., Case No. 615.

A bridge constructed across a navigable stream, as authorized by act of congress and the local legislature, cannot be enjoined as a public nuisance.—Miller v. New York, Case No. 9,585.

Where a bridge to be constructed over navigable waters, with the draws as proposed, will not cause any appreciable obstruction to commerce, the federal courts will not act to enjoin the same. —United States v. Railroad Bridge Co., Case No. 16,114.

The construction of a railroad bridge across a navigable river, though authorized by state legislature, may be enjoined by federal court.—Baird v. Shore Line Ry. Co., Case No. 758.

But where congress subsequently gives authority to construct the bridge, the injunction will be dissolved.—Baird v. Shore Line Ry. Co., Case No. 759.

A law declaring a bridge a lawful structure pending a suit to declare it a nuisance removes the ground of complaint.—In re Clinton Bridge, Case No. 2,900.

The federal circuit court has jurisdiction of a suit to restrain the building of a bridge across a navigable stream only so far as to inquire whether such building is in violation of the constitution or laws of the United States.—Miller v. New York, Case No. 9,585.

The erection of a bridge across the Hudson river between the city of Troy and the village of West Troy, in accordance with the provisions of Act N. Y. April, 1872, *held* not to result in a material obstruction to navigation, and an injunction refused.—Silliman v. Troy & W. T. Bridge Co., Case No. 12,853.

The federal court will not enjoin the erection of a bridge over the Raritan river, authorized by the New Jersey legislature, although it may completely intercept navigation, except as accommodated by draws, where congress has not legislated on the subject.—Easton v. New York & L. B. R. Co., Case No. 4,259.

The construction of a bridge across the Hudson at Albany, in accordance with Act N. Y. April 9, 1836, cannot be enjoined by a federal court, unless the act is repugnant to the constitution of the United States, or unless the bridge, when erected, would abridge complainant's rights of navigation.—Silliman v. Hudson River Bridge Co., Case No. 12,852.

A federal court should not enjoin the construction of a bridge authorized by a state legislature, unless the serious character of the injury has been first clearly established by a trial at law.—Silliman v. Hudson River Bridge Co., Case No. 12,852.

The erection of a bridge under state authority, which will prevent navigation of a public stream lying wholly within the state upon which there is commerce with other states, may be enjoined by a federal court.—Devoe v. Penrose Ferry Bridge Co., Case No. 3,845.

The question in such case is relative, whether the bridge be or be not a greater obstruction to commerce than benefit to the public.—Devoe v. Penrose Ferry Bridge Co., Case No. 3,845.

In such case an interlocutory injunction may be granted, though the answer deny both the law and the facts, and an issue directed to determine whether the bridge contemplated or any other bridge at such spot will be a nuisance. —Devoe v. Penrose Ferry Bridge Co., Case No. 3,845.

The United States may prevent the construction of bridges across the Mississippi river otherwise than as prescribed by congress, and the federal courts have jurisdiction for that purpose. —United States v. Milwaukee & St. P. Ry. Co., Case No. 15,778.

A preliminary injunction against the erection of a bridge authorized by state statute should be promptly granted by a federal court, until a final hearing, if there be reasonable ground to believe that it will be an obstruction to navigation.—Silliman v. Hudson River Bridge Co., Case No. 12,851.

§ 10. Booms.

Riparian owners on the Oconto river have no right to construct booms or piers in it without authority from the legislature.—Leigh v. Holt, Case No. 8,220.

The owner of a boom must use unusual diligence in keeping a passage way clear for other persons.—Leigh v. Holt, Case No. 8,220.

One constructing a boom of specified dimensions under a private statute containing a proviso that navigation shall not be obstructed cannot assert that logs of others, which went into his boom, were there by inevitable accident, and that he was not responsible for their detention. —Mason v. Boom Co., Case No. 9,232.

§ 11. Piers, dams, and cables.

Quære if the legislature of one state can authorize a dam locally in that state to be raised, so as to flow back a public river running into another state, to the injury of mill privileges locally situate in the latter state.—Farnum v. Blackstone Canal Corp., Case No. 4,675.

A riparian proprietor owning a saw mill on a navigable river has no right to erect a solid pier of masonry within the navigable channel for a boom for the protection of his logs.—Northwestern Union Packet Co. v. Atlee, Case No. 10,341.

The Ohio legislature has a right to charter a canal company, which may obstruct the navigation of the Maumee river by a dam, though the ordinance of 1787 declared that the navigable waters of the Northwest Territory should be "common highways, and forever free."—Spooner v. McConnell, Case No. 13,245.

A wire cable laid across a navigable river as a guy on which to run a ferryboat is not an unlawful obstruction to navigation unless it actually prevents or renders hazardous the navigation of the river by others.—The Vancouver, Case No. 16,838.

§ 12. Obstructions—In general.

See, also, ante, § 6.

Navigable streams should be left open, and no one has a right to obstruct their channels.— Lallande v. The C. D. Jr., Case No. 8,000.

Under the constitution and laws of Wisconsin, any obstruction to the use of a navigable stream by the public for purposes of navigation, which is erected without a constitutional legislative authority, is a nuisance, and liable to be abated either at the suit of an individual or at the instance of the state.—Woodman v. Kilbourn Mfg. Co., Case No. 17,978.

§ 13. —— Removal.

In the case of a vessel attempting to pass a bridge across the Chicago river, the city must use every reasonable precaution, as soon as practicable after notice, to remove all obstacles. —Scott v. Chicago, Case No. 12,526.

Where a raft was driven by vis major into a river channel, and every effort was made by those in charge to remove it, *held*, that a steamboat was not justified, by apprehension of pecuniary loss from reasonable delay, in summarily destroying it.—Lallande v. The C. D., Jr. Case No. 8,000.

§ 14. —— Injuries and liabilities therefor.

An individual suffering special damages by an obstruction of a navigable river may have a civil redress by a suit, though the obstruction be authorized by a state, if it be contrary to, or conflict with, an act of congress.—United States v. New Bedford Bridge, Case No. 15,867.

Where a bridge constructed over a navigable stream under the authority of a state statute is a material obstruction, the statute is no defense to a suit for an injury caused thereby.— Jolly v. Terre Haute Draw-Bridge Co., Case No. 7,441.

Where the injury to plaintiff's boat in collision with a bridge was caused by the negligence of those in charge, he cannot recover, though the bridge was a material obstruction to navigation. —Jolly v. Terre Haute Draw-Bridge Co., Case No. 7,441; Columbus Ins. Co. v. Peoria Bridge Ass'n, Id. 3,046.

A riparian proprietor who, without legislative authority, erects a pier within the navigable channel of a river and fails to keep it lighted at night, in consequence of which a vessel is injured by collision therewith, will be *held* liable. —Northwestern Union Packet Co. v. Atlee, Case No. 10,341.

A vessel which stretches a line across a river channel is liable for damages caused thereby to a raft. The latter is under no obligation to look out for such an obstruction.—McCord v. The Tiber, Case No. 8,715.

A telegraph company which lays a cable across a navigable river is liable for all damages caused by its catching in the screw of a propeller, where the vessel acted with reasonable skill after she became entangled.—Stephens & C. Transp. Co. v. Western Union Tel. Co., Case No. 13,371.

§ 15. —— Injunctions.

The federal courts have jurisdiction of a suit by the United States to restrain the placing of obstructions in their navigable waters.—United States v. Milwaukee & St. P. Ry. Co., Case No. 15,779.

A person who owns properties, such as tanneries and mills, located upon a navigable stream, for which he depends in part for his trade, may sue to enjoin the obstruction of the

navigation of the bay in which the river empties by a private corporation, where the same would injure his trade.—Works v. Junction R. R., Case No. 18,046.

See, also ante, § 9.

§ 16. —— Criminal prosecutions.

The obstruction of navigable rivers under the laws of the original states is not punishable as a crime, unless contrary to some clause in the federal constitution, or a treaty or an act of congress.—United States v. New Bedford Bridge, Case No. 15,867.

The circuit court has no jurisdiction to punish as a crime the obstruction of navigable tide waters by the erection of a bridge, without an express grant of authority by congress.—United States v. New Bedford Bridge, Case No. 15,867.

Jurisdiction of offense of obstructing, see "Admiralty," § 1.

§ 17. Lands under water.

The state has the right to the soil under navigable water within her territorial limits, subservient only to the right of the general government to regulate interstate and foreign commerce.—Griffing v. Gibb, Case No. 5,819.

Intermediate the date of the treaty of Guadalupe Hidalgo and the admission of California into the Union, the title to property below low-water mark in the Bay of San Francisco was in the United States, and a deed thereof unauthorized by congress is a mere nullity.—Seabury v. Field, Case No. 12,574.

The alcaldes of San Francisco had no power to grant lands below low-mater mark, covered by the navigable waters of the bay.—Walker v. Marks, Case No. 17,078.

The grant of lands under water to adjacent proprietors, under Act N. Y. April 10, 1850, c. 283, must be confined to a line starting at the intersection with the shore, and extending at a right angle with the thread of the stream, or at a right angle into the lake, without any regard to the course or direction of the line upon the land.—United States v. Ruggles, Case No. 16,204.

A person obtaining a grant in violation of the statute will be restrained, at the suit of a proprietor of adjacent lands entitled to the grant, from making erections upon the lands.—United States v. Ruggles, Case No. 16,204.

§ 18. Riparian rights.

The right of the public for purposes of navigation is paramount to that of the riparian owner.—Avery v. Fox, Case No. 674.

The owner of land bounded by a navigable river may convey the soil, excepting the right of ferry.—Bowman v. Mathen, Case No. 1,740.

A riparian owner on navigable but nontidal stream is presumed to own the land to the center line of the stream.—Avery v. Fox, Case No. 674.

The proprietors of New Jersey had no right in the Delaware river beyond low-water mark.—Bennett v. Boggs, Case No. 1,319.

An alteration in the course of a navigable stream which deprives a riparian owner of its use as an incident to his land is a taking of private property for which compensation must be made.—Avery v. Fox, Case No. 674.

Both federal and state governments may authorize alterations in navigable streams to afford greater facilities for navigation, and in so doing may take property of riparian owners, upon making compensation therefor.—Avery v. Fox, Case No. 674.

The right of lot owners to easement in adjoining streets *held* not to extend to an extension of the street running into a navigable river below low-water mark.—United States v. Bain, Case No. 14,496.

The owners of a wharf on a navigable river constructed wholly beyond low-water mark, and adjoining their lot on the main land, bounded by a street running to the water's edge, have no easement in the water in front of the street and beside their wharf.—United States v. Bain, Case No. 14,496.

Accretions formed after the entry on government land bounded by a meandered line on a river or lake belong to the party holding title under the entry.—Granger v. Swart, Case No. 5,685.

Otherwise where swamp or waste lands lie between the meandered line and the river or lake.—Granger v. Swart, Case No. 5,685.

NAVIGATION.

Power to regulate, see "Commerce," § 2.
Rules for preventing collision, see "Collision."

NAVY.

See "Army and Navy."

NE EXEAT.

§ 1, When writ will issue. § 2, Authority to issue writ. § 3, Affidavits. § 4, Bonds.

§ 1. When writ will issue.

A ne exeat will not lie, under the laws of Virginia, to restrain a garnishee from going out of the District of Columbia.—Patterson v. Bowie, Case No. 10,825.

A ne exeat will be granted to restrain an administratrix from removing from the jurisdiction with the effects of deceased before final settlement of her accounts, if her sureties reside out of the jurisdiction.—Patterson v. McLaughlin, Case No. 10,828.

The writ will not issue where plaintiff's clerk, about to quit the district, had embezzled his goods, and converted them into money, which he has deposited in a bank to his credit; no debt being positively averred.—McKenzie v. Cowing, Case No. 8,856.

A demand, to be a foundation for a writ of ne exeat, must be an equitable debt or pecuniary claim, and be certain or capable of being reduced to certainty.—Graham v. Stucken, Case No. 5,677.

The writ cannot be issued unless the defendant designs quickly to depart from the United States.—Loewenstein v. Biernbaum, Case No. 8,461a.

§ 2. Authority to issue writ.

A judge of the district court of the United States has no authority to issue writs of ne exeat.—Gernon v. Boecaline, Case No. 5,367.

Query, whether a federal district judge sitting as a circuit judge can issue the writ of ne exeat.—Loewenstein v. Biernbaum, Case No. 8,461a.

§ 3. Affidavits.

The affidavit upon which the writ of ne exeat will issue should be positive to a debt, or to the belief of the plaintiff that a certain balance of account was due.—Gernon v. Boecaline, Case No. 5,367.

Plaintiff was permitted to amend his affidavit.—Gernon v. Boecaline, Case No. 5,367.

§ 4. Bonds.

A ne exeat bond only binds the sureties to the extent of the final decree; and if defendant continually remains in the district, according to the condition of the bond, they will be discharged all together.—Zantzinger v. Weightman, Case No. 18,202.

NEGLIGENCE.

§ 1, Acts or omissions constituting negligence. § 2, Proximate cause. § 3, Contributory negligence. § 4, Actions—Evidence. § 5, —— Questions for jury.

Causing death, see "Death," §§ 2, 3.
Criminal liability for, see "Criminal Law," § 1; "Homicide," § 2.
Limitation of liability, see "Carriers," §§ 27–32; "Shipping," §§ 174–178, 244–255; "Telegraphs and Telephones," § 4; "Towage," § 24.
Measure of damages, see "Damages," § 9.

By particular classes of parties.

See "Carriers," §§ 17–35, 40–46; "Mercantile Agencies"; "Municipal Corporations," §§ 24, 25; "Pilots," § 12; "Railroads," §§ 68–73; "Telegraphs and Telephones," §§ 3–5; "Warehousemen," § 3.
Bailee, see "Bailment," §§ 3, 4.
Employers, see "Master and Servant," §§ 3–8.
Master or crew of vessel, see "Shipping," §§ 94, 102.
Officers, see "United States," § 9.
Owner of vessel, see "Seamen," § 156.
Tenant, see "Landlord and Tenant," § 6.
Tug, see "Towage," §§ 10–29.
Vessel causing loss or injury of goods, see "Shipping," §§ 161–173.
Wharfinger, see "Wharves," § 7.

Condition or use of particular species of property, works, or machinery.

See "Highways," §§ 4, 5; "Navigable Waters," § 4; "Railroads," §§ 68, 73.
Vessels, see "Collision."

§ 1. Acts or omissions constituting negligence.

Negligence is the doing of some lawful act in a careless, unusual, and improper way, or omitting the performance of some act required by law to be done, by which injury results to the person or property of another.—Stout v. Sioux City & P. R. Co., Case No. 13,503.

An owner who leaves uncovered an excavation made by him in the adjoining sidewalk is liable to a pedestrian who, in the use of ordinary care, falls into it at night.—Beardsley v. Swann, Case No. 1,187.

§ 2. Proximate cause.

A person who had left his vessel and taken refuge in another at the time of a collision was injured in regaining his vessel. *Held*, that the collision was the remote, and not the proximate, cause of the injuries.—The Union, Case No. 14,345.

The failure to equip railroad cars with air brakes by which a train might have been stopped in time to avoid running over a child trespassing on the track is not the proximate cause of an injury to such child.—Ex parte Stell, Case No. 13,358.

Where the presence of gunpowder in a warehouse in the case of a fire hinders and prevents the firemen from saving other goods, the powder will be regarded as the proximate cause of the loss.—White v. Colorado Cent. R. Co., Case No. 17,543.

The owner of an oil lighter is not liable for injury to craft lying alongside, where, in the absence of a watchman, a thief broke into a locker, and an explosion was caused from gas which had escaped into the locker from the tank, ignited by a match in the hands of the thief.—Sofield v. Sommers, Case No. 13,157.

§ 3. Contributory negligence.

A boy of eight years, who is permitted to play in the streets, will be deemed capable of contributory negligence.—Miles v. Receivers, Case No. 9,544.

The mere fact that a child four years of age strayed a distance of more than two blocks from home, at play with other children, is not, of itself, evidence of contributory negligence on the part of its parents.—Morgan v. Illinois & St. L. Bridge Co., Case No. 9,802.

The common-law doctrines of contributory negligence do not apply to admiralty law. The sufferer may sue in law or in admiralty, and in either case the law of the forum must prevail.—McCord v. The Tiber, Case No. 8,715.

The failure of libelant to properly lash a propeller wheel in which he was working is no defense to an action for injuries caused by a collision with the propeller which caused the wheel to revolve.—Bowas v. Pioneer Tow Line, Case No. 1,713.

Contributory negligence in respect to the burning of a building by sparks from a steamer is not imputable to the owner for constructing the building of wood, though it be within five feet of a dock on a public navigable river.—King v. American Transp. Co., Case No. 7,787.

Of passenger, see "Carriers," § 47.
Of servant, see "Master and Servant," § 7.

§ 4. Actions—Evidence.

A child four years old is, in law, incapable of negligence; and the burden of showing contributory negligence on the part of his parents, imputable to him, is upon the one against whom damages are claimed for an injury caused by negligence.—Morgan v. Illinois & St. L. Bridge Co., Case No. 9,802.

Upon a count charging negligence of the defendant and his servants, it is sufficient to prove negligence of the servant.—Dobbin v. Foyles, Case No. 3,942.

§ 5. —— Questions for jury.

Where the question of negligence is one of law rather than fact, it will not be submitted to the jury.—Ex parte Stell, Case No. 13,358.

Defendant's steamboat, having no spark arrester, communicated fire to its elevator, which, in turn, communicated fire to plaintiff's mill. *Held*, that the questions of proximate and remote cause, and of defendant's negligence, were questions of fact for the jury.—Kellogg v. Milwaukee & St. P. Ry. Co., Case No. 7,664.

What facts constitute due care, the want of which is culpable negligence, is a question for the jury.—King v. American Transp. Co., Case No. 7,787.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes"; "Bonds," §§ 12–14.
Bill of lading, see "Carriers," § 3.
Liability of vessels or owners, see "Shipping," § 100.

NEGROES.

See "Citizens," § 1; "Slavery."

NEUTRALITY LAWS.

§ 1, To what states neutrality laws apply. § 2, Accepting foreign commission. § 3, Enlisting in foreign service. § 4, Arming vessels against neutral nations. § 5, Augmenting force of foreign war vessels. § 6, Sale of war ships. § 7, Expeditions against friendly state—In general. § 8, —— Aiding belligerent. § 9, —— Intent. § 10, —— Overt act. § 11, —— Providing means. § 12, —— Where war is inevitable. § 13, —— Authority from president. § 14, Persons liable. § 15, Bonds to observe neutrality laws. § 16, Prosecutions—Preliminary proceedings. § 17, —— Indictment. § 18, —— Evidence. § 19, Seizure and forfeiture.

§ 1. To what states neutrality laws apply.

A colony in rebellion is within the law of nations relating to the rights of neutrals, without

regard to its status as a state.—Chacon v. Eighty-Nine Bales of Cochineal, Case No. 2,568.

§ 2. Accepting foreign commission.

To constitute the offense of accepting and exercising a commission to serve against a foreign prince, state, etc., with whom the United States are at peace, under the first section of the act of congress, some overt act under the commission must be done, such as raising men for the enterprise, collecting provisions, munitions of war, or any other act which shows an exercise of the authority which the commission was supposed to confer.—Charge to Grand Jury, Neutrality Laws, Case No. 18,265.

Our courts cannot question the validity of the commission of a French privateer, whose prize is brought into our courts under article 17 of the treaty with France.—Salderondo v. The Nostra Signora Del Camino, Case No. 12,247.

§ 3. Enlisting in foreign service.

It is not a crime under the statutes to leave this country with intent to enlist in foreign military service.—United States v. Kazinski, Case No. 15,508.

It is not a crime to transport persons out of this country with their consent, who intend to enlist in foreign military service.—United States v. Kazinski, Case No. 15,508.

To constitute a crime under the statute, such persons must be hired or retained to go abroad with intent to be so enlisted.—United States v. Kazinski, Case No. 15,508.

It is an offense under Act April 20, 1818, to engage a person to go beyond the limits of the United States to enlist in the service of a foreign country, where there is an intention that a consideration should be paid therefor.—United States v. Hertz, Case No. 15,357.

Quære, whether a colony in a state of rebellion is embraced by Act Cong. 1794, prohibiting the enlistment of soldiers, etc., within the limits of the United States to enter the service of any foreign prince or state.—Chacon v. Eighty-Nine Bales of Cochineal, Case No. 2,568.

§ 4. Arming vessels against neutral nations.

What equipments in our ports amount to a breach of neutrality.—Moodie v. The Betty Carthcart, Case No. 9,742.

Actual fitting out and arming in the United States is not necessary to subject to forfeiture a vessel in part prepared for hostilities therein.—The Meteor, Case No. 9,498.

Equipment for war in a neutral port does not take place merely by alteration of two ports in repairing the waist of a vessel previously armed.—Moodie v. The Brothers, Case No. 9,743.

It is no breach of neutrality on the part of a belligerent to equip vessels of war in a neutral port, unless the act be interdicted.—Juando v. Taylor, Case No. 7,558.

The landing of a cargo contraband of war on the shore of the country of one belligerent at a point not blockaded, is not an act of hostility against the other belligerent.—The Florida, Case No. 4,887.

To constitute the offense against section 3, the vessel must not only have been fitted out with intent to be employed against a friendly nation, but actually armed for that purpose.—United States v. Skinner, Case No. 16,309.

A French armed vessel, duly commissioned, but fitted out in our country, may bring in and carry away her prizes, without being subject to the jurisdiction of our courts.—Stannick v. The Friendship, Case No. 13,291.

§ 5. Augmenting force of foreign war vessels.

Raising or lowering gun carriages on a vessel of war, or replacing rotten with sound timbers, is an offense, within Act June 5, 1794, § 4.—United States v. Grassin, Case No. 15,248.

An augmentation of force in our ports is a breach of neutrality, and of the law of nations, and of the United States; and will occasion a restitution of the prize if brought within our jurisdiction.—British Consul v. The Nancy, Case No. 1,898.

§ 6. Sale of war ships.

A sale by a belligerent of a war ship to a neutral in a neutral port is invalid by the law of nations.—The Georgia, Case No. 5,349.

A vessel sent by her owners to a neutral port to find a market for her, without previous understanding with a belligerent, may be sold there to such belligerent, without violating the neutrality laws.—United States v. The Meteor, Case No. 15,760.

Mere carrying on of negotiations by the owners of a ship in this country with foreign agents, with knowledge that, if a sale were effected, the vessel would be employed against a nation with whom the United States are at peace, *held* not a breach of the law, the negotiations having failed.—United States v. The Meteor, Case No. 15,760.

Where a privateer was illegally fitted out and commissioned in this country by the French minister, but was afterwards dismantled and her register canceled, then sold to a foreigner, and fitted out and commissioned in a foreign port, *held*, that her proceedings under the latter commission were not in violation of the neutrality laws.—Williamson v. The Betsy, Case No. 17,750.

§ 7. Expeditions against friendly state—In general.

Act April 20, 1818, § 6 (3 Stat. 449), forbidding military expeditions by individuals against countries with which the United States are at peace, commented on.—Charge to Grand Jury, Neutrality Laws, Case No. 18,264.

The carrying on from the United States of an expedition against a neutral power is an offense, though the association originated in another country.—Ex parte Needham, Case No. 10,080.

§ 8. —— Aiding belligerent.

Act June 5, 1794, extends to warlike expeditions from this country, though not intended to aid one belligerent against another, but directed against a friendly power at peace with all the world.—United States v. O'Sullivan, Cases Nos. 15,974, 15,975.

The participation by the citizens of a neutral state in an attack by one belligerent power upon another is an offense against the law of nations, and may be punished as such by such neutral state.—Henfield's Case, Case No. 6,360.

§ 9. —— Intent.

The conversion of a merchant ship into a vessel of war, with intent to commit hostilities against a friendly nation, is an original fitting out of a vessel with such intent. 1 Stat. 383.—United States v. Guinet, Case No. 15,270.

To constitute the offense of beginning, setting on foot, or providing the means for a military expedition against a nation with whom the United States are at peace, under Act April 20, 1818, § 6, there must be a hostile intention connected with the act of beginning or setting on foot the expedition.—United States v. O'Sullivan, Case No. 15,975.

When connected with such hostile intent the crime is completed either by beginning or setting on foot an expedition, or providing or procuring the means therefor.—United States v. O'Sullivan, Case No. 15,975.

§ 10. —— Overt act.

The offense of beginning or setting on foot, or providing or preparing the means for, a mili-

tary expedition against a friendly state, under Act April 20, 1818, § 6, is not complete without some overt or definite act.—United States v. Lumsden, Case No. 15,641.

Mere words spoken or written, though indicative of the most determined purpose to do the forbidden acts, will not constitute an offense under that section.—United States v. Lumsden, Case No. 15,641.

The overt act is not an invasion of a foreign country, but taking the incipient steps in the enterprise, such as providing the means for the expedition, furnishing munitions of war or money, enlisting men, and, in short, doing anything and everything that is necessary to the commencement and prosecution of the enterprise.—Charge to Grand Jury, Neutrality Laws, Cases Nos. 18,266, 18,267.

To constitute the offense of beginning or setting on foot a military expedition against a friendly power, within section 6, it is not necessary that the expedition shall be actually set on foot. It is sufficient if such preparations are made for it as show an intent to set it on foot.—Charge to Grand Jury, Neutrality Laws, Case No. 18,265.

An expedition, to be within Act June 5, 1794, § 5, need not to have been consummated without deviation of course. It is sufficient if it was begun and the means prepared to be carried on from the United States, though the vessel, at the identical time of sailing, was not in complete readiness for hostile engagements.—United States v. Smith, Case No. 16,342a.

To constitute the offense, it is not necessary that the expedition should start for its destination.—United States v. O'Sullivan, Case No. 15,975.

It is unimportant whether the persons engaged in such a purpose engage the whole vessel to themselves, or depart from the United States as passengers.—Ex parte Needham, Case No. 10,080.

§ 11. —— Providing means.

To "provide or prepare the means for any military expedition or enterprise," within the meaning of section 6, such preparation must be made as shall aid the expedition. The contribution of money, clothing for the troops, provisions, arms, or any other contribution which shall tend to forward the expedition or add to the comfort or maintenance of those engaged in it, is a violation of this provision.—Charge to Grand Jury, Neutrality Laws, Cases Nos. 18,265, 18,267, 18,268.

To provide the means for such an expedition implies that such means shall be actually furnished and brought together for the criminal purpose.—United States v. Lumsden, Case No. 15,641.

Any combination of individuals to carry on an expedition is "setting it on foot," within the meaning of the statute, and the contribution of money or anything else which shall induce such combination may be a beginning of the enterprise.—Charge to Grand Jury, Neutrality Laws, Case No. 18,267.

If the means provided were to be used only on the occurrence of a future contingent event, or if they were to be used at a time and under circumstances when their use would not violate the law, there is no offense.—United States v. Lumsden, Case No. 15,641.

§ 12. —— Where war is inevitable.

The setting on foot or providing the means of a military expedition against a nation with which the United States are at peace is an offense, notwithstanding it appear that war is inevitable, unless the prosecution of the expedition depended upon its taking place.—United States v. Burr, Case No. 14,694a.

A citizen cannot make the election, or anticipate his government's making the election, to consider as an act of war the taking possession by another nation of contested territory, arising out of a dispute as to boundaries.—United States v. Burr, Case No. 14,694a.

§ 13. —— Authority from president.

The fact that defendant set on foot a military expedition, in violation of Act June 5, 1794, § 5, with the knowledge and approbation of the president, is no justification, as the president has no authority to set on foot a military expedition against a nation with which the United States are at peace.—United States v. Smith, Case No. 16,342.

§ 14. Persons liable.

A native American who has become naturalized under the laws of France still remains subject to indictment in the United States courts for serving on a French privateer engaged in committing hostilities against a power at peace with the United States.—Williams' Case, Case No. 17,708.

§ 15. Bonds to observe neutrality laws.

A federal judge has power, on just grounds of suspicion, to require a bond to observe the neutrality laws.—United States v. Quitman, Case No. 16,111.

The presentation of a grand jury, charged with the duty of inquiring into the existence of the organization whose object was the invasion of the territory of a friendly power, that they believed such organization to exist, but could get no evidence, because witnesses refused to testify on the ground that their answers might criminate them, *held* sufficient ground of suspicion.—United States v. Quitman, Case No. 16,111.

§ 16. Prosecutions—Preliminary proceedings.

The question whether a military expedition against a nation with which the United States were at peace was really to depend upon war being declared will not be determined upon a preliminary examination.—United States v. Burr, Case No. 14,694a.

§ 17. —— Indictment.

Sufficiency of indictment for setting on foot and preparing the means for a military expedition against a foreign country with which the United States were at peace.—United States v. O'Sullivan, Case No. 15,974.

§ 18. —— Evidence.

Any legal testimony which shows the expedition in question to be military, or to have been designed against the dominions of the nation, as charged, is admissible.—United States v. Burr, Case No. 14,694.

The acts of accomplices, except so far as they prove the character or object of the expedition in question, are not admissible in evidence.—United States v. Burr, Case No. 14,694.

In a prosecution under Act April 20, 1818, § 6, written and printed evidence, though containing no proof of an overt act, is admissible as confessions and declarations, subject to the rule that the parts favorable to defendants must be considered, as well as those implying guilt.—United States v. Lumsden, Case No. 15,641.

Evidence that defendant admitted that a certain person was associated with him in the plan to invade a foreign territory is sufficient to render admissible statements of such person to show the extent of the plan, and whether it was legal.—United States v. Workman, Case No. 16,764.

On a trial on indictment under Act June 5, 1794, § 5, the president's message to congress, and other documents transmitted therewith, are inadmissible to show the existence of a war at the time the acts were charged to have been

committed.—United States v. Smith, Case No. 16,342a.

Evidence to acquit or condemn, in the case of a vessel arrested for breach of the neutrality laws, must, in the first instance, come from the vessel taken, the persons on board, and the examination on oath of the officers.—Moodie v. The Betty Carthcart, Case No. 9,742.

Sufficiency of affidavit giving translation of letter and cipher, taken in connection with declarations of accused to justify commitment for setting on foot a military expedition against a nation with which the United States were at peace.—United States v. Burr, Case No. 14,692a.

Sufficiency of evidence to justify finding that defendant was actually concerned in the fitting out of a vessel with intent to commit hostilities against a friendly nation.—United States v. Guinet, Case No. 15,270.

A vessel alleged to have been fitted out and armed in violation of the neutrality laws will be condemned, where the government's evidence raises a well-grounded suspicion, which claimants fail to explain.—The Meteor, Case No. 9,498.

Proof that the vessel was fitted out and armed, or that there was an attempt to fit and arm her, with the unlawful intent to cruise against a neutral nation, is sufficient, without identifying the persons engaged therein.—The Meteor, Case No. 9,498.

§ 19. Seizure and forfeiture.

Property may be seized by the commanding officer of a military force ordered out to prevent the violation of the neutrality act of 1838, with a view to detaining the same until it should be proceeded against in the manner directed by law.—Stoughton v. Dimick, Case No. 13,500.

On a libel for forfeiture of a vessel for a violation of neutrality laws (Act 1818), the question of ownership of the vessel is not material.—The Meteor, Case No. 9,498.

A sea letter is not the only document necessary to establish the neutral character of a vessel belonging to the United States under treaty with France.—Tunno v. Preary, Case No. 14,238.

Admissibility of executive documents as proof of a state of war between foreign nations, and of their consular officers, etc., on a libel of forfeiture for breach of the neutrality laws.—The Meteor, Case No. 9,498.

A vessel laden with arms for insurgents in Canada, though not intended to pass the frontier herself, is subject to seizure, and, where wrecked after such seizure, without any fault on the part of the seizing officer, he is not liable.—Stoughton v. Dimick, Case No. 13,500.

NEWLY-DISCOVERED EVIDENCE.

As ground of bill of review, see "Equity," §§ 127, 128.
—— of continuance, see "Continuance," § 3.
—— of new trial, see "Criminal Law," § 101; "New Trial," §§ 12–17.
—— of rehearing in equity, see "Equity," § 106.
—— of relief against judgment, see "Judgment," § 41.

NEW PROMISE.

After discharge in bankruptcy, see "Bankruptcy," § 623.
Within statute of limitation, see "Limitation of Actions," §§ 17–25.

NEWSPAPERS.

Copyrights, see "Copyrights," § 6.
Liability for libel, see "Libel and Slander," § 8.

NEW TRIAL.

§ 1, Grounds for granting in general. § 2, Errors and irregularities at trial in general. § 3, Misconduct of parties or counsel. § 4, Errors in pleading. § 5, Rulings and instructions. § 6, Disqualification or misconduct of or affecting jury. § 7, Irregularity in verdict. § 8, Verdict or findings contrary to law or evidence—Verdicts contrary to evidence. § 9, —— Excessive damages. § 10, —— Remission of part of recovery. § 11, Surprise, accident, or mistake. § 12, Newly-discovered evidence—Power and duty of court in general. § 13, —— Diligence in procuring evidence. § 14, —— Cumulative evidence. § 15, —— Contradicting, sustaining, and impeaching witnesses. § 16, —— Credibility of witnesses. § 17, —— Probable effect. § 18, Waiver of right. § 19, Proceedings to procure new trial—Time of application. § 20, —— Bill of exceptions or statement of case. § 21, —— Affidavits and extrinsic evidence in general. § 22, —— Affidavits and testimony of jurors. § 23, —— Hearing and decision. § 24, —— Conditions on granting new trial. § 25, —— Rehearing. § 26, —— Stay of judgment. § 27, Proceedings at new trial. § 28, Statutory new trial as of right.

After judgment on reference, see "Reference," § 10.
Opening or vacating judgment, see "Judgment," §§ 35–42.
Rehearing in equity, see "Equity," §§ 105–108.

Particular actions or proceedings.

See "Bankruptcy," § 133; "Detinue," § 4; "Ejectment," § 19.
Criminal prosecutions, see "Criminal Law," §§ 100–103.
For penalties, see "Penalties," § 12.
For violation of customs laws, see "Customs Duties," § 107.
In admiralty, see "Admiralty," § 100.
In equity, see "Equity," § 104.
On appeal, see "Admiralty," § 123; "Appeal and Error," § 31.
To recover back duties and charges paid, see "Customs Duties," § 75.

§ 1. Grounds for granting in general.

Grounds stated upon which a court of common law may grant a new trial.—United States v. One Thousand Three Hundred and Sixty-Three Bags of Merchandise, Case No. 15,964.

A new trial will not be granted against strong circumstances of equity.—Denniston v. McKeen, Case No. 3,803.

General rules as to granting where fraud is in issue.—Alsop v. Commercial Ins. Co., Case No. 262.

§ 2. Errors and irregularities at trial in general.

Errors of the court are no ground for a new trial where the verdict was right, and the moving party was not prejudiced.—In re Marsh, Case No. 9,108.

§ 3. Misconduct of parties or counsel.

Where irregular conduct of the party or the jury is established, it is not necessary that it should appear that it influenced the jury. If it be such that it might have affected the verdict, a new trial will be granted.—Johnson v. Root, Case No. 7,409.

Where counsel for the plaintiff, in the closing argument, adverted to facts not in proof, but the remarks were checked by the court, and the jury were instructed to confine their attention to the evidence in the case, the course of the counsel was *held* not to be sufficient ground for a new trial.—Wightman v. Providence, Case No. 17,630.

§ 4. Errors in pleading.

After verdict for plaintiff, the court will not grant a new trial for defects in a declaration

that might have been amended when substantial justice has been done.—Walker v. Grand Trunk Ry. Co., Case No. 17,070.

§ 5. Rulings and instructions.

Errors of the court in matters of law constitute a valid ground for a new trial.—Rochell v. Phillips, Case No. 11,974a.

The court in its discretion will grant a new trial because of the omission to charge on important questions of law.—Calbreath v. Gracy, Case No. 2,295.

A verdict will be set aside for a misdirection which might have noticeably affected it.—Blake v. Smith, Case No. 1,502.

When a motion for a new trial is not drawn up for some weeks, and the counsel disagree as to some of the rulings made, the court must settle the differences, and will not award a new trial on account of them, if no injustice seems on the whole case to have been done by the verdict.—Allen v. Blunt, Case No. 217.

New trial not granted because of erroneous instructions or refusals to instruct, if not prejudicial.—Allen v. Blunt, Case No. 217; Lander v. United States, Id. 8,039.

Where the judge used the expression "exemplary damages," but it appears that the jury did not go beyond the actual injuries sustained, the verdict will not be disturbed.—Taylor v. Carpenter, Case No. 13,785.

The jury being impaneled to try three causes, plaintiff in one of them gave evidence applicable to a case in which he was not a party, but which affected his own case, to his advantage. *Held*, that new trials should be granted in all the cases.—Consequa v. Willings, Case No. 3,128.

An error in a charge, which might have been corrected by the court, is not available on motion for new trial, where objection was not raised at the time.—Hamlin v. Pettibone, Case No. 5,995; Locke v. United States, Id. 8,442.

A new trial will not be granted for an error of the court in permitting illegal testimony to go to the jury, where no objection was made at the time.—Russel v. Union Ins. Co., Case No. 12,147.

An objection to testimony as a whole will not raise the point that part of it was incompetent.—Flint v. Norwich & N. Y. Transp. Co., Case No. 4,874.

§ 6. Disqualification or misconduct of or affecting jury.

It is only in cases imputing gross inattention, prejudice, or misconduct on the part of a jury that the court will interfere to disturb their verdict.—United States v. Five Cases of Cloth, Case No. 15,110.

The court will not grant a new trial because one of the jurors was brother-in-law of the plaintiff.—Orme v. Pratt, Case No. 10,578.

Misbehavior of jurors is not a ground for a new trial, if it has not affected the verdict.—Henry v. Ricketts, Case No. 6,385.

The drinking of liquor by the jury before the verdict is rendered, where it is not affected thereby, is no ground for a new trial, where not furnished by the party in whose favor it was rendered.—Harrison v. Rowan, Case No. 6,142.

A new trial will be granted on proof that one juror has acted corruptly.—United States v. Chaffee, Case No. 14,773.

Where the verdict has done substantial justice, information given by one juror to the others is not ground for new trial.—Cherry v. Sweeny, Case No. 2,641.

A verdict will be set aside where the jury separated after the case was committed to them and before they agreed on the verdict.—Lester v. Stanley, Case No. 8,277.

Vacillating conduct of a juryman, in voting in the jury room, *held* no ground for a new trial.—Harrison v. Rowan, Case No. 6,142.

A new trial will be granted where the jury, without defendant's consent, take plaintiff's account with them to the jury room.—Hutchinson v. Decatur, Case No. 6,956.

A new trial will not be granted because the jury, by mistake, took out with them plaintiff's account, where the same was withdrawn a few minutes afterwards.—Simms v. Templeman, Case No. 12,872.

It is no ground for a new trial that the jury took out with them a deposition which was held inadmissible, where it was totally inapplicable to the count on which the judgment is given.—Lonsdale v. Brown, Case No. 8,494.

Irregular conduct of jury in open court not objected to at the time is not available as a ground for new trial.—Allen v. Blunt, Case No. 217.

§ 7. Irregularity in verdict.

A new trial will be granted where special verdict is ambiguous or uncertain.—Bellows v. Hallowell & A. Bank, Case No. 1,279.

§ 8. Verdict or findings contrary to law or evidence—Verdicts contrary to evidence.

The rules under which the court will exercise its power to set aside a verdict on the ground that it is against the weight of evidence.—In re Hezekiah, Case No. 6,448.

A new trial will be ordered where the verdict is clearly against the evidence.—Cady v. Phœnix Fire Ins. Co., Case No. 2,284; Kohne v. Insurance Co. of North America, Id. 7,921.

A verdict will be set aside as against the weight of evidence where the jury was acting under a mistake.—Aiken v. Bemis, Case No. 109; Childs v. Somerset & K. R. Co., Id. 2,682; Fearing v. De Wolf, Id. 4,711; Hunt v. Pooke, Id. 6,895; Roberts v. Schuyler, Id. 11,915; Wiggin v. Coffin, Id. 17,624; Wilkinson v. Greely, Id. 17,671.

A verdict will be set aside as against the evidence where it was the result of passion or an improper motive.—Aiken v. Bemis, Case No. 109; Childs v. Somerset & K. R. Co., Id. 2,682; Fearing v. De Wolf, Id. 4,711; Hunt v. Pooke, Id. 6,895; Roberts v. Schuyler, Id. 11,915; Wiggin v. Coffin, Id. 17,624; Wilkinson v. Greely, Id. 17,671.

Or where the jury was acting under undue influence.—Wiggin v. Coffin, Case No. 17,624; Wilkinson v. Greely, Id. 17,671.

New trial not granted where construction given by jury to the evidence appears to be consistent with the justice of the case.—Blagg v. Phœnix Ins. Co., Case No. 1,478.

But where a jury render a verdict against the plain principles of law as laid down by the court, and against clear and unquestioned evidence, the court will grant a new trial, notwithstanding the particular circumstances or general justice of the case.—United States v. Duval, Case No. 15,015.

A new trial will not be granted where evidence is conflicting, because court would have drawn different conclusion.—Bayly v. London & L. Ins. Co., Case No. 1,145; Carr v. Gale, Id. 2,435; Waters v. Mutual Life Ins. Co., Id. 17,267.

A verdict not founded upon either of two distinct grounds claimed, but partly upon both, will be set aside.—Biggs v. Barry, Case No. 1,402.

A new trial will not be granted because the verdict is contrary to evidence as to one issue, where it is not contrary to the evidence applicable to another issue in the case.—Lonsdale v. Brown, Case No. 8,494.

A new trial will be granted where, in case of separate pleas, the verdict fails to respond to one

of such pleas.—Postmaster General v. Cross, Case No. 11,306.

A new trial will be granted where the verdict is only sustained by the testimony of two witnesses for the government, as against the testimony of nine unimpeached witnesses for defendants.—United States v. Chaffee, Case No. 14,773.

New trial not granted because of interest of a witness, where such interest would probably be released on another trial.—Macy v. De Wolf, Case No. 8,933.

A verdict will not be set aside as against the weight of evidence where there was evidence on both sides, where the credibility of witnesses was in question, or where testimony was not rejected. —Fearing v. De Wolf, Case No. 4,711.

§ 9. Excessive damages.

A verdict awarding excessive damages may be set aside in the discretion of the court.—Blunt v. Little, Case No. 1,578.

Courts have a legal right to grant new trials in actions for torts, on the ground of excessive damages, and may grant any number until the ends of justice are answered.—Parker v. Lewis, Case No. 10,741a.

A new trial will not be granted on ground that verdict is excessive unless plainly largely beyond injury inflicted.—Aiken v. Bemis, Case No. 109.

The court will not set aside a verdict on the ground of excessive damages, if the action is on a contract, unless they exceed the legal liability of the defendant under the contract.—White v. Arleth, Case No. 17,536.

A new trial will not be granted on account of excessive damages unless the jury have mistaken the principles of law which govern their estimate, or have been guilty of some gross error which shows an improper feeling or bias.—Palmer v. Fiske, Case No. 10,691; Swann v. Bowie, Id. 13,672; Thurston v. Martin, Id. 14,018; Whipple v. Cumberland Mfg. Co., Id. 17,516; White v. Arleth, Id. 17,536; Wightman v. Providence, Id. 17,630.

In the case of a loss of a sum of money by defendant's negligence, the court will not set aside the verdict for plaintiff because the jury did not allow interest.—Walker v. Smith, Case No. 17,087.

If amount of damages warranted by evidence, court will not inquire how jury reached result to make their reasons grounds of objection for the purpose of a new trial.—Bayly v. London & L. Ins. Co., Case No. 1,145.

§ 10. —— Remission of part of recovery.

Where damages are excessive, the court may allow plaintiff to remit the excess, instead of submitting to a new trial.—Blunt v. Little, Case No. 1,578; Russell v. Place, Id. 12,161.

On motion for a new trial in an action of tort on the ground of excessive damages, the plaintiff may be required to remit the excess, instead of being required to submit to a new trial.—Warren v. Robertson, Case No. 17,198a.

Where the finding is not only contrary to the evidence, but in direct contravention of the charge of the court, the error cannot be obviated by allowing the prevailing party to remit an excess in the verdict.—Johnson v. Root, Case No. 7,409; Stafford v. Pawtucket Hair-Cloth Co., Id. 13,275.

§ 11. Surprise, accident, or mistake.

Failure of witnesses to state facts which the party expected them to state is no ground for new trial.—Martin v. Clark, Case No. 9,158a.

A new trial will be granted on the ground of surprise in the testimony of witnesses, who made different representations before the trial, only where the evidence to be produced on another trial is such as will probably secure a different result.—Stellwagen v. Life Ass'n of America, Case No. 13,359.

Letters of one of the defendants being read on the trial is no ground for surprise, for which a new trial can be granted.—Henckley v. Hendrickson, Case No. 6,348.

A verdict or nonsuit will be set aside where reasonable notice to the adverse party was not given of formal objections to a deposition.—Dodge v. Israel, Case No. 3,952.

A new trial will not be granted on the ground of surprise because the case was tried by other counsel than the one who was originally employed and prepared the case, where it does not appear that the result would have been different.—Van Dyke v. Tinker, Case No. 16,849.

A party surprised at the trial, who does not apply for a continuance, cannot have a new trial for that reason.—Carr v. Gale, Case No. 2,433.

A new trial will be granted where a written instrument was admitted in evidence on the erroneous assumption that it was an original paper.—Savage v. D'Wolf, Case No. 12,383.

The reliance of counsel upon an obiter dictum is no ground of awarding a new trial.—Bowden v. Morris, Case No. 1,715.

§ 12. Newly-discovered evidence—Power and duty of court in general.

New trial will be granted upon the discovery of new, material, and important evidence.—Marshall v. Union Ins. Co., Case No. 9,134.

§ 13. —— Diligence in procuring evidence.

It must appear that the newly-discovered evidence was unknown to the party at the time of the trial, as well as his counsel.—Fikes v. Bentley, Case No. 4,785a.

The party must have used due diligence to discover it before the trial, to induce the court to grant a new trial.—Macy v. De Wolf, Case No. 8,933; Palmer v. Fiske, Id. 10,691; Washburn v. Gould, Id. 17,214: Wiggin v. Coffin, Id. 17,624.

A new trial will be granted for newly-discovered evidence, in the absence of gross negligence in procuring it on first trial.—Aiken v. Bemis, Case No. 109.

A new trial will not be granted to enable a party to introduce evidence which was in his control at the time of trial, but not used because not advised of its importance.—Dickson v. Mathers, Case No. 3,898a.

The knowledge and diligence of counsel are to be considered on the subject of new evidence, the same as those of the party.—Ready Roofing Co. v. Taylor, Case No. 11,613.

A new trial will not be granted on the ground of newly-discovered evidence, where counsel did not think the evidence would be material, and did not know of it, though it might easily have been discovered.—Codman v. Vermont & C. R. Co., Case No. 2,936.

Failure of defendant banking company to avail itself of documents in its possession because not known to one of its officers at the time of trial is not good ground for new trial.—Coote v. Bank of United States, Case No. 3,204.

§ 14. —— Cumulative evidence.

A new trial will not be granted for the purpose of introducing newly-discovered evidence which is merely cumulative.—Aiken v. Bemis, Case No. 109; Alsop v. Commercial Ins. Co., Id. 262; Ames v. Howard, Id. 326; Macy v. De Wolf, Id. 8,933; Palmer v. Fiske, Id. 10,691; Wiggin v. Coffin, Id. 17,624.

But, in a case of great importance, involving large interests, cumulative testimony will be received on an application for a new trial.—United States v. Chaffee, Case No. 14,773.

§ 15. —— Contradicting, sustaining, and impeaching witnesses.

A new trial will not be granted to contradict the witness by negative evidence, nor to impeach a witness.—Carr v. Gale, Case No. 2,433.

A new trial will not be granted to enable a party impeached on the trial to produce sustaining witnesses.—Otis v. Montgomery & E. R. Co., Case No. 10,612.

Newly-discovered evidence to discredit a witness, where others testified to the same point, is no ground for a new trial.—Brooke v. Peyton, Case No. 1,934.

§ 16. —— Credibility of witnesses.

It must appear that the witness is credible where newly-discovered evidence is claimed as a ground for new trial.—Macy v. De Wolf, Case No. 8,933.

§ 17. —— Probable effect.

The court will not grant a new trial on the ground of newly-discovered evidence unless satisfied that, if a new trial was had, a different result would follow.—White v. Arleth, Case No. 17,536; United States v. Chaffee, Id. 14,773.

The proof must clearly show sufficiency of newly-discovered evidence to lead to different result.—Buerk v. Imhaeuser, Case No. 2,107a.

§ 18. Waiver of right.

Matter of surprise, as a ground for a new trial, will be deemed to be waived where the party goes on with the trial.—Ames v. Howard, Case No. 326.

§ 19. Proceedings to procure new trial—Time of application.

A motion for a new trial on a case, before judgment, can be entertained after the expiration of the term at which the action was tried.—Emma Silver Min. Co. v. Park, Case No. 4,467.

The statute of the state of Maine giving a party in default right to a trial on proof of a probably good defense within three years is not repugnant to the judiciary act of 1789, authorizing a new trial on motion after verdict.—Clark v. Sohier, Case No. 2,835.

Special finding of facts in action at law tried by court is not necessary to secure right to move for new trial or to appeal.—Clement v. Phœnix Ins. Co., Case No. 2,882.

§ 20. —— Bill of exceptions or statement of case.

Bill of exceptions received as a substitute for a case on a motion for a new trial.—Brewster v. Gelston, Case No. 1,853.

In making up a case on which to move for a new trial, oral testimony taken at the trial, by way of question and answer, must be reduced to the form of a narrative, or the court will refuse to hear the motion.—United States v. Five Hundred and Eight Barrels of Distilled Spirits, Case No. 15,113.

§ 21. —— Affidavits and extrinsic evidence in general.

No affidavit of merits is required where the motion is properly addressed to the minutes of the judge.—Vose v. Mayo, Case No. 17,009.

Where the motion is founded on fact not within the knowledge of the judge, and not appearing on his minutes, it must be verified by affidavit, unless the opposite party waive such requirement.—Vose v. Mayo, Case No. 17,009.

Affidavits of the witnesses to be examined is not a compliance with rule 22, but the allegation of newly-discovered evidence must be verified by the oath of the party or his attorney.—Vose v. Mayo, Case No. 17,009.

A motion founded upon alleged newly-discovered evidence or on the charge of misconduct by the opposite party or the jury in respect to the trial, is such a motion.—Vose v. Mayo, Case No. 17,009.

Such affidavits are not, without consent, admissible at the final hearing of the motion.—Vose v. Mayo, Case No. 17,009.

On the final hearing of a motion not founded on facts within the knowledge of the judge, testimony may be taken in open court, or by depositions, or by interrogatories, or by cross interrogatories, or by a commissioner appointed by the court on consent of the parties.—Vose v. Mayo, Case No. 17,009.

Upon a motion for new trial, the defendants cannot put in new rebutting evidence to affidavits of the plaintiff, offered in reply to those first offered by the defendants.—Ames v. Howard, Case No. 326.

§ 22. —— Affidavits and testimony of jurors.

In general, affidavits of jurymen cannot be read to show mistake, miscalculation, or misconduct of the jury as ground of new trial.—Ladd v. Wilson, Case No. 7,977.

Affidavits of jurors cannot be received to show how the instructions of the court were received.—Mirick v. Hemphill, Case No. 9,647a.

Affidavits of jurors are not admissible to show the mode of computation adopted by the jury to be contrary to the law and the evidence.—Rumford Chemical Works v. Finnie, Case No. 12,130.

Evidence of declaration of jurors that they assessed the damages by taking the average of the sums put down by each juror, respectively, is inadmissible.—Holmead v. Corcoran, Case No. 6,627.

§ 23. —— Hearing and decision.

The court will not give an extended argument in disposing of a motion for a new trial, where the evidence is conflicting, and the verdict satisfactory.—Bray v. Hartshorn, Case No. 1,820.

The effect of an equal division of opinion in the court on a motion for a new trial.—Goddard v. Coffin, Case No. 5,490; Lanning v. London, Id. 8,075.

§ 24. —— Conditions on granting new trial.

A motion for a new trial will not be entertained, unless the bill of exceptions taken at the trial is waived.—Cunningham v. Bell, Case No. 3,479.

Where the court has misdirected the jury, a new trial will be granted without imposing costs or any terms whatever.—United States v. Beaty, Case No. 14,555.

Costs of former trial imposed as terms on granting new trial for newly-discovered evidence.—Aiken v. Bemis, Case No. 109; Macy v. De Wolf, Id. 8,933.

Where a new trial is granted on payment of costs, and the costs are not paid by the second day of the following term, and judgment is entered, the court may set aside the judgment, and permit the cause to be tried.—Howe v. McDermott, Case No. 6,768.

In granting a new trial for defendant, the court will make it a condition that the verdict shall stand until another shall be rendered.—Zantzinger v. Weightman, Case No. 18,202.

New trial granted defendant only on condition of allowing amendment of declaration to save a nonsuit.—Gerbier v. Emery, Case No. 5,357.

§ 25. —— Rehearing.

Leave to reargue a motion for a new trial cannot be granted after a judgment has been rendered and paid and satisfied.—Smith v. Ontario, Case No. 13,086.

§ 26. —— Stay of judgment.
Motion for new trial does not suspend entering of judgment after one verdict, but execution will be stayed on application.—Arnold v. Jones, Case No. 559.

The action upon a motion for new trial must be considered as had on the day when the motion was filed, and judgment on a verdict for plaintiff will not be delayed because between the filing and the hearing defendant was summoned as plaintiff's trustee.—Longfellow v. Lewis, Case No. 8,487.

Probable cause for the motion must be shown before the court will give notice to the other side or stay the entry of judgment.—Vose v. Mayo, Case No. 17,009.

§ 27. Proceedings at new trial.
Where a default has been opened the pleadings may be amended on the new trial.—Clark v. Sohier, Case No. 2,835.

The fact that improper evidence was received at the first trial is no ground of admitting it at the second trial.—Riggs v. Tayloe, Case No. 11,832.

Where a jury has had a case before it and disagreed, a second trial cannot be had by another jury from the residue of the panel. The case must go over, in order that it may be tried on a new venire.—Wilson v. Barnum, Case No. 17,787.

§ 28. Statutory new trial as of right.
Where a new trial is granted as of course in a state court under the state statute, the party cannot abandon the special remedy, and proceed in the federal court.—Fraser v. Weller, Case No. 5,064.

NEXT OF KIN.

See "Descent and Distribution."

NONINTERCOURSE ACTS.

See "War," §§ 7–25.

NONRESIDENCE.

Effect on limitation, see "Limitation of Actions," § 13.
Operation and effect of insolvency laws on nonresidents, see "Insolvency," § 3.
Privilege of nonresidents from service of process, see "Process," § 6.
Taxation of nonresidents, see "Taxation," § 8.

NONSUIT.

At trial, see "Trial," § 14.
Before trial, see "Dismissal and Nonsuit."

NOTARIES.

§ 1, Liabilities. § 2, Seal.

Authority to take acknowledgment, see "Acknowledgment," § 2.
—— affidavits, see "Affidavits," § 1.
—— depositions, see "Depositions," § 9.

§ 1. Liabilities.
No right of action exists against a notary public for an official malfeasance, incorruptly and falsely certifying to the execution and acknowledgment of an assignment of an interest in real estate, by other than the person to whom the assignment was made, and whose title was thereby invalidated. A purchaser from the assignee cannot maintain the action.—Ware v. Brown, Case No. 17,170.

§ 2. Seal.
The seal of a notary must bear his name and show his official character.—In re Nebe, Case No. 10,073.

A seal of a notary may be an impression made by the seal on paper, without wax or any other tenacious substance.—Orr v. Lacy, Case No. 10,589.

And this is true although it does not contain any device or words indicating any particular official.—In re Phillips, Case No. 11,098.

The requisites of a notarial seal are determined by the law of the locality from which the official derives his authority.—In re Phillips, Case No. 11,098.

NOTES.

Bank notes, see "Banks and Banking," § 13; "Payment," §§ 2, 3.
Promissory notes, see "Bills and Notes."

NOTICE.

As affecting right to costs, see "Admiralty," § 131.
In bankruptcy, see "Bankruptcy," §§ 143–146.
In habeas corpus proceedings, see "Habeas Corpus," § 9.

Of particular facts, acts, or proceedings.

Abandonment to insurer, see "Insurance," § 122.
Accounting, see "Executors and Administrators," § 58.
Action or process, see "Process," § 5.
—— pending, see "Lis Pendens."
Amendment, see "Equity," § 80; "Pleading," § 46.
Appeal, see "Appeal and Error," § 14.
—— from decision of justice of the peace, see "Justices of the Peace," § 13.
—— in admiralty, see "Admiralty," § 119.
Application for discharge, see "Bankruptcy," § 553.
—— for injunction, see "Injunction," §§ 10, 18.
Appointment of assignee in bankruptcy, see "Bankruptcy," § 178.
—— of guardian, see "Guardian and Ward," § 3.
Arrival of goods, see "Carriers," § 10; "Shipping," § 152.
Blockade, see "War," § 27.
Cancellation of insurance policy, see "Insurance," § 40.
Claim against city, see "Municipal Corporations," § 40.
Copyright, see "Copyrights," §§ 15, 16.
Default of principal, see "Guaranty," § 9.
Dissolution of partnership, see "Partnership," § 59.
Examination in bankruptcy, see "Bankruptcy," § 324.
Foreclosure of mortgage, see "Mortgages," § 17.
Loss insured against, see "Insurance," §§ 140–157, 194.
Meeting of stockholders, see "Corporations," § 26a.
Motions in general, see "Motions," § 1.
—— to dissolve injunction, see "Injunction," § 30.
Nonpayment or protest of bill or note, see "Bills and Notes," §§ 59, 63, 72–79.
Sale in bankruptcy, see "Bankruptcy," §§ 299, 300.
Special matter in defense, see "Patents," §§ 196, 226.
Taking depositions, see "Depositions," §§ 2, 11–16.
Time for payment of insurance premium, see "Insurance," § 83.
To produce written instrument, see "Evidence," § 25.
To quit, see "Ejectment," § 2.
Trial, see "Trial."

To particular classes of parties.

Agent, see "Principal and Agent," § 33.
Officer or agent, see "Insurance," § 92.
Purchaser, see "Vendor and Purchaser," §§ 23–30.
Transferee of negotiable paper, see "Bills and Notes," § 52.

NOVATION.

§ 1, What constitutes a novation. § 2, Operation and effect.

§ 1. What constitutes a novation.

A debtor cannot voluntarily transfer his obligation to pay to a third person without the consent of his creditors.—Jones v. Walker, Case No. 7,507.

An agreement for an extension of credit *held* not to supersede a prior agreement under which a mortgage was given to secure notes and the right to enforce the same on default in payment.—In re Johnston, Case No. 7,424.

A bond under seal is not superseded by a subsequent parol agreement, of like terms and effect, as to which the promisee parts with nothing, and assumes no responsibility.—Cartright v. Bostwick, Case No. 2,481.

§ 2. Operation and effect.

The ratification by one of the unauthorized act of another cannot have a retroactive effect so as to defeat the rights of intervening third persons.—Strain v. Gourdin, Case No. 13,521.

NUISANCE.

§ 1, Private nuisances. § 2, Public nuisances. § 3, Injunction. § 4, Liabilities and proceedings to enforce.

Obstruction to navigable waters, see "Navigable Waters," §§ 9, 12–16.

§ 1. Private nuisances.

A livery stable in the residence portion of a city is not, as a matter of law, necessarily to be considered as a nuisance to the improved property adjoining or near it.—Flint v. Russell, Case No. 4,876.

§ 2. Public nuisances.

The use of a steam railroad lawfully constructed, in the absence of any abuse, is not a public nuisance.—Miller v. Long Island R. Co., Case No. 9,580a.

§ 3. Injunction.

Where there is a question whether a building will be a nuisance, its construction will not be enjoined.—Ramsay v. Riddle, Case No. 11,544; Flint v. Russell, Id. 4,876.

The abuse of the use of a steam railroad, if general and common to all owners of adjacent property, cannot be enjoined at the suit of an individual owner.—Miller v. Long Island R. Co., Case No. 9,580a.

A private person can have relief in equity against public nuisances only in virtue of special and individual injuries, and where the remedy at law is inadequate.—Illinois & St. L. Railroad & Canal Co. v. St. Louis, Case No. 7,007; Spooner v. McConnell, Id. 13,245.

§ 4. Liabilities, and proceedings to enforce.

The author of a dangerous nuisance on the public streets is equally liable with the city for the injuries caused thereby.—Ware v. St. Paul Water Co., Case No. 17,172.

The question of nuisance or no nuisance is one of fact, exclusively for the jury to decide.—Hickerson v. United States, Case No. 18,301.

NUNCUPATIVE WILLS.

See "Wills," § 10.

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OATH.

§ 1, Sufficiency in general. § 2, Affirmation instead of oath. § 3, Powers to administer.

False swearing, see "Perjury."
Of juror, see "Jury," § 29.
Of witnesses, see "Depositions," § 22.
To specifications for patent, see "Patents," § 70.

§ 1. Sufficiency in general.

A witness must be sworn in such a way as is binding on his conscience.—The Merrimac, Case No. 9,474.

The oath of a Chinaman, taken on the Bible, in the usual way, *held* sufficient, where, on examination, it appeared that he felt solemnly bound by it.—The Merrimac, Case No. 9,474.

§ 2. Affirmation instead of oath.

Affirmation instead of oath will only be permitted when the court is satisfied that the witness belongs to a society which professes to be conscientiously scrupulous of taking an oath.—King v. Fearson, Case No. 7,790; Bank of Columbia v. Wright, Id. 883.

Affirmation instead of oath may be permitted where the witness has applied for admission to full participation in the membership of the society of Quakers, and usually meets with them for worship.—King v. Fearson, Case No. 7,790.

Affirmation by juror not a Quaker, not attached to any particular religious sect, not permitted.—McIntire's Case, Case No. 8,824.

§ 3. Powers to administer.

A judge having a right to administer oaths may administer them in any county in the state.—Voce v. Lawrence, Case No. 16,979.

An oath required to be administered by an act of congress, under the usage of the department, may be administered by a state officer having power to administer oaths.—United States v. Winchester, Case No. 16,739.

See, also, "United States Commissioners," § 1.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," §§ 6–9.

OBSCENITY.

Importation of indecent or obscene articles, see "Customs Duties," § 87.
Sending obscene and indecent matters through mails, see "Post Offices," §§ 21, 27.